COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.9.2006
SEC(2006) 1118

COMMISSION STAFF WORKING DOCUMENT

Accompanying document to the

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of shareholdings in the financial sector

IMPACT ASSESSMENT

{COM(2006) 507 final}
{SEC(2006) 1117}

IMPACT ASSESSMENT

PROPOSAL TO REVIEW THE SUPERVISORY APPROVAL PROCESS FOR MAJOR SHAREHOLDINGS IN THE BANKING, INSURANCE AND SECURITIES' SECTORS[1]

Table of contents

[1] Article 16 of Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, Articles 15 of Directive 2002/83/EC of 5 November 2002 concerning life assurance and of Directive 92/49/EEC of 18 June 1992 (third non-life insurance Directive), Articles 19-23 of Directive 2005/68/EC of 16 November 2005 on reinsurance and Article 10 of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.

EXECUTIVE SUMMARY

This Impact Assessment ("IA") is part of a review of the supervisory approval process for major shareholdings in the banking, insurance and securities sectors. Several market participants and Member States identified that the current rules lack precise criteria and procedures for supervisors when assessing and approving such acquisitions. These shortcomings allow for inconsistent practices by different supervisory authorities, creating the potential for misuse by supervisory authorities. The IA examines how this situation can be addressed and improved.

While providing the context and background on current trends on cross-border consolidation, this IA explains how the supervisory approval process creates, in practice, a barrier to cross-border consolidation; an abusive use of the existing provisions may prevent otherwise economically desirable mergers or acquisitions.

The following sections describe the problems of the existing rules in detail and present a list of several non-legislative and legislative tools that could be used to address these shortcomings. It is concluded that an amendment to the existing Directives by means of targeted changes within the current framework is the preferred policy option. The main elements of a Commission Draft Proposal for an amending directive are presented, along with a section on monitoring and evaluating these changes.

SECTION 1: PROCEDURAL ISSUES AND CONSULTATION WITH INTERESTED PARTIES

Institutions

On September 11th 2004, the issue of cross border consolidation was discussed at an informal meeting of EU Finance Ministers in Scheveningen in the Netherlands. During this discussion, it was noted that the incidence of cross-border mergers and acquisitions (M&As) in the banking sector trailed other (non-financial) sectors. Following this discussion and at the invitation of Finance Ministers, the European Commission undertook to carry out a study on possible obstacles to cross-border M&A in the banking sector and to review the existing rules pertaining to supervisory assessments of shareholdings, as currently provided for in Article 16[2] of the EU Banking Directive.

Work on the review of the existing rules on the supervisory assessments of shareholdings in the banking sector commenced in late 2004. The general proposal to review Article 16 was endorsed at the informal meeting of the European Banking Committee (EBC) on March 22nd 2005. At this meeting, members also agreed that the Committee of European Banking Supervisors (CEBS) should be asked to provide technical advice on the review of Article 16, advice that was subsequently received by the Commission at the end of May 2005[3]. As part of the Solvency II project, the Committee of European Insurance and Occupational Pensions (CEIOPS) also provided technical advice on whether it is necessary to change the current wording of Articles 15[4].

A formal proposal to review Article 16 of the Banking Directive was included in the Commission's Legislative and Work Programme 2006. [5] As the banking legislation relating to supervisory assessments is very similar to the legislation in the securities and insurance sectors, at the end of 2005 it was considered appropriate to extend the review from the banking sector to include the securities and insurance sectors. This extension, to maintain and enhance further cross-sectoral consistency was supported by a majority of EU Finance Ministers.[6]

Since the end of 2005, the Commission services have been working on the review with Finance Ministry representatives through a dedicated cross-sectoral working group, which included representatives from CEBS, CEIOPS and the Committee of European Securities Regulators (CESR).

---

2 Article 19 is the new reference within the Capital Requirements Directive (CRD) for the former Article 16 of the Banking Directive (2000/12/EC)

3 Technical advice to the European Commission on a review of Article 16 of Directive 2000/12/EC':

http://www.c-ebs.org/pdfs/cebs0576.pdf.

4 Article 15 of Directive 2002/83/EC of 5 November 2002 concerning life assurance and Article 15 of Directive 92/49/EEC of 18 June 1992 (third non-life insurance Directive)

5 'Commission Legislative and Work Programme 2006': http://europa.eu.int/comm/atwork/programmes/docs/clwp2006_en.pdf

6 Presidency conclusions of the Ecofin meeting of November 2005: http://www.fco.gov.uk/Files/kfile/EcofinConclusions_08nov.pdf

Consultations

In April 2005, the Commission had launched a public survey on obstacles to cross-border mergers and acquisitions.[7] In November 2005, an analysis of the obstacles identified was presented. Among the obstacles identified, market participants pointed at the supervisory approval process for the acquisition of qualifying shareholdings in banks.

In March 2006, a public consultation 'The Review of the Rules on Supervisory Assessments of Transactions in Shareholdings in the Banking, Insurance and Securities Sectors' was launched.[8] This consultation aimed to give all stakeholders the opportunity to express their views on the existing rules in relation to supervisory assessments of transactions in shareholdings in the banking, insurance and securities sectors. Respondents to the survey were asked to indicate the extent to which they considered the existing supervisory assessments to be working effectively, and whether or to what extent they could be improved upon.

The results[9] of this consultation were taken into consideration in the impact assessment report; explicit references to the results are made throughout the text. The Commission's minimum standards for public consultation were met with the exception of the consultation period. The Commission's standards for consultation propose allowing at least 8 weeks for receiving responses to written public consultations[10]. Due to the limited scope of the review involving specific articles rather than entire directives, a shorter time period of 5 weeks was deemed appropriate.

Steering Group

In December 2005, a Steering Group was formed to monitor the progress of the impact assessment and of the present proposal. The Steering Group was made up of representatives of several Directorates-General that were invited to participate in the Steering Group by DG Internal Market and Services. The Directorates-General represented included DG Trade, DG Enterprise, DG Competition, DG for Economic and Financial Affairs, and a representative of the Secretariat-General. The Group monitored, on an ongoing basis, the work on the impact assessment, providing input and drafting contributions throughout the period.

---

7 Public survey on obstacles to cross-border consolidation: http://europa.eu.int/comm/internal_market/finances/cross-sector/index_en.htm

8 http://europa.eu.int/comm/internal_market/finances/cross-sector/consultation_en.htm

9 The summary results of this public consultation are attached in Appendix A

10 'Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission' http://europa.eu.int/comm/secretariat_general/impact/docs/com2002_0704en01.pdf

SECTION 2: PROBLEM DEFINITION

2.1 Background

Cross-border consolidation[11]

The incidence of cross-border consolidation in the financial services sector is low compared to other sectors. Between 1999 and 2004, cross-border EU deals accounted for around 20% of the total value of deals within the financial sector. For non-financial sectors, the proportion of cross-border EU deals in value equalled 45%. The exception occurred in 2004, when one single deal[12] resulted in a surge in the proportion of cross-border EU deals to 40 % of the total value in the financial services sector. If we remove this single deal, then the proportion falls back to the average 20% figure, which is in line with the previous four years' figure.

Nevertheless, the impact of the Internal Market on consolidation trends in the financial services sector is noticeable. Excluding domestic activity, between 1999 and 2004 intra-EU 25 cross-border deals (M&As between EU companies based in different Member States) amounted to EUR 109 billion, accounting for nearly 30% of worldwide cross-border transactions, which is far more intense than any other region in the world. These numbers prove that intra-EU cross-border consolidation is more intense than the global one and therefore is not only attributable to globalisation trends. Other factors played vital roles as well. Besides technological advances, most importantly, both the improved regulatory framework for financial institutions, which was achieved by an increased effort starting in the mid-1980's to promote an EU internal market and the introduction of the Euro, which created the potential for economies of scale and scope for the financial sector, contributed to increased cross-border consolidation.

Today, most cross-border flows, apart for some regional clusters (as Nordic Countries, Benelux) and for capital inflow directed at New Member States, seem to be largely unilateral and are explained by a few large one-off deals, rather than a series of geographically similar mergers and acquisitions. Further to note is the fact that if cross-border transactions occur within the financial services sector, then these deals are usually carried out by large institutions targeting substantially smaller ones (on average EUR 50 Billion on the acquirer side vs. EU 10 Billion on the target side). Moreover, within the financial services sector, only for the securities trading and post-trade activities market segment are cross-border deals significantly bigger in deal sizes than domestic deals, and this is the segment where cross-border consolidation is the most significant.

