

Part 2

Implementing directive 2002/87/EC – Financial conglomerates and other financial groups – HM Treasury’s legislation

1. Introduction

- 1.1 Most of Directive 2002/87/EC¹ (“the FGD”) can be implemented by the Financial Services Authority² (FSA) using the powers given to it by the Financial Services and Markets Act 2000 (FSMA). In particular, as has been set out in Part 1, the FSA’s powers to make rules³ and vary the permission of authorised persons⁴ are sufficient to enable it to implement the main provisions of the FGD.
- 1.2 However, there are certain procedural aspects of the FGD (for example, the obligation to consult a financial conglomerate or related competent authorities and the obligation to notify a group that it has been identified as a financial conglomerate) which cannot be implemented in this way. To implement these procedural aspects, the Treasury propose to legislate by way of statutory instrument and to amend other Treasury legislation made under FSMA. A draft of the statutory instrument – the Financial Conglomerates and Other Financial Groups Regulations (“the draft Regulations”) – is set out at Annex 1.

1 Referred to as the “conglomerates directive” in the draft Regulations.

2 Referred to as “the Authority” in the draft Regulations.

3 See in particular section 138 of FSMA.

4 See in particular section 45 of FSMA.

2. Notifying when a financial conglomerate has been identified

- 2.1 Article 4(2) of the FGD requires the coordinator to inform the parent undertaking at the head of a group⁵ that the group has been identified as a financial conglomerate. The parent undertaking must also be informed of the identity of the coordinator. In addition, the coordinator must notify the competent authorities which have authorised regulated entities in the financial conglomerate, as well as the competent authorities of the European Economic Area (EEA) State in which the mixed financial holding company has its head office. The European Commission must also be notified. Accordingly, the draft Regulations⁶ will require the FSA, when it has become the coordinator for a financial conglomerate, to abide by these notification requirements.

3. Choice of coordinator

- 3.1 Article 10(1) and (2) of the FGD specifies how the coordinator for each financial conglomerate may be identified. However, the competent authorities may, by common agreement, waive these criteria and appoint a different competent authority as coordinator where their application would be inappropriate⁷. For example, if the parent undertaking of a financial conglomerate is a regulated entity established in France, but 90% of the conglomerate's activities take place in Germany, the criteria in Article 10(1) (whereby the coordinator would be the relevant French competent authority) might not be appropriate.
- 3.2 The decision to waive these criteria and appoint a different competent authority as coordinator rests with the relevant competent authorities, who must be in common agreement. In addition the financial conglomerate itself must have an opportunity to comment on this decision. The draft Regulations⁸ will therefore require the FSA, when it is a relevant competent authority, to comply with these requirements.

4. Obligations to consult or obtain consent before taking supervisory action or to act in concert

- 4.1 A number of provisions of the FGD require competent authorities to consult each other or to obtain the consent of another competent authority before taking certain decisions or certain action regarding a firm which is a member of a financial conglomerate. In some cases, the financial conglomerate must also be consulted. Other provisions of the FGD require competent authorities to act in concert.

5 Or the largest regulated entity in the most important financial sector of that group if the group has no parent undertaking.

