

South Africa

Directive 13 of 2013: Clarification of the requirements for approval of the acquisition of "an interest" outside the Republic

Practice Direction 13 of 2013

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outside the Republic

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Practice Direction 13 of 2013

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To: All banks, controlling companies, branches of foreign institutions, eligible institutions and auditors of banks or controlling companies

Directive 13/2013 issued in terms of section 6(6) of the Banks Act, 1990

Clarification of the requirements for approval of the acquisition of "an interest" outside the Republic as provided for in section 52(1)(c) of the Banks Act, 1990 (Act No. 94 of 1990)

Executive summary

The purpose of this directive is to clarify the requirements in respect of the application of the provisions of section 52(1)(c) of the Banks Act, 1990 (Act No. 94 of 1990 - the Banks Act), which section requires that banks and controlling companies obtain the prior written approval of the Registrar of Banks (Registrar) for the acquisition of "an interest" in any undertaking outside the Republic. This directive is preceded by Circular 8/2004, which was withdrawn on 1 January 2008.

1. Introduction

The wide ambit of section 52(1)(c) of the Banks Act has resulted in a number of impractical applications and unintended consequences. Banks or controlling companies (hereinafter collectively referred to as "banks") wishing to acquire "an interest" in any undertaking outside the Republic as defined in the abovementioned section are required to follow an application process to obtain prior written approval from the Registrar. While it is conceded that there are instances where the acquisition of these interests may have little supervisory value, there are also instances where the acquisitions may be of significant value to the supervisor and which may pose a potential risk to the acquiring bank. The directive aims to find a balanced solution that would address both the practical difficulties experienced by certain banks in this regard as well as the issues pertaining to potential supervisory risks faced by this Office.

2. Section 52(1)(c) of the Banks Act, 1990

Section 52(1)(c) of the Banks Act requires banks and controlling companies to obtain prior written approval from the Registrar, which approval may also include certain conditions, before acquiring an interest in any undertaking having its registered office or principal place of business outside the Republic.

3. Other relevant references

- 3.1 Principle 7 of the Core Principles for Effective Banking Supervision (Core Principles) pertaining to major acquisitions states the following: "The supervisor has the power to approve or reject (or recommend to the responsible authority the approval or rejection of), and impose prudential conditions on, major acquisitions or investments by a bank, against prescribed criteria, including the establishment of cross-border operations, and to determine that corporate affiliations or structures do not expose the bank to undue risks or hinder effective supervision."

- 3.2 The essential criteria pertaining to Principle 7 of the Core Principles state the following:
- 3.2.1 Laws or regulations clearly define:
- (a) what types and amounts (absolute and/or in relation to a bank's capital) of acquisitions and investments need prior supervisory approval; and
 - (b) cases for which notification after the acquisition or investment is sufficient. Such cases are primarily activities closely related to banking and where the investment is small relative to the bank's capital.
- 3.2.2 "Laws or regulations provide criteria by which to judge individual proposals."
- 3.3 Consistent with the licensing requirements, among the objective criteria that the supervisor uses is that any new acquisitions and investments do not expose the bank to undue risks or hinder effective supervision. The supervisor also determines, where appropriate, that these new acquisitions and investments will not hinder effective implementation of corrective measures in the future.¹ The supervisor can prohibit banks from making major acquisitions/investments (including the establishment of cross-border banking operations) in countries with laws or regulations prohibiting information flows deemed necessary for adequate consolidated supervision. The supervisor takes into consideration the effectiveness of supervision in the host country and its own ability to exercise supervision on a consolidated basis.
- 3.4 The supervisor determines that the bank has, from the outset, adequate financial, managerial and organisational resources to handle the acquisition/investment.
- 3.5 The supervisor is aware of the risks that non-banking activities can pose to a banking group and has the means to take action to mitigate those risks. The supervisor considers the ability of the bank to manage these risks prior to permitting investment in non-banking activities.

Additional criterion

The supervisor reviews major acquisitions or investments by other entities in the banking group to determine that these do not expose the bank to any undue risks or hinder effective supervision. The supervisor also determines, where appropriate, that these new acquisitions and investments will not hinder effective implementation of corrective measures in the future. Where necessary, the supervisor is able to effectively address the risks to the bank arising from such acquisitions or investments.

4. Directive

- 4.1 Based on the aforesaid exposition, this Office issues the directive specified in paragraphs [4.2](#) to [4.4](#) below:
- 4.2 The acquisition of an aggregate effective interest of 5 per cent or more, held directly or indirectly by the bank or controlling company in a foreign institution requires the prior written approval of the Registrar; or

(For example, a 2 per cent interest acquired by Bank A in company X situated outside the Republic, in January 2013, falls below the threshold and only requires notification to the Registrar by Bank A. An additional 2 per cent interest acquired by Bank A in company X in February 2013 also falls below the threshold and will result in an aggregate effective interest of 4 per cent, which in total also falls below the threshold, therefore only requiring notification to the Registrar by Bank A. Another 2 per cent interest acquired by a fully owned subsidiary of Bank A in company X in June 2013 also falls below the threshold but as the aggregate effective interest of Bank A in company X now becomes more than 5 per cent, prior written approval of the Registrar is required for the latter acquisition and every subsequent direct or indirect acquisition of any further interest by Bank A in company X. The same principles shall apply to

¹

In the case of major acquisition, this determination may take into account whether the acquisition or investment creates obstacles to the orderly resolution of the bank.

the acquisition of an interest exceeding the specified limits in respect of qualifying capital and reserve funds.)

4.3 when the acquisition of an interest in a foreign institution is less than 5 per cent, held directly or indirectly, but equates to 1 per cent or more of the qualifying capital and reserve funds of the acquiring bank or controlling company, the prior written approval of the Registrar is required; and

4.4 provided that in all relevant cases:

4.4.1 where the interest in a foreign institution amounts to less than 1 percent of the qualifying capital and reserves of the acquiring bank or controlling company and in aggregate is less than a 5 per cent interest held directly or indirectly, the acquiring bank or controlling company shall notify the Registrar within 30 days after the acquisition;

4.4.2 if the investment in a foreign institution falls below both thresholds, but where it may have a significant impact on the acquiring bank or controlling company's financial position, business strategy, managerial resources or reputation, the acquiring bank or controlling company shall obtain prior written approval from the Registrar;

4.4.3 where the possibility of a hindrance of effective supervision may exist, such as obstructions to the flow of information caused by, for example, secrecy laws, the prior written approval of the Registrar shall be required; and

4.4.4 nothing contained in this directive derogates from any provision issued under the rules or regulations of the Financial Surveillance Department of the South African Reserve Bank or any other regulatory or supervisory authority.

5. **Acknowledgement of receipt**

5.1 Two additional copies of this directive are enclosed for the use of your institution's independent auditors. The attached acknowledgement of receipt, duly completed and signed by both the chief executive officer of the institution and the said auditors, should be returned to this Office at the earliest convenience of the aforementioned signatories.