Finally, the overall proportion of cross-border deals remains quite low in comparison to other sectors and in most market segments the average size of cross-border deals is lower than the average size of domestic deals. Although consolidation is underway in the financial services sector, it is less advanced than in other sectors. Most importantly, it has to be noted that in a perfectly integrated market, differences between cross-border and domestic mergers in the EU financial sector should be minimal. Since this is not the case, there must be some reasons to explain the low level of cross-border consolidation, when assessed against the domestic consolidation process. The ultimate question becomes why considerable consolidation has taken place in domestic markets, but not to the same extent in cross-border situations. Are there concrete barriers for entities in engaging in cross-border M&A activities? Is cross-border consolidation simply the next step after domestic consolidation process

---

11 Cross-border consolidation here means consolidation involving entities located in different EU Member States. Domestic consolidation represents consolidation occurring within a single EU Member State.

12 The acquisition of Abbey National PLC by Banco Santander Central Hispano SA.

nears its maturity? While it goes beyond the scope of this paper to address these questions, most studies suggest that in general, certain regulatory, fiscal and cultural barriers make cross-border mergers and acquisitions unfavourable compared to domestic ones.

Cross-border consolidation as a means to integration

The integration of financial markets is a means to achieve more efficient allocation of economic resources. Market-driven integration enables EU financial institutions to reach their effective potential, operate at maximum efficiency and compete internationally.

Financial institutions have a number of options to extend their presence in the EU. Banks, for instance, can use a range of strategies: direct cross-border selling, greenfield establishments via a branch or a subsidiary, setting up an alliance, joint venture or cooperation agreement, and cross-border merger and acquisition. **The Commission's position is neutral**: it does not seek to promote one approach over another (as long as they are in conformity with European law), nor indeed to favour any particular business model. Rather its task is to ensure that financial institutions that want to access markets within the EU have all of the above mentioned strategies available to them. The role of the Commission is to foster the functioning of the market, by **preventing any unjustified obstacles** that would hamper companies in making their own decisions regarding the organisation of their business in the Internal Market

Cross-border consolidation is one of the strategies available to financial institutions to extend their presence on the one hand and to derive operating synergies on the other. A key benefit of consolidation is better risk management through product and geographical diversification. Critical to the success of any such initiative is the ability of the acquirer to integrate the target institution effectively.

2.2 The Problem Identified

The current system of prudential supervision in the European Union (EU) is based on the principle of home country (*de facto*) control and single licensing requirements combined with minimum standards and mutual recognition. A financial institution is thus authorised and supervised in its home country and can expand throughout the EU (by establishing branches or by offering cross-border services) without additional supervision. If a financial institution decides to acquire a qualifying shareholding within an institution based in another Member State, then the proposed acquirer needs to notify the supervisor of the target institution[13]. This target supervisor then has a maximum of 3 months from the date of notification to oppose such a plan. The 3 month period, however, can be interrupted repeatedly to obtain further information. The problem arises when the target institution's supervisory authority assesses the "suitability" (used in banking and securities) or "qualifications" (insurance) of the proposed acquirer "to ensure the sound and prudent management" of the target institution in question. How suitability is defined, or against what characteristics or criteria qualifications should be reviewed, is not elaborated upon in the current provisions[14]; this results in an almost infinite series of practices by supervisory authorities. The provisions are vague and ill-defined in relation to what the supervisory assessment

---

13 The term "target supervisor" will be used instead of "supervisory authority of the target institution" in this document.

14 Article 16 of Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, Articles 15 of Directive 2002/83/EC of 5 November 2002 concerning life assurance and of Directive 92/49/EEC of 18 June 1992 (third non-life insurance Directive), Articles 19-23 of Directive 2005/68/EC of 16 November 2005 on reinsurance, and Article 10 of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments. Attached in Annex B.

should cover and how this assessment should be carried out; there is therefore excessive scope for different interpretations by the target supervisors thus leaving the potential for misuse. While Community law, and if needed, Commission involvement should ultimately guarantee the full implementation of the right of establishment of the free movement of capital, the prospect of lengthy negotiations with the host authorities may lead some acquiring institutions to renounce their cross-border acquisition plans. In some of these cases, if everything else stands in favour of a deal (synergies at the business level, shareholder agreement, etc.) an abusive use of the provisions may become the single factor that causes an otherwise economically desirable merger or acquisition to fail. **With progress towards more integration of financial markets and the progressive dismantling of other remaining barriers (multiple reporting requirements, certain tax issues, etc.), it is necessary to ensure that supervisory approval processes match these developments, while preserving at the same time the legitimate prudential supervision functions recognized in the Treaty[15].**

2.3 The Problem in Detail

As currently drafted, certain provisions within the Articles allow inconsistent practices by different supervisory authorities because they lack the following:

a) Precise definitions, as well as clarity and transparency about the process, procedures and responsibilities involved in the supervisory assessment
b) the scope of assessment of certain shareholding transactions, market developments and supervisory cooperation practices
c) Commission's responsibilities under Article 16 of Directive 2000/12/EC, Articles 15 of Directive 2002/83/EC and of Directive 92/49/EEC (third non-life insurance Directive), Articles 19-23 of Directive 2005/68/EC and Article 10 of Directive 2004/39/EC

a) Specificities

Lack of precise definitions

Prudential supervisors are required to assess the 'suitability' or 'qualifications' of the proposed acquirer to ensure the sound and prudent management of the target. Yet, how suitability is defined, or against what characteristics or criteria qualifications should be reviewed, is not given.

Lack of clarity and transparency about the assessment process

Both the notification and decision procedures are unclear for several reasons. Currently, the notification procedure does not specify what information a proposed acquirer needs to submit to the competent authority of the financial institution in which it is either increasing or acquiring a qualifying holding. Thus, in the event that the information received is not satisfactory, the target supervisory authority can suspend the authorisation process or *stop the clock* to request further information. Consequently, the present deadline for a decision (3 months) on the proposed acquisition may be extended[16]. In addition, the current provisions do not specify in what form a notification needs to take place and when the authorisation period actually begins.

---

15 In the case of cross-border acquisitions, Article 56 EC of primary Treaty law states the fundamental Treaty freedom of capital movements, while Article 58 (1b) EC provides Member States with the right to "take all requisite measures to prevent infringements of national law and regulations, in particular in the field of (…) prudential supervision of financial institutions". Article 58 (1b) hence gives Member States the competence to exercise prudential supervision functions.

16 This occurred in the BBVA/BNL and ABN AMRO/ANTONVENETA procedure.

These shortcomings of the current provisions create the following problems:

Inconsistent supervisory application/ Level playing field concerns

The absence of an adequate definition of 'suitability' of a proposed acquirer can and does result in different interpretations by supervisors creating the potential for divergent supervisory practices, which in turn creates concerns regarding a level playing field for market participants in different Member States. In particular, inadequate definitions create the potential for misuse by national supervisors.

Legal uncertainty for market participants

When the process and procedures undertaken by supervisory authorities lack clarity and transparency, market participants cannot assess with any certainty what may be entailed in the assessment by a supervisory authority. Consequently, legal uncertainty may restrain and deter market participants from pursuing transactions that they would otherwise have sought. By potentially unnecessarily extending the authorisation process it may also add substantial costs to the industry while hampering the effectiveness of the internal market.

b) Scope of Assessment

As currently drafted, the existing rules on supervisory assessments do not contemplate certain shareholding transactions and market developments:

Competing bids

The existing prudential rules do not explicitly state how competing bids in a shareholding transaction should be treated. Yet, particularly in these cases, the aim should be full transparency towards the proposed acquirers, the target company and markets at large in order to ensure a fair and clear process for all involved parties.

Cross-border transactions

The existing prudential rules do not explicitly state how cross-border shareholding transactions should be assessed, both intra-EU and involving other third countries.

Supervisory co-operation and responsibilities

The supervisory approval rules apply in national and cross-border situations. In the case of cross-border transactions of regulated entities, at least two supervisory authorities have a direct and relevant interest in the assessment and ultimate determination. However, the current provisions do not address whether and how relevant supervisory authorities should work with each other to assess a proposed EU cross-border shareholding transaction, where both the proposed acquirer and the target institution are EU regulated entities.

The above shortcomings of the current provisions create the following problems:

Legal uncertainty

The lack of specific references within the current prudential provisions as to how competing bids and cross-border transactions should be treated creates legal uncertainty problems for market participants involved in such situations. In both cases, the proposed acquirers should have a clear understanding of what's involved in their respective assessments.