6 Regulation 2(1) of the draft Regulations.

7 See Article 10(3) of the FGD.

8 Regulation 2(2) & (3) of the draft Regulations.

4.2 *Obligations to act in concert when identifying a financial conglomerate*

- 4.2a The FGD sets out when the activities of a group are “mainly” in the financial sector⁹ (the “financial sector” test), and how “significant” the activities of a group in different financial sectors must be before the group can be treated as a financial conglomerate¹⁰ (the “cross-sectoral” test). Both of these tests are key to identifying a financial conglomerate.
- 4.2b The FGD sets out when the financial sector and cross-sectoral tests are met.¹¹ However, in some circumstances, the FGD allows the relevant competent authorities acting together or the coordinator (in cases, where a financial conglomerate has already been identified)¹² to decide not to regard the group as a financial conglomerate or not to apply the provisions of Articles 7 to 9 of the FGD.
- 4.2c The FSA has sufficient powers under the Financial Services and Markets Act (FSMA) to identify financial conglomerates. However, the current provisions of FSMA do not reflect the procedural requirements of the decision-making process which is set out in the FGD. For example, if a group satisfies the cross-sectoral test in the first sentence of Article 3(3) of the FGD (the balance sheet total of the smallest financial sector in the group exceeding Euro 6 billion), but does not satisfy the cross-sectoral test in Article 3(2) of the FGD (the balance sheet total and solvency requirements of each financial sector having to represent at least 10% of the balance sheet total and solvency requirements of all of the financial sector entities of the group), it is possible for the relevant competent authorities to determine that the group should not be regarded as a financial conglomerate. However, the relevant competent authorities must do this by common agreement. Accordingly, the draft Regulations¹³ will require the FSA to obtain the consent of the relevant competent authorities where required by the FGD.

4.3 *Obligation to consult when deciding which method should determine capital adequacy*

The FGD allows the coordinator to decide which of the methods listed in Annex 1 for determining capital adequacy is to be applied by a particular financial conglomerate.¹⁴ The coordinator must consult the other relevant

9 See Article 3(1) of the FGD which specifies (subject to paragraphs (4) to (6)) the cases in which the activities of a group are to be treated as “mainly in the financial sector” for the purposes of Article 2(14)(c) of the FGD – the definition of a “financial conglomerate”.

10 See Article 3(2) and (3) of the FGD which specify (subject to paragraphs (3) to (6)) the cases in which the activities of a group in different financial sectors are “significant” for the purposes of Article 2(14)(e) of the FGD – the definition of a “financial conglomerate”.

11 Paragraphs (1) and (2) and the first sentence of paragraph (3) of Article 3 of the FGD.

12 Second sentence of paragraph (3) and paragraphs (4) to (6) of Article 3 of the FGD.

13 Regulations 3 and 4 of the draft Regulations .

14 The second paragraph of Annex 1 of the FGD.

competent authorities and the financial conglomerate itself before making this choice. Accordingly, the draft Regulations¹⁵ will require the FSA to consult the other relevant competent authorities and the financial conglomerate, where this is called for by the FGD.

4.4 *Obligation to consult when determining which risk concentrations and intra-group transactions are “significant”*

The FGD requires the coordinator to determine which risk concentrations and intra-group transactions are significant (and so which concentration and transactions should be reported by the financial conglomerate)¹⁶. The coordinator must consult the other relevant competent authorities and the financial conglomerate itself before making its decision. The draft Regulations will thus require the FSA to consult the other relevant competent authorities and the financial conglomerate, where this is called for by the FGD.

4.5 *Obligation to consult before approving organisational changes, imposing major sanctions or imposing exceptional measures*

4.5a In order to further cooperation between competent authorities which supervise undertakings of a financial conglomerate, the FGD requires all competent authorities which have authorised a regulated entity in a financial conglomerate to consult each other¹⁷.

4.5b The obligation to consult applies where –

- (a) a competent authority is considering whether to approve or authorise changes in the shareholder, organisational or management structure of a member of a financial conglomerate or to take major sanctions or exceptional measures in relation to such an undertaking;
- (b) the decision would be of importance to the other competent authorities in their carrying out of supervisory tasks; and
- (c) consultation would not jeopardise the effectiveness of the decision and the case is not urgent (although in such cases, the competent authority must inform the other competent authorities of its decision).

