

2004-05-25

TO ALL BANKS, BRANCHES OF FOREIGN BANKS AND MUTUAL BANKS

BANKS ACT CIRCULAR 8/2004

APPLICATIONS IN TERMS OF SECTION 52(1)(c) OF THE BANKS ACT, 1990 (ACT NO. 94 OF 1990)

1. INTRODUCTION

The banking industry has developed substantially over the past number of years. Large banking institutions have begun to conduct various types of banking activity, and banking-related and non-banking activities are generally conducted in the same group. Banks are also continuously expanding their foreign operations, which include various business undertakings, investments, joint ventures and subsidiaries.

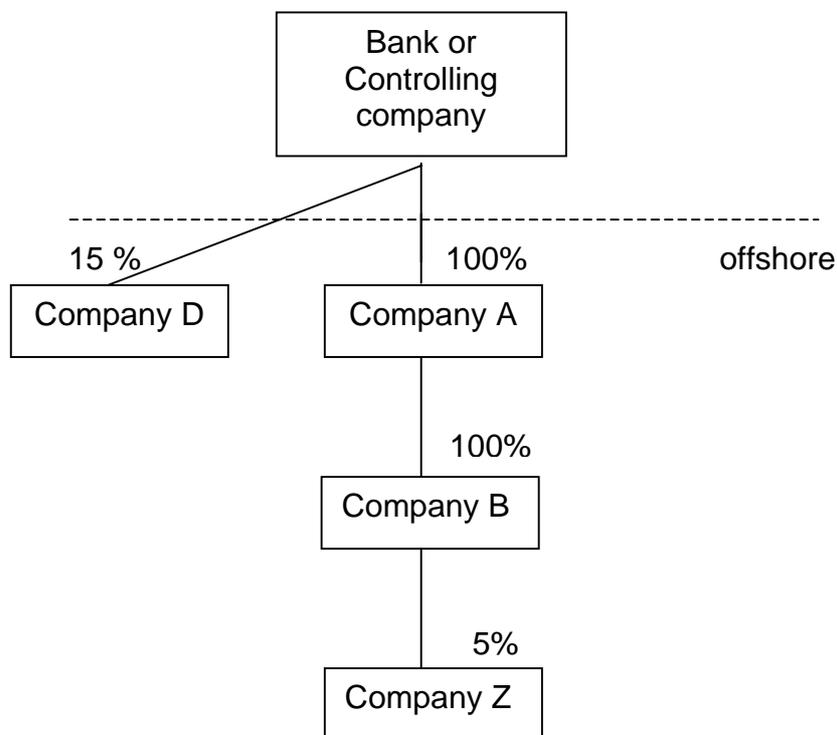
In terms of section 52 of the Banks Act, 1990 (Act No. 94 of 1990 – “the Banks Act”), the Registrar of Banks is not required to approve the acquisition or establishment by a bank or controlling company of a bank of interests within South Africa if the interest acquired or established will not result in the entity in which such an interest is held becoming a subsidiary of the bank or controlling company. In terms of section 52(1)(c) of the Banks Act, a bank or controlling company, however, requires the prior approval of the Registrar of Banks to acquire an interest in any undertaking having its registered office or principal place of business outside the Republic of South Africa (“RSA”). In addition to the aforementioned approval, approvals are also required from the Exchange Control Department of the South African Reserve Bank (“EXCON”) when a bank or controlling company wishes to acquire an interest outside the RSA.

The purpose of this circular is to provide clarity on the legislator’s intention with section 52(1)(c) of the Banks Act, with regard to foreign acquisitions and with specific reference to the meaning of “an interest”, since the term is ostensibly causing uncertainty in the banking sector.

2. DEFINITION OF “AN INTEREST”

It is important to determine whether “an interest” should be regarded as a direct or an indirect interest. In the interests of regulatory certainty and efficiency, this Office has interpreted “an interest” as a direct interest acquired by a bank or controlling company in an undertaking that is situated outside the RSA. Therefore, only the first line of acquisitions that a bank or controlling company obtains directly in an undertaking situated outside the RSA would be regarded as a direct interest and, hence, subject to the provisions of section 52(1)(c) of the Banks Act.

The meaning of “direct interest” can be explained by the following schematic example:



If bank or controlling company acquires an interest of 100 per cent in Company A, based outside the RSA, approval would be required in terms of sections 52(1)(a) and 52(1)(c) of the Banks Act. Similarly, the acquisition of an interest of 15 per cent in Company D will require the prior written approval of the Registrar of Banks, despite Company D for the purposes of this example, not qualifying as a subsidiary. This is because Company D is regarded as a first line of acquisition and, therefore, a direct interest obtained by the bank or controlling company. If Company A, in turn, acquires an interest of 100 per cent in Company B, approval would also be required in terms of section 52(1)(a) of the Banks Act, since Company B will be an indirect subsidiary of the bank or controlling company. If Company B, however, acquires an interest of 5 per cent in Company Z (and Company Z does not become a subsidiary), the acquisition of Company Z would not be regarded as a

direct interest. An application for prior written approval from the Registrar of Banks would therefore not be necessary.

It is important to note that should a bank or controlling company of a bank obtain any controlling interest that results in an acquisition qualifying as a subsidiary in terms of the Companies Act 1973 (Act No. 61 of 1973), prior approval from the Registrar of Banks will be required in terms of Section 52(1)(a) of the Banks Act.

3. SUPERVISORY RESPONSIBILITIES

As is commonly known, this Office subscribes to the Basel Core Principles for Effective Supervision (“Core Principles”) issued by the Basel Committee on Banking Supervision. In terms of the Core Principles, this Office, in fulfilling its supervisory processes and responsibility, is required to adhere to certain specific requirements pertaining to the structures of banks and controlling companies of banks. These requirements pertain to the following, amongst others:

- Criteria for reviewing acquisitions or investments by a bank.
- Ensuring that corporate affiliations or structures do not expose the bank to undue risks or hinder effective supervision.
- Supervisor’s ability to undertake supervision on a consolidated basis, in order to review all activities that could pose a risk to a bank.
- Exchange of information with other supervisors, in order to ensure adherence to prudential norms in all jurisdictions in which a bank conducts business.
- Certain responsibilities of home-country supervisors.

One of the main reasons for this Office having interpreted “an interest” as being the direct interests held by a bank or bank controlling company only is this Office’s policy to conduct its supervisory process through the institutions directly controlled by a bank or controlling company of a bank. Thereby, this Office is able to comply fully with the requirements of the Core Principles. The application of the above-mentioned interpretation will also result in a more effective and efficient regulatory process that will accommodate banks’ business initiatives. The above-mentioned interpretation of “an interest” by this Office should not in any way be viewed or regarded as non-adherence to any of the requirements of the Core Principles.

4. NOTIFICATION REQUIREMENT

As from the date of this circular, banks and controlling companies of banks will not require the prior approval of the Registrar of Banks for the acquisition of indirect interests, as described above. This Office, however, requires banks and controlling companies of banks to notify

this Office within 14 days of the acquisition of any interest that does not require prior approval from the Registrar of Banks. Furthermore, should a bank or controlling company of a bank be of the opinion that the planned acquisition of an interest will result in a material change and/or shift to the particular bank's risk profile, the bank or controlling company shall notify this Office prior to such an acquisition being made. Notwithstanding the arrangements contained in this Circular, banks are advised that the prior approval of EXCON would still be required. All notifications to this Office should include a copy of the said submission to EXCON.

Notifications by banks and controlling companies of banks will be reviewed during the quarterly or half-yearly consolidated supervisory reviews that form part of this Office's supervisory process.

5. ACKNOWLEDGEMENT OF RECEIPT

Two additional copies of this circular 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.

E M Kruger
Registrar of Banks

The previous circular issued was Banks Act Circular 7/2004 dated 24 May 2004.