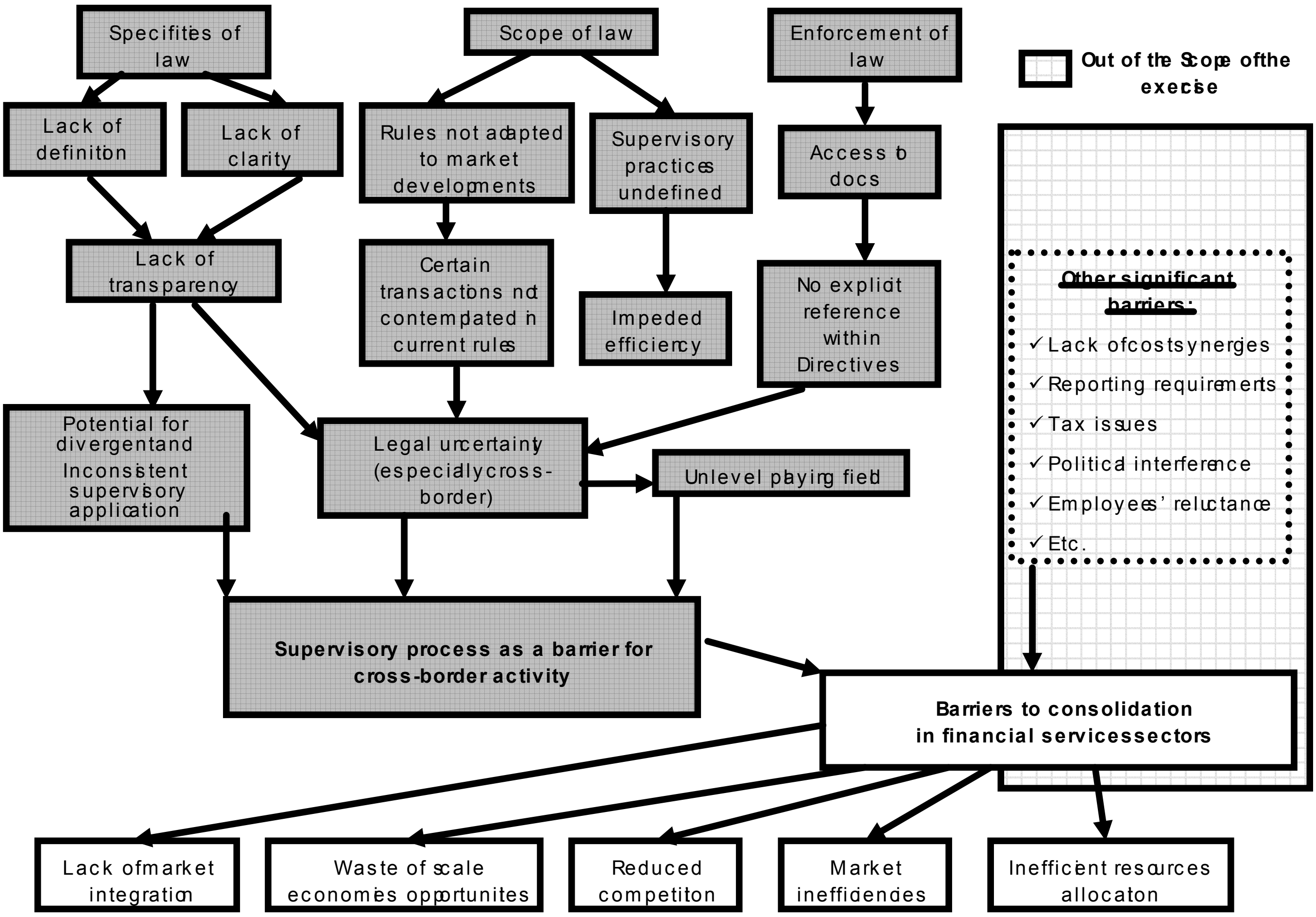
<u>Impeded efficiency</u>

Supervisors may redundantly duplicate their efforts when conducting a cross-border acquisition without cooperating with their counterparts. When the supervisory authority of the target institution conducts an assessment, some of the relevant information needed may already be available or available more quickly from the proposed acquirer's supervisory authority. Supervisors should benefit from and make use of the knowledge of their counterparts regarding the proposed acquirer.

c) Enforcement

There is no explicit article in the current Directives that lays out the Commission's rights and responsibilities under Article 211 first indent and 226 of the Treaty. This adds to the current shortcomings of the definitions and the procedures as to the Commission's ability to intervene in the process.

Review of supervisory approval process in financial services sectors: Definition of the problem



2.4 Subsidiarity

Currently, Member States are defining themselves the criteria for "suitability" or "qualifications" and the various procedural steps of the assessment as laid out in the existing directives in the banking, insurance and securities sectors. Although the problem falls under a competence shared by the Union and the Member States, it cannot be sufficiently solved by Member States. As will be explained in greater detail in section 5 and 6, in order to ensure that the rules are applied consistently across Member States and to provide for legal certainty for market participants, Community intervention is needed.

In a cross-border context, Article 58 (1b) EC provides that Member States may restrict the principle of free movement of capital as laid down in Article 56 EC for considerations related to the prudential supervision of financial institutions. As mentioned above (2.2), the problem arises when interpreting what prudential assessment actually entails within the auspices of Article 58 (1b) EC.

Without action taken at EU level:

- The absence of an adequate definition of 'suitability' or appropriate 'qualifications' will continue to result in different interpretations by supervisors creating the potential for divergent supervisory practices

- The potential for divergent supervisory practices will continue to create concerns regarding a level playing field for market participants in different Member States. The potential for misuse by national supervisors will persist.

- The lack of clarity and transparency of the process and procedures involved in assessment may continue to restrain and deter market participants from pursuing transactions that they would otherwise have sought. Substantial cost to the industry may still arise while hampering the effectiveness of the internal market.

- Different shareholding transactions and developments will not be addressed; transparency and legal uncertainty issues will persist for market participants involved in competing bids and cross-border transactions.

- As a result of the absence of an explicit reference to the Commission's rights and responsibilities under Article 211 first indent and 226 of the Treaty, enforcement will remain unpredictable and perhaps "controversial"

SECTION 3: OBJECTIVES

3.1 General Policy Objectives

<u>Ensure a level playing field</u>

Equal treatment for all market participants needs to be at the core of the supervisory approval process.

<u>Ensure consistency in practice across financial services sectors and across member states</u>

All market participants, supervisory authorities and member states benefit from consistency in practice across the financial services sectors and across member states through a transparent process.

Ensure legal certainty for the market

Market participants should be able to make reasonable assumptions as to what may be expected from supervisors when they are carrying out their assessments. Without a reasonable level of legal certainty as to what the process entails and how it unfolds, market participants may consider the risks and potential costs to outweigh the benefits. Improving the predictability of the process *(not the result of the ultimate determination)* would reduce the risks and potential costs associated with the uncertainty of the assessments.

3.2 Specific Policy objectives

Enhance transparency and clarity, more precise definitions

All market participants can benefit from clear and limited set of prudential conditions that are assessed as part of the supervisory review. Moreover, both market participants and supervisory authorities benefit if they follow a transparent procedure when assessing qualifying shareholdings.

Address different type of shareholding transactions and market developments

The rules on supervisory assessments have to contemplate certain shareholding transactions and market developments. The situation of competing bids and cross-border transactions needs to be addressed.

Enhance supervisory cooperation

In the case of cross-border transactions of regulated entities, at least two supervisory authorities have a direct and relevant interest in the assessment and ultimate determination. In line with the principles of mutual recognition and cooperation, it makes sense that supervisors should cooperate in these situations. Enhanced supervisory cooperation will improve the quality of the review by relying on the experience and knowledge of more than one supervisory authority.

3.3 Operational Policy objectives

Formalise the approval procedure

In order to provide market participants with more transparency and predictability as to what the process entails; the notification, assessment and decision procedures need to be formalised and the deadlines for the various procedural steps determined.

Improve definitions

The current provisions merely require the acquirer to be "qualified" or "suitable" for the "sound and prudent management" of the respective regulated entity. The lack of any precise requirements that proposed acquirers need to meet concedes discretion to the supervisor which may be misused to oppose transactions. Clearer criteria for the supervisory assessment need to be provided to minimise this potential.

Clarify scope

Both of the following situations need to be clarified:

- Competing bids

The situation of different bids competing for the same target company needs to be clarified in order to provide for transparency, legal certainty and consistency in practice across financial service sectors and across member states.

- Cross-border transactions

Clarifying the procedure of how to assess both intra-EU and third-country transactions. Again, this would contribute to transparency, legal certainty and consistency in practice across financial service sectors and across member states.

Establish cooperation procedures

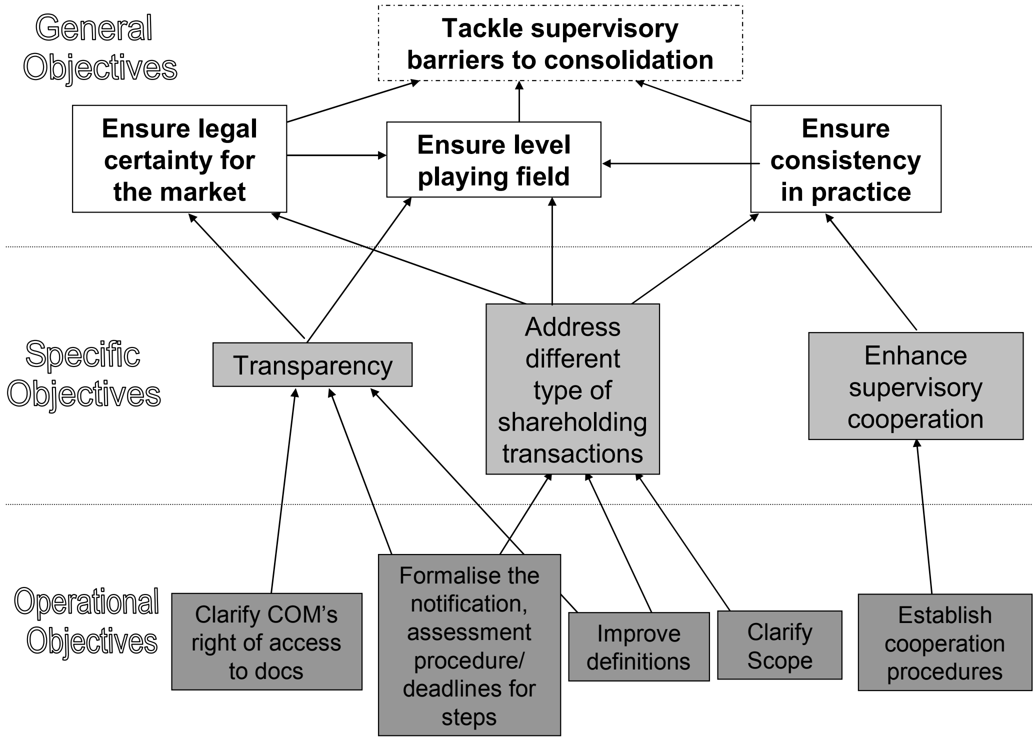
When conducting the assessment of a cross-border transaction, supervisors should have a clear idea of their responsibilities and communicate and exchange relevant information in an efficient manner.

Clarify Commission's right of access to documents

Expressly articulating the Commission's rights and responsibilities within the context of the approval process.

3.4 Graphical Illustration of Objectives

Review of supervisory approval process in financial services sectors: Structure of objectives



3.5 Consistency of the objectives with other EU policies

The objectives outlined are consistent with the policies and objectives of the European Commission's 'White Paper on Financial Services Policy 2005-2010'. Indeed the White Paper notes that there is "a clear call for more clarity, transparency and disclosure" in relation to the supervisory reviews of qualifying shareholdings.

In addition to this, the White Paper lists as one of its objectives the enhancement of "supervisory cooperation and convergence in the EU". The Commission also outlines its intention to undertake "sectoral and cross-sectoral consistency checks" with a view to improving the "simplification, codification and clarification" of existing legislation.

SECTION 4: POLICY OPTIONS

The aim of the review is to determine how to improve the existing rules concerning the supervisory approval process, taking into account the concerns of all major stakeholders. The current section presents the various legislative and non-legislative instruments that could be used to improve these existing rules. The next section will then detail the impact of each of these options on the general objectives. Once the regulatory tool has been determined, the final analysis will focus on whether and how specific elements of the supervisory approval process could be improved upon.

- **Option 1: Take no further action at EU level**

This first option, which can also be called the "no action" option, means that no further action will be taken at EU level to improve the current provisions that govern the supervisory approval process. This "status quo" would have the practical consequence that Member States would continue to define the criteria and the process for the assessment and address the issues relating to the supervisory approval process at their national level.

- **Option 2: Non-legislative action at EU level**

This option could be implemented by one of the following instruments:

a) Level 3 committees would assist in streamlining and clarifying the supervisory approval process by setting up specific guidelines to prevent divergent practices. These guidelines could provide for greater clarity on the assessment criteria and establish a common and transparent assessment procedure for supervisors. However, these guidelines would have no legally binding value for Member States.

b) A Recommendation would be approved by the Commission explicitly stating how supervisors should conduct prudential assessments. Such a Recommendation would not be legally binding, yet the Commission could provide a follow-up and take appropriate action if is not satisfied with its adaptation.

c) An interpretative Commission Communication would be issued to clarify the meaning and the scope of the existing provisions. Specifically, the Communication would recommend to introduce a list of explicit criteria to be used in the assessment process, suggest to formalise the assessment procedure and propose to establish cooperation procedures for supervisors. This communication would provide a clear orientation on how the Commission would examine Member States behaviour. In any case, Member States would, however, maintain their latitude with regard to the actual process.

- **Option 3: Legislative action at EU level**

This option could be implemented by one of the following instruments:

a) A Regulation would introduce a uniform set of rules and establish a tight framework for prudential assessments providing legal certainty and predictability not only in domestic, but also in cross-border situations. It would be directly applicable and leave no scope for national specificities.

b) An Amendment to the Directives would clarify the criteria and the procedure of the approval process by directly addressing and amending the existing provisions[17] in the various financial sectors. Targeted changes would clarify the current framework in place providing legal certainty and predictability.

---

[17] Article 16 of Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, Articles 15 of Directive 2002/83/EC of 5 November 2002 concerning life assurance and of Directive 92/49/EEC of 18 June 1992 (third non-life insurance Directive), Articles 19-23 of Directive 2005/68/EC of 16 November 2005 on reinsurance, and Article 10 of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.

SECTION 5: ANALYSIS OF IMPACTS

5.1 The Purpose and Method of the Analysis

This section's purpose is to analyse the *potential* impact of the various policy options presented in the previous section. Each option will be evaluated on its effectiveness in achieving the general objectives spelt out in section 3. The results of the public consultation will also be considered. The analysis carried out in the following paragraphs will be qualitative as any quantitative evaluation would only be speculative.

5.2 Impact of "No Action option"

According to the public consultation results, savings banks support this status quo. They are generally of the opinion that supervisory assessments by supervisors work well and that they should not be changed[18]. In addition, they emphasize that consistency in the rules for the different sectors is important, but they don't know whether the current rules are applied consistently across EU Member States. It is to be noted that with the exception of one, none of these market participants that find the current supervisory assessment procedure to work well have any previous experience in relation to such transactions. At the same time, the majority of the other institutions and individuals with experience in such transactions state that supervisory assessments work sub-optimally.

If a clarification on the existing rules on the supervisory approval process does not take place and the "status quo" is maintained, then the Commission would continue interventions on an *ad hoc* basis through infringement proceedings, potentially finishing in the Court of Justice. The advantage of such an approach is that no re-negotiations of the present rules in the Directives would be necessary. Although the Commission has been active recently and has conveyed the appropriate message to Member States, the main downside with an ad hoc approach through Court proceedings is that it remains a lengthy process. Moreover, the criteria for prudential assessments will remain subject to potential misuse.[19] Hence, many market participants will not have the legal certainty they have asked for.

As a result of maintaining the status quo, the potential for lengthy negotiations between the proposed acquirer and the target supervisor would persist; this could lead acquiring institutions to potentially renounce their otherwise sound cross-border acquisition plans. The status quo should thus not be maintained.

5.3 Impact of Non-legislative action at EU level

(a) "Level 3 Committee guidelines" Option

---

18 One suggested change is that supervisory authorities should not be allowed to introduce further authorisation thresholds (currently they are). Also, supervisors should not be allowed to suspend the time period for carrying out their assessments indefinitely (currently, supervisors can suspend the process if they require additional information from their counterpart or from the qualifying shareholder).

19 Again, it is important to note that it is the Treaty itself which provides Member States with a degree of flexibility for as long as supervisory decisions are based on prudential concerns in the sense of Art 58.1.b. Member States will hence continue to argue that the Directives deliberately provide them with a degree of legal flexibility

Level 3 Committees would establish specific guidelines for supervisory assessments. The application of a clear set of criteria and a transparent process could lead to better convergence among supervisors, which in turn could result in more consistency among financial sectors and Member States.[20]

Even though Level 3 Committees would introduce specific guidelines to address supervisory co-operation in the assessment of shareholding transactions, legal certainty and consistency between both Member States and the financial sectors could not be achieved, nor for the same reason would a level playing field be ensured. As a result, the provisions may continue to lead to the prospect of lengthy negotiations with the host authorities and may result in some acquiring institutions renouncing their otherwise economically sound cross-border plans. Guidelines are therefore not the best option to tackle the problems identified and reach the general objectives set out.

(b) "Recommendation" Option

A recommendation is normally adopted when there is no Community legislation in place. In the matter at hand, however, directives in the banking, insurance and securities sectors already exist. Hence, a recommendation in the current case would not be necessary, because the focus is on clarifying the existing prudential rules. Among the non-legislative measures, a communication would be more useful in the current context as it could be used to clarify the meaning and scope of existing provisions.

(c) "Interpretative Commission Communication" Option

As suggested above, another option would be for the Commission to issue an interpretative communication directed towards Member States. This measure is usually adopted when it is necessary and sufficient to clarify the scope and meaning of certain provisions.

Again, the advantage of such an approach would be that no re-negotiations of the present rules in the Directives would be necessary. At the same time, by clarifying the meaning of the term "suitability" and "qualifications" to be used in the assessment process, by formalising the assessment procedure and by recommending cooperation procedures for supervisors, the clarification of the provisions could lead to greater convergence among supervisors, provided Member States adopt the same approach. Also, a clarification on the scope of the assessment could take place, extending it to specify how situations of competing bids for the same entity should be treated and including a transparent and clear procedure when assessing both intra-EU and third-country transactions.

The disadvantage of a communication is that it does not provide legal certainty for market participants. Although it recommends Member States to adopt the same approach, it is not legally binding. Supervisors could continue to use different interpretations on the "suitability" and "qualifications" of proposed acquirers as defined in the relevant provisions, the assessment procedure could still vary from Member State to Member State and cooperation procedures could not be ensured. Hence, the potential for inconsistent supervisory application could not be minimised and level playing field concerns would

[20] To improve supervisory convergence, CEBS has recently published guidelines on general cooperation between consolidating and host supervisors. The paper "Guidelines for cooperation between consolidating supervisors and host supervisors" (http://www.c-ebs.org/pdfs/GL09.pdf) elaborates in detail how the relevant supervisors should work together in monitoring the operations of credit institutions and investment firms. Yet it does not address the concept or practice of supervisory co-operation in the assessment of a shareholding transaction. A more specific guideline for the supervisory approval process could be developed.

continue to persist. From the discussion above, it is thus clear that only a legislative measure can assure consistent application and provide legal certainty for market participants.

5.4 Impact of Legislative Action at EU level

(a) "Regulation" Option

Adopting a regulation would lead to fully harmonised prudential assessments in all Member States. A new and tight framework would in its entirety and directly apply in both domestic, as well as cross-border qualifying shareholding transactions.

The advantage of such an approach is the fact that market participants would be provided with transparency and legal certainty as to what the assessment process entails. Moreover, through consistency in practice across financial sectors and Members States, a level playing could be ensured as well. However, a general overhaul of the framework in place is not considered appropriate because the shortcomings within the existing provisions do not justify such a step. The regulation option does not comply with the proportionality principle because there is no case for wide-ranging changes. Rather, as explained in the next paragraphs, a few targeted changes within the existing provisions reflect a more proportionate course of action.

(b) "Amended Directives" Option

The final option to tackle the problems identified would be to amend the current provisions governing the supervisory approval process by rendering the assessment criteria and processes more transparent.

The advantage of such an option is that legal certainty for market participants would be substantially enhanced. Already before engaging in a shareholding transaction, they would have the necessary predictability by knowing what the process will entail. Moreover, by drafting the provisions in a more detailed way, consistency across the financial sectors and across Member States would be improved. Finally, the powers of supervisory authorities would not be restricted or removed. Supervisors would continue to conduct assessments, albeit through a more transparent process. As a result, the assessments for financial institutions seeking approval of acquisitions would be more transparent.

An amendment to the current provisions is also supported by those respondents to the public consultation who say that assessments work sub optimally. These respondents emphasize that the criteria on which supervisors make assessments could be improved by a combination of amending the legislation and changing supervisory behaviour.

SECTION 6: COMPARING THE OPTIONS

In light of the discussion on the non-legislative options, it is clear that the general goals set out in section 3 (consistency in practice across financial sectors and Member States, level playing field and legal certainty) cannot be achieved by means of non-binding measures. Level 3 Committees would introduce specific guidelines to address supervisory co-operation in the assessment of shareholding transactions, yet legal certainty and consistency between both Member States and the financial sectors could not be ensured[21]. A recommendation, on the other hand, is not the appropriate policy instrument as directives

[21] Regardless of the chosen policy option, Level 3 Committees would have the latitude to act in a way they deem appropriate.

are already in place, while a communication leaves Member States the choice to adopt the same approach into their national systems to the extent they deem opportune. Consistency across Member States, one of the general objectives, could thus not be achieved. The importance of consistent application of the rules across financial sectors and across EU Member States is underscored by the fact that almost all respondents to the public consultation agreed on this particular issue.

Only binding measures ensure that a clear and transparent framework applies to all Member States and all financial sectors. When comparing a regulation to amending the current directives, the regulation is not preferable because the range of the problem identified does not justify a case of wide-ranging changes. The scope and extent of the problem is not proportionate with adopting a new framework. On the other hand, a few targeted changes to the existing directives would be sufficient to clarify the current framework in place and meet the general objectives. **It is hence concluded that amending the existing directives is the preferred policy instrument.**

		Legal certainty	Consistency	Level playing field	Subsidiarity/Proportionality
No action		-	-	-	NA
Non legislative action	Level 3 committees	✓	✓	✓	✓✓✓
	Recommendation	✓	✓	✓	✓✓
	Communication	✓	✓	✓	✓✓✓
Legislative action	Regulation	✓✓✓	✓✓✓	✓✓✓	-
	Amended Directives	✓✓✓	✓✓✓	✓✓✓	✓✓✓

As a next step, the following section will discuss in detail the various elements of the provisions that need to be revisited and potentially amended. The views and concerns expressed in the public consultation will form part of the analysis.

6.1 List of criteria

a) Maintaining present situation

Supervisors would continue to interpret the "suitability" or "qualifications" of the proposed acquirer based on the current provisions. According to our public consultation, the group that would favour this action would be precisely the same group that said that supervisory assessments do not work sub-optimally (savings institutions and savings intuitions representative bodies). However, in general, a clarification of the assessment criteria is supported not only by a number of financial institutions and representative bodies[22], but also by Member States and supervisory authorities, including level 3 committees. In its technical advice to the Commission, CEBS "agrees that it would be desirable to make progress towards a consistent interpretation of the term 'suitability'" and "(…) that there is a scope to introduce in the Directive some explicit criteria (…)". CEIOPS also states that "the wording in the current legislation leaves scope for inconsistent application and for applying them to persons with different functions. Theoretically, a person with certain qualifications and reputation could be considered fit and

[22] With the exception of one, all of those respondents stating that supervisory assessment work sub-optimally regard the insufficient clarity and transparency of the assessment criteria as one the reasons why supervisory assessments work sub-optimally.

proper for a particular position in one Member State but the same person with unchanged qualifications would fail the test for a position of similar nature in another."

Without spelling out the prudential criteria for an assessment, the potential for divergent and inconsistent supervisory practice will persist. Based on the discussions in the previous sections, it is clear that a list with prudential criteria for the assessment needs to be established. Since consistency in practice is one of the general objectives in the exercise, maintaining the present situation is not considered an appropriate solution.

b) Indicative list of criteria

In CEBS' view, a non-exhaustive list with indicative prudential criteria should be introduced. The criteria used "must be indicative and non-exhaustive because no specific criteria can cover the necessary range of cases and there are differences in what the wider law will allow in each country". At the same time, some criteria related to the financial strength of the institutions should "rather be dealt with through convergence of supervisory practice at level 3".

The introduction of indicative and non-exhaustive list would not provide clarity and predictability for market participants. Without explicitly stating the criteria, each assessment could potentially vary on the number and/or content of the criteria on which it is conducted. Even though convergence of supervisory practice at level 3 may lead to a more general set of criteria and to a decrease in the potential for divergent supervisory practices, consistency in practice could not be ensured.

c) Open-ended list of criteria

Another option would be to introduce a non-exhaustive list with explicit prudential criteria. Member states could introduce further criteria if justified for a prudential assessment. Again, the disadvantage of such an option lies in the fact that by introducing further criteria, the market's need for greater clarity and legal certainty could only partially be achieved. The additional criteria could vary greatly from one member state to the other. Particularly difficult would be to determine whether these further criteria would be prudential in nature and whether they harbour a potential for abuse by authorities.

d) Closed list of criteria

To define the scope of the assessment, an exhaustive list of explicit prudential criteria would be introduced. The assessment would be solely conducted on the basis of these criteria. Following this option, the prudential criteria would be harmonised throughout the EU.

Good legislation should set out clearly defined principles and procedures that allow supervisors to exercise judgement but within a reasonable and well-understood framework. A closed list of prudential criteria is preferable because it provides legal certainty and predictability to stakeholders as to what the assessment is based on. Another positive effect is that by assessing a defined set of prudential criteria, the current time period for authorisation of an increase in qualifying shareholding (to be discussed in 6.2.2) could be shortened, hence saving costs to both industry and supervisory authorities. Amending the current provisions to include a clear and closed list of prudential criteria (option d) to be assessed as part of the approval process is thus considered the appropriate solution.

6.2 Assessment Procedure

6.2.1 Notification to increase or to acquire holding

a) Maintaining the present situation

As explained in section 2.3, the current notification mechanism does not lay out the type of information that should be requested by the competent authority of the financial institution in which an increase or acquisition of a qualifying holding is sought. Also, there is no clear reference within the provisions as to what form the notification should take and when the actual authorisation period should start.