4.5c The only circumstances in which the FSA formally approves or authorises changes to shareholder, organisational or management structures of authorised persons is where a change of control triggers the obligation to notify the FSA

15 Regulations 3 and 4 of the draft Regulations .

16 See Annex II of the FGD.

17 See Article 12(2) of the FGD.

under Part XII of FSMA. In such cases, FSMA already requires the FSA to consult connected competent authorities in other EEA States¹⁸. The draft Regulations¹⁹ clarify the scope of consultation required by providing that the FSA must consult competent authorities which have authorised regulated entities in a financial conglomerate when considering whether to approve a change of control, except where consultation would jeopardise the effectiveness of the decision (due to its urgency or otherwise) or the decision is not of importance for the tasks of the competent authority in question.

- 4.5d The FGD requires this same scope of consultation where major sanctions or exceptional measures are taken by the competent authorities, without specifying what constitutes a “major sanction” or “exceptional measure”. Potentially, the cancellation or variation of permission granted under Part IV of FSMA, a statement of public censure, the imposition of a financial penalty or the exercise of any of the injunctive or restitutionary powers under Part XXV of FSMA could trigger the obligation to consult. The draft Regulations²⁰ require the FSA to consult on the same basis as described in the previous paragraph.

5. Third-country financial conglomerates and Third-country groups

- 5.1 The FGD makes provision for the supplementary supervision of financial conglomerates whose parent company is established outside the EEA (third-country financial conglomerates)²¹. As a result of the amendment made to the Banking Consolidation Directive (which also applies for the purposes of the Capital Adequacy Directive), this approach also applies to banking groups, mixed banking and investment groups and investment groups.²²
- 5.2 Again, the FSA already has adequate powers under FSMA to supervise third-country groups where this is necessary. However, FSMA does not reflect the procedural requirements of the relevant Directives.
- 5.3 *Determination of equivalence*
- 5.3a In the case of a third-country financial conglomerate, the competent authority which is the coordinator must consult the other relevant competent

18 See sections 183(2) and 188(2) of FSMA and the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001 (S.I. 2001/2509).

19 See the amendments made to the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001 (S.I. 2001/2509) by regulation [13] of the draft Regulations.

20 Regulation [5] of the draft Regulations.

21 See Article 18 of the FGD.

22 The Banking Consolidation Directive (BCD) (Directive 2000/12/EC) which relates to banking-only groups and the Capital Adequacy Directive (CAD) (Directive 93/6/EC) which applies the provisions of the BCD – with some modifications – to investment firm-only groups and to mixed investment/banking groups are, together with the Insurance Groups Directives (Directive 98/78/EC), directives which will, as having already taken effect, complement the Conglomerates Directive in its supervision of financial services groups.

authorities before deciding if the regulated entities in the group are subject to supervision by a third-country competent authority equivalent to that provided for by the FGD. In addition, the competent authority which is the coordinator must take into account any relevant guidance prepared by the Financial Conglomerates Committee (and, for that purpose, consult that Committee) before making a decision on equivalence²³.

5.3b The provisions for determining equivalence in the Banking Consolidation Directive and the Capital Adequacy Directive are very similar to those in FGD²⁴. The competent authority which is responsible for consolidated supervision must consult the other competent authorities involved and take into account any relevant guidance issued by the Banking Advisory Committee (and, for that purpose, consult that Committee). The draft Regulations²⁵ will therefore require the FSA to consult other competent authorities and take into account guidance issued by the Financial Conglomerates Committee or the Banking Advisory Committee where required to by the relevant Directives.

5.4 *Application of other methods if the supervision of regulated entities by a third country competent authority is not deemed equivalent to that provided for by the FGD*

The FGD permits the coordinator to waive parts of the FGD and to apply “alternative” measures, as long as these measures ensure appropriate supplementary supervision of the regulated entities in the third-country financial conglomerate²⁶. For example, such an alternative measure may be to require that the financial conglomerate concerned has a holding company in the EU to cover all of its European financial firms. A European sub-group would thus be created which would then be subject to group supervision (including capital requirements). Similarly, amendments to the Banking Consolidation Directive permit the application of other methods, where appropriate.

5.5 In relation to a third-country financial conglomerate, the coordinator must consult the other relