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## Banking - Luxembourg

### Credit Institutions: Guidance on Assessment of Acquisitions and Increases in Holdings

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#### Introduction

On March 21 2009 the Law of July 17 2008, which implements the EU Acquisitions Directive (2007/44/EC), entered into force. This law modified the Laws of April 5 1993 and December 6 1991, which regulate the financial and insurance sectors, respectively.

These laws require natural or legal persons, whether acting alone or in concert, to notify the Supervisory Authority of the Financial Sector or the Insurance Commission if they decide either to (i) acquire (directly or indirectly) a qualifying holding in a credit institution, or (ii) increase (directly or indirectly) their qualifying holding in such an institution so that their proportion of voting rights or capital reaches or exceeds 20%, 33.3% or 50%, thereby making the institution their subsidiary.

The competent regulator has 60 working days from receipt of the written notification to assess the transaction, provided that it has received all of the required documents. Up to 50 days after receipt of the initial submission, it may request additional information and pause the assessment process until it receives such information. If the authority does not issue a written objection to the proposed acquisition by the end of the assessment period, the acquisition is deemed to be approved.

In order to ensure that the target institution will be soundly and prudently managed, the authority must assess the acquirer's suitability by evaluating:

- its track record and standing;
- the reputation and experience of the persons directing the business;
- its financial soundness;
- its compliance with prudential requirements; and
- the risk of money laundering or terrorist financing.

On February 4 2009 the authority issued a circular to alert institutions to the publication of guidelines for prudential assessment by the Committee of European Banking Supervisors, the Committee of European Securities Regulators and the Committee of European Insurance and Occupational Pensions Supervisors. The guidelines provide:

- practical explanations of the five criteria to be applied in assessing an acquisition or an increase in holdings in order to harmonize them at EU level;
- guidance to facilitate the coordination and exchange of information between supervisory authorities; and
- an exhaustive and harmonized list of the information that acquirers must submit to the supervisory authority.

The circular outlines the approach that the authority will take in assessing acquisitions of credit institutions.

#### Assessment Criteria

The authority must apply the proportionality principle in its assessments. Thus, in the case of intra-group transactions without an effective change in the shareholding, groups need not be reassessed. Adequate



information must be provided at all times. However, an acquisition should not be refused solely because required information has not been supplied if the omission can be justified by the nature of the transaction.

#### ***Reputation of proposed acquirer***

The authority must have no doubt as to the integrity and professional competence of the proposed acquirer. The acquirer is presumed to be trustworthy in the absence of evidence to the contrary. An assessment of integrity may be affected by any objective and recorded factors, such as court decisions, judicial proceedings and penalties for non-compliance with provisions governing banking, financial, securities or insurance activities. 'Integrity' for the purpose of this test includes compliance in past business dealings by maintaining transparency, cooperating with supervisors and regulators and obtaining due authorization to carry out business. The authority must analyze each case individually.

'Professional competence' includes competence in management and in the entity's sector, as applicable.

#### ***Reputation and experience of persons managing the business***

This criterion applies only if the proposed acquirer intends to appoint other persons to manage the business.

#### ***Financial soundness***

The acquirer must be able to finance the proposed acquisition and maintain a sound financial structure. The acquisition may not create conflicts of interest that are liable to destabilize the target's financial structure.

#### ***Compliance with prudential requirements***

This criterion is linked to the previous criterion, as it involves an assessment of the target's financial soundness. It is relevant mainly where the acquisition involves a change of control. Moreover, the post-transaction structure of the institution should allow for effective supervision and exchange of information.

#### ***Money laundering and terrorist financing***

In practice, failure to comply with this criterion constitutes grounds for the authorities to block an acquisition. It applies if the proposed acquirer is (i) believed or known to be involved in money-laundering operations or attempted money laundering, or (ii) listed as having links to terrorist financing or suspected of having such links.

#### **Coordination and Exchange of Information**

According to the three committees, the competent authorities supervising the acquirer and the target must cooperate to allow for a prompt and effective assessment of the acquisition or increase in shareholding. If two or more authorities in the same EU member state are involved, they must coordinate with each other.

#### **Acquirer's Information Obligations**

The acquirer must supply the authority with accurate information about:

- its status as a natural or legal person, its fulfilment of the five criteria and the identity of the persons directing the business;
- the acquisition (eg, the parties and the number and type of shares);
- the financing, especially the origin of the funding; and
- any change in control (based on the proportionality principle and depending on the level of the shareholding).

The acquirer is liable if it supplies false, misleading or deceptive information.

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