Apart from savings banks, respondents clearly see the scope to improve the notification process. Respondents believe that the type of information that may be requested by supervisors to make their assessment is not well known in advance by market participants. They agree that making publicly available details of the key information that is likely to be requested by supervisors in their assessment would assist market participants and enhance the transparency of the process. Furthermore, respondents agree to the fact that supervisors should acknowledge the receipt of notification.

Since clarity and transparency in the process is envisaged, the present situation should not be maintained.

b) More detailed notification procedure

To improve the efficiency and transparency of the process, supervisors would have to make publicly available what is generally requested for the purposes of their assessments. Consequently, market participants could prepare their notification accordingly. Through this better communication, each party could save both time and costs. Furthermore, in order to clarify the start date of the authorisation process, supervisory authorities would also have to acknowledge the receipt of the notification. This confirmation of receipt would then effectively pose the start date for the authorisation and thus further enhance the transparency of the process.

Besides increased predictability and transparency as to what the notification process entails, a provision stating such information would also lead to legal certainty and is thus considered the preferred option.

6.2.2 Time period for authorisation of an increase in qualifying shareholding[23]

a) Maintaining the present situation

The present deadline for a decision is 3 months, but this time period can be extended indefinitely by suspending the authorisation process (stopping the clock).

According to the public consultation results, savings banks' responses indicate that the length of the current authorisation period is appropriate. The opinion of other respondents is not as homogenous, yet the majority indicates that they perceive the current period as too long. A more general picture can be noticed when looking at the question of whether and for how long supervisors should be allowed to suspend the time period for carrying out their assessments until they have received all the information they consider necessary from the proposed acquirer. In this regard, the vast majority of all respondents disagree that supervisors should be allowed to stop the clock.

[23] A direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or an increase above 20%, 30%, or 50% of the voting rights or capital.

A closed and defined list of criteria (6.1d) and making publicly available the information requested for an assessment (6.2.1b) could make it possible to reduce the current authorisation period, which could lead to cost savings for both supervisors and acquirers. Furthermore, stakeholders clearly indicate that supervisors should not be allowed to extend the authorisation period indefinitely. Since there is the possibility to improve the communication between supervisors and market participants and to eliminate the potential of indefinitely extending the suspension break, the present situation should not be maintained.

b) Shortened authorisation process/ defined suspension period

Apart from savings institutions and savings institution's representative bodies, market participants agree in general that supervisors should be allowed to suspend the time period for carrying out their assessments as long as such suspension does not exceed a pre-determined time period.

One way of achieving this goal would be to introduce a strict time table for the authorisation process. The determination by the target supervisor would have to be made within <90 days and the supervisor would be able to suspend the process to request further information only once for a limited time-period. Any further requests would then not result in an interruption of the determination period.

By reducing the deadline for the authorisation process, supervisors would have an incentive to publish as accurately as possible the necessary information needed for an assessment in order to receive the relevant information as early as possible in the authorisation process. On the other hand, the proposed acquirer would be encouraged to deliver precise and complete information as soon as possible to the supervisor. The eventual result would be a better predictable and transparent process, which could save costs for both supervisors and market participants.

c) Shortened authorisation process/ undefined suspension period

Another option would be to reduce the length of the authorisation process, yet leave the target institution's supervisory authority the power to suspend the process, as long as it requires further prudential information or clarification concerning the proposed increase of holding. Supervisors would be provided with flexibility to avoid instances in which an acquirer does not deliver all the necessary information and the supervisor is forced to take a decision because the predefined maximum authorisation period is approaching. Thus, the maximum period of the interruption of the authorisation process remain undetermined.

The downside with this approach is that by allowing supervisors to extend the suspension period indefinitely, the predictability of the process is compromised. Since this option does not pose a substantial advancement from the present situation, a shortened timeframe with clear requirements and incentives for both the acquirer and the supervisor is deemed to be the more appropriate solution (option b). An amendment to the current provisions could provide legal certainty for supervisors that if an acquirer does not provide the necessary information requested, then the supervisor may oppose the proposed transaction.

6.2.3 Notification of the decision taken

a) Maintaining the present situation

The lack of consistent supervisory practice as far as who should be informed when a determination leads to transparency problems. Specifically, it is not clear what should happen in the case of positive as well as negative determinations. The question of when these decisions should be sent and to whom they should be sent to is not addressed in the current provisions. Also, there is no explicit indication in the current legislation as to how competing bids should be treated, including the scenarios where at least one bid comes from a proposed acquirer that is regulated in another Member State or Non-Member State. The present situation does not provide predictability, transparency and legal certainty; hence it should not be maintained.

b) Laying out the decision notification process

An amendment to the current rules could specifically state how decision notifications need to be carried out for both positive and negative determinations, as well as competing bids where entities from different member states or non-member states are involved. Supervisory authorities would need to send a copy of their decisions within a certain timeframe to all relevant parties involved.

Such an approach would clarify the decision and enhance transparency to all involved entities. By amending the current provisions, it would also provide for legal certainty.

c) Publication of negative decision

The Commission raised a particular question to both supervisors (CEBS) and market participants about the possibility of a public notification of negative decisions when assessing qualifying shareholdings. One of the discussed possibilities was to publish an annual aggregate report of all negative decisions taken. The idea was to shed light on the reasons for a refusal of an authorisation by making negative decisions more transparent.

CEBS does not agree that publicly notifying a negative decision is the appropriate way to achieve transparency. In their view the "reasons behind a negative assessment could prove complex, misleading, and damaging for some of the interested parties. The decision might not be well understood or even could have an undue negative repercussion on the acquirer's reputation". Industry responses also underline that publishing such information could provide detrimental to the potential acquirer. Finally, the Commission agrees that it would be especially difficult to define who should receive such information and what information should be included, without potentially damaging the reputation of the parties involved.

In order to enhance the transparency of the process and to improve consistency in practice, an amendment to the current rules detailing the decision procedure is proposed (option b). A requirement to publish negative decisions is not deemed appropriate.

6.3 Thresholds

a) Maintaining the present situation

Under the current legislation[24], supervisors should be notified of an intention to acquire a "qualifying shareholding" in a financial institution (10% of voting rights or capital) or to increase the share of the voting rights or capital (the Directive currently fixes three levels at 20%, 33% or 50%). Moreover, Member States have the right afforded by the Directives to introduce further authorisation thresholds.

Industry is satisfied with the current levels of thresholds. CEBS is of the same opinion stating that the current thresholds provide the supervisory authorities with important prudential information and they do not pose an undue burden to industry. Member states have also used their right to introduce further authorisation thresholds. However, respondents to the public consultation indicate that supervisory authorities should not be able to introduce additional thresholds to those that already exist. Individual responses point out that there is a need for consistent application. The Commission agrees that there is a need for a harmonised approach throughout the EU in order to enhance consistency and hence it does not consider that the present situation should be maintained.

b) Streamline thresholds

In order to align the percentage with those of the Transparency Directive[25], the 33% threshold would be changed to 30%. The thresholds that trigger a supervisory assessment process would be streamlined across Member States to the 20%, 30% and 50% levels. In the light of the views of the EBC and CEBS that convergence in practices should be enhanced, as well as industries' clear response to the public consultation, the current flexibility afforded by the recitals of the Directives to Member States to introduce other authorisation thresholds would be removed.

c) Notification only in case of controlling intention

There was also a merit in reviewing whether an acquisition of 10% or 20% of voting rights, where it is not accompanied by an intention on the part of the acquirer to make a bid for control of the bank but amounts to a strategic shareholding, ought to be subject to a notification procedure at all. However, as experience indicates, a 10 or 20% voting right in a major bank, insurance undertaking or securities firm can mean a significant influence over the management of that undertaking and hence the notification requirement for these two levels should remain in place.

Only Option b) is preferred as a harmonised approach throughout the EU enhances consistency for market participants.

6.4 Cooperation Procedures

a) Maintaining the present situation- Enhance cooperation through further work by the Level 3 committees

The current provisions do not state whether supervisors should cooperate in cross-border situations. Yet it is clear that especially in these cases it would be important if supervisors cooperated to rely on each others knowledge related to the proposed acquirer in order to increase the efficiency of the assessment

---

24 Article 1 (10) of Directive 2000/12/EC and Article 4 (11) of the Capital Requirement Directive set the minimum threshold at 10%, and Article16 of Directive 2000/12/EC further stipulates that the thresholds are “20%, 33% or 50%” for the Banking sector. The same levels are stipulated in the Insurance and Securities Directives as well.

25 Article 9 of Transparency Directive (17.12.2004)

procedure. Apart from savings institutions and savings institution's representative bodies, respondents to the public consultation generally support this view by saying that the EU supervisor of the target of the transaction should be one of the supervisors actively involved in the process and that supervisors should cooperate in a predefined manner.

CEBS has already published guidelines on general cooperation.[26] Further guidelines could be developed with a specific scope on supervisory approval cooperation in cross-border merger or acquisition situations. It would be important that all EU supervisors agreed on this practice of cross-border cooperation in order to ensure consistency in practice.

b) Explicit reference to supervisory cooperation within the Directives

Another option would be to amend the current provisions explicitly stating that supervisors should work together.

For the Banking Directive, such an option would emphasize that supervisory authorities would need to work together to reach a joint determination. The final determination would continue to rest with the target supervisor, yet it would need to take into account the views and reservations expressed from the other competent authority.

The Insurance Directives already contain provisions on prior consultation of other involved competent authorities in the context of an acquisition or increase of a holding when the acquirer is a regulated financial institution. However, it is considered appropriate to make this co-operation rule more explicit and include a clear reference to the criteria for the prudential assessment.

The Security Directive (Markets in Financial Instruments Directive) already provides for that the assessment of the acquisition has to be subject to the prior consultation provided for in Article 60 of the same Directive when the acquirer is a regulated financial institution. Moreover, the same procedure of consultation is applicable for the initial granting of authorisation to investment firms. In order to ensure consistency it is considered appropriate to apply the same procedure in the context of the prudential assessment of acquisition or increase of a qualifying holding

c) Creating an EU supervisory institution

A very different approach would be to create an independent EU supervisory institution, which would take an arbitrage role between supervisors. Should the relevant supervisory authorities not be able to reach a determination on the proposal, then this EU supervisory institution would make its own determination. According to Article 105 (6) EC, the European Central Bank (ECB) may be conferred upon "specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings" and could hence theoretically assume this role of a 'supervisor of supervisors'. Such an option could provide for an added dimension of transparency and independence to the process. However, since the aim of the current exercise is cross-sectoral consistency, thus including consistency with the insurance sector, such an option is not found appropriate.

[26] CEBS paper on "Guidelines for co-operation between Consolidating Supervisors and Host Supervisors"

The conclusion is that only an amendment ensures that both supervisors are involved in the process. By explicitly stating that supervisors should work together, each assessment will be conducted based on the knowledge and experience of both supervisors, thus increasing the efficiency of the assessment process. The ultimate determination of the decision will, however, continue to rest with the target institution's supervisor.

6.5 Right of access to documents

Maintaining the present situation vs. amending provisions to include rights of access to documents

There is no explicit article in the current directive that lays out the course of action available to the Commission in exercising its responsibility under Article 211 first indent and 226 of the Treaty. This further aggravates the current shortcomings in clarity and transparency as there is no explanation of when and how the Commission may formally intervene in the process. It was hence considered to add a provision into the respective directives to clarify the Commission's responsibilities and powers in the context.

The right of access to documents tool would allow the Commission to act promptly if it receives a complaint that there has been a potential misuse of supervisory powers by requesting the competent authorities of the Member States as well as the natural or legal persons that files a notification as a qualifying shareholder to provide the Commission with all the necessary information. The Commission would be entitled to request the relevant documents during the authorisation period or after a negative decision has been taken.

6.6 Overview of Preferred Options

	PROS	**CONS**
6.1 List of criteria		
A: Maintaining present situation		Lack of definition Potential for divergent and inconsistent supervisory practice
B: Indicative list of criteria	Some flexibility to cover all the necessary range of cases Possibility of complementing the list with convergence of supervisory practice at level 3.	Lack of clarity and predictability Consistency not ensured Legal certainty not achieved.

C: Open-ended list of criteria	Flexibility to add criteria	Lack of clarity and predictability. Consistency not ensured Legal certainty not achieved
D: Closed list of criteria	Legal certainty Predictability Possibility of reducing the time period for authorisation (reducing costs for supervisors and institutions).	Lack of flexibility
6.2 Assessment procedure		
6.2.1 Notification to increase or to acquire a holding		
A: Maintaining present situation		Lack of transparency. Lack of clarity Unpredictability
B: More detailed notification procedure	Legal certainty Improved efficiency through better communication Increased predictability	
6.2.2 Time period for authorisation		
A: Maintaining present situation		Lengthy process of authorisation Potential to extend the authorisation process indefinitely
B: Shortened authorisation process/defined suspension period	Predictability Transparency Incentives for supervisors and potential acquirers to fasten the process Cost-savings	No flexibility for supervisors
C: Shortened authorisation process/undefined suspension period	Certain flexibility for supervisors	Predictability not completely achieved
6.2.3 Notification of the decision taken		
A: Maintaining present situation		Lack of predictability, transparency and legal certainty
B: Laying out the decision notification process	Enhance transparency Provide legal certainty	
C: Publication of negative decision	Improve transparency	Possibility of reputation damages
6.3 Thresholds		

A: Maintaining present situation		Lack of consistency across Member States
B: Streamline thresholds	Improve consistency Alignment of percentages with those of Transparency Directive	
C: Notification only in case of controlling intention	Less administrative burden	In any case, the influence on management is important even if the intention is not to control.
6.4 Cooperation procedures		
A: Maintaining present situation		Lack of cooperation and consistency in supervisory practices
B: Explicit reference to supervisory cooperation within Directives	Ensure consistency Improve cooperation among supervisors	
C: Creating a EU supervisory institution	Increase transparency and consistency Improved independence	Out of the scope of the proposal Strong institutional implications
6.5 Right of Access to documents		
A: Maintaining present situation		COM right of access to documents not laid out in current Directives
B: *Include reference to right of access to documents*	Providing the Commission with a tool to gather the necessary information to act if necessary.	

The above mentioned preferred options (in italics) illustrate the main features of the Commission Draft Proposal to amend Directives 2000/12/EC, 92/49/EC, 2002/83/EC, 2005/68/EC and 2004/39/EC. One of the envisaged effects of these proposed changes would be more efficient communication both between supervisor and proposed acquirer(s) and in a cross-border situation also between the relevant supervisors.

In order to comply with these new requirements, supervisors would have to make certain necessary procedural modifications. However, these modifications would have minimum effects on administrative costs for supervisory authorities. In fact, the idea is that more efficient communication would make it possible to shorten the authorisation period, which could save administrative costs for both supervisor and proposed acquirer.

SECTION 7: MONITORING AND EVALUATION

The proposal is expected to follow normal implementation procedures, i.e. transposition in Member States within *18-24 months*. The amendments would enter into force 20 days after its publication in the *Official Journal of the European Union*.

The monitoring of the impacts of the amendments will be conducted by consulting with stakeholders. The Commission might distribute on an annual basis questionnaires to financial institutions which have engaged in major shareholding transactions after the implementation of the new provisions. Questions asked could include whether the amendment to the Directives succeeded in making the supervisory approval process more transparent and whether they perceive that the rules are applied more consistently. National supervisory authorities might also be asked to provide feedback on how the new requirements effect their operations.

The forthcoming legislation will be subject to a complete evaluation to analyze whether and to what costs, the objectives have been achieved and to decide whether new measures or amendments are needed. This evaluation could be produced four years after the end of the transposition period.

Appendix A- Public Consultation Results

Introduction

The European Commission conducted a consultation on how to improve the supervisory approval process for mergers and acquisitions (M&A) in the banking, insurance and securities sectors. Specifically, the Commission asked the financial services industry how the clarity and transparency of these rules could be improved, and how best to ensure their consistent application across the EU. All interested stakeholders were invited to respond to the consultation from 15 March to 19 April 2006.

Respondents

By the deadline of the consultation period, the Commission Services received a total of 74 responses.

- ⇒ 61 came from savings institutions and savings institutions' representative bodies
- ⇒ 6 responses from financial institutions (4 banks, 1 investment firm, 1 insurance)
- ⇒ 3 responses from representative bodies with the sector of activity banking or banking/ investment banking
- ⇒ 1 representative body active in the sector of insurance
- ⇒ 1 advisor to financial institutions (active in the sector of banking, investment banking, investment firm, insurance)
- ⇒ 2 individual responses (both active in the sector of insurance)

Results

The results are characterized by two groups of respondents. Representative bodies and a number of financial institutions are in general positive and supportive for the need to improve the approval process. On the other hand, small savings institutions and savings institutions' representative bodies do not believe that current rules are working sub-optimally.

However, almost all respondents agreed on the following points:

<u>In general:</u>

- consistency in the rules for supervisory assessments for the banking, insurance and securities sectors is important

<u>In specific:</u>

- current authorisation thresholds that trigger a supervisory assessment are appropriate and supervisors should not be allowed to introduce further thresholds
- in case of competing bids, each proposed acquirer should be treated impartially
- supervisors should not be allowed to suspend the time period for carrying out their assessments indefinitely until they have received all the information they consider necessary from the proposed acquirer
- it is always in the best interest of the proposed acquirer to submit any information requested by the supervisor as promptly as possible
- the EU supervisor of the proposed acquirer should contribute or be involved in the assessment

Detailed breakdown of answers

More detailed breakdown of answers will be available on the *Public Consultation Report*.

APPENDIX B- CURRENT PROVISIONS GOVERNING THE SUPERVISORY PROCESS IN THE BANKING, INSURANCE AND SECURITIES SECTORS

Currently, **Article 16 of Directive 2000/12/EC** of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions states:

1. The Member States shall require any natural or legal person who proposes to hold, directly or indirectly a qualifying holding in a credit institution first to inform the competent authorities, telling them of the size of the intended holding. Such a person must likewise inform the competent authorities if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital held by him would reach or exceed 20 %, 33 % or 50 % or so that the credit institution would become his subsidiary.

Without prejudice to the provisions of paragraph 2, the competent authorities shall have a maximum of three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the credit institution, they are not satisfied as to the suitability of the person referred to in the first subparagraph. If they do not oppose the plan referred to in the first subparagraph, they may fix a maximum period for its implementation.

2. If the acquirer of the holdings referred to in paragraph 1 is a credit institution authorised in another Member State or the parent undertaking of a credit institution authorised in another Member State or a natural or legal person controlling a credit institution authorised in another Member State and if, as a result of that acquisition, the institution, in which the acquirer proposes to hold a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be the subject of the prior consultation referred to in Article 12.

3. The Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in a credit institution first to inform the competent authorities, telling them of the size of his intended holding. Such a person must likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital held by him would fall below 20 %, 33 % or 50 % or so that the credit institution would cease to be his subsidiary.

4. On becoming aware of them, credit institutions shall inform the competent authorities of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in paragraphs 1 and 3

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of shareholders and members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

5. The Member States shall require that, where the influence exercised by the persons referred to in paragraph 1 is likely to operate to the detriment of the prudent and sound management of the institution, the competent authorities shall take appropriate measures to put an end to that situation. Such measures may consist for example in injunctions, sanctions against directors and managers, or the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information, as laid down in paragraph 1. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

6. For the purposes of the definition of qualifying holding and other levels of holding set out in this Article, the voting rights referred to in Article 7 of Directive 88/627/EEC shall be taken into consideration.

Currently, **Article 15 of Directive 2002/83/EC** of 5 November 2002 concerning life assurance states:

Qualifying holdings 1. Member States shall require any natural or legal person who proposes to hold, directly or indirectly, a qualifying holding in an assurance undertaking first to inform the competent authorities of the home Member State, indicating the size of the intended holding. Such a person must likewise inform the competent authorities of the home Member State if he/she proposes to increase his/her qualifying holding so that the proportion of the voting rights or of the capital held by him/her would reach or exceed 20 %, 33 % or 50 % or so that the assurance undertaking would become his/her subsidiary. The competent authorities of the home Member State shall have a maximum of three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the assurance undertaking, they are not satisfied as to the qualifications of the person referred to in the first subparagraph. If they do not oppose the plan in question they may fix a maximum period for its implementation. 2. Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in an assurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his/her intended holding. Such a person must likewise inform the competent authorities if he/she proposes to reduce his/her qualifying holding so that the proportion of the voting rights or of the capital held by him/her would fall below 20 %, 33 % or 50 % or so that the assurance undertaking would cease to be his/her subsidiary. 3. On becoming aware of them, assurance undertakings shall inform the competent authorities of their home Member States of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in paragraphs 1 and 2. They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of shareholders and members or as a result of compliance with the regulations relating to companies listed on stock exchanges. 4. Member States shall require that, if the influence exercised by the persons referred to in paragraph 1 is likely to operate to the detriment of the prudent and sound management of the assurance undertaking, the competent authorities of the home Member State shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, sanctions against directors and managers, or the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question. Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information, as laid down in paragraph 1. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

Currently, **Article 15 of Directive 92/49/EEC** of 18 June 1992 of 5 November 2002 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) states:

1. Member States shall require any natural or legal person who proposes to acquire, directly or indirectly, a qualifying holding in an insurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding. Such a person must likewise inform the competent authorities of the home Member State if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital he holds would reach or exceed 20, 33 or 50 % or so that the insurance undertaking would become his subsidiary.

The competent authorities of the home Member State shall have up to three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the insurance undertaking in question, they are not satisfied as to the qualification of the person referred to in the first subparagraph. If they do not oppose the plan in question, they may fix a maximum period fort its implementation.

2. Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in an insurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding. Such a person must likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital he holds would fall below 20, 33 or 50 % or so that the insurance undertaking would cease to be his subsidiary.

3. On becoming aware of them, insurance undertakings shall inform the competent authorities of their home Member States of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below any of the tresholds referred to in paragraphs 1 and 2.

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders or members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

4. Member States shall require that, where the influence exercised by the persons referred to in paragraph 1 is likely to operate against the prudent and sound management of an insurance undertaking, the competent authorities of the home Member State shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, sanctions against directors and managers, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information imposes in paragraph 1. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

Currently, **Articles 19-23 of Directive 2005/68/EC** of 16 November 2005 on reinsurance state:

Article 19

Acquisitions

Member States shall require any natural or legal person who proposes to hold, directly or indirectly, a qualifying holding in a reinsurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding. That person must likewise inform the competent authorities of the home Member State if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital he holds would reach or exceed 20 %, 33 % or 50 % or so that the reinsurance undertaking would become his subsidiary.

The competent authorities of the home Member State shall have up to three months from the date of the notification provided for in the first paragraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the reinsurance undertaking in question, they are not satisfied as to the qualifications of the person referred to in the first paragraph. If they do not oppose the plan in question, they may fix a maximum period for its implementation.

Article 20

Acquisitions by financial undertakings

If the acquirer of the holdings referred to in Article 19 is an insurance undertaking, a reinsurance undertaking, a credit institution or an investment firm authorised in another Member State, or the parent undertaking of such an entity, or a natural or legal person controlling such an entity, and if, as a result of that acquisition, the undertaking in which the acquirer proposes to acquire such a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be subject to the prior consultation referred to in Article 14.

Article 21

Disposals

Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in a reinsurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding.

Such a person shall likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital he holds would fall below 20 %, 33 % or 50 % or so that the reinsurance undertaking would cease to be his subsidiary.

Article 22

Information to the competent authority by the reinsurance undertaking

On becoming aware of them, reinsurance undertakings shall inform the competent authorities of their home Member States of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below any of the thresholds referred to in Articles 19 and 21.

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders or members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

Article 23

Qualifying holdings: powers of the competent authority

Member States shall require that, where the influence exercised by the persons referred to in Article 19 is likely to operate against the prudent and sound management of a reinsurance undertaking, the competent authorities of the home Member State shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, penalties against directors and managers, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information imposed pursuant to Article 19. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other penalties to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

Currently, **Article 10 of Directive 2004/39/EC of 21 April 2004** on markets in financial instruments states:

Shareholders and members with qualifying holdings 1. The competent authorities shall not authorise the performance of investment services or activities by an investment firm until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings. The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an investment firm, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings. Where close links exist between the investment firm and other natural or legal persons, the competent authority shall grant authorisation only if those links do not prevent the effective exercise of the supervisory functions of the competent authority. 2. The competent authority shall refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions. 3. Member States shall require any natural or legal person that proposes to acquire or sell, directly or indirectly, a qualifying holding in an investment firm, first to notify, in accordance with the second subparagraph, the competent authority of the size of the resulting holding. Such persons shall likewise be required to notify the competent authority if they propose to increase or reduce their qualifying holding, if in consequence the proportion of the voting rights or of the capital that they hold would reach or fall below or exceed 20%, 33% or 50% or the investment firm would become or cease to be their subsidiary. Without prejudice to paragraph 4, the competent authority shall have up to three months from the date of the notification of a proposed acquisition provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the investment firm, it is not satisfied as to the suitability of the persons referred to in the first subparagraph. If the competent authority does not oppose the plan, it may fix a deadline for its implementation. 4. If the acquirer of any holding referred to in paragraph 3 is an investment firm, a credit institution, an insurance undertaking or a UCITS management company authorised in another Member State, or the parent undertaking of an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, or a person controlling an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, and if, as a result of that acquisition, the undertaking would become the acquirer's subsidiary or come under his control, the assessment of the acquisition shall be subject to the prior consultation provided for in Article 60. 5. Member States shall require that, if an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in the first subparagraph of paragraph 3, that investment firm is to inform the competent authority without delay. At least once a year, investment firms shall also inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders and members or as a result of compliance with the regulations applicable to companies whose transferable securities are admitted to trading on a regulated market.

6. Member States shall require that, where the influence exercised by the persons referred to in the first subparagraph of paragraph 1 is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation.

Such measures may consist in applications for judicial orders and/or the imposition of sanctions against directors and those responsible for management, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall be taken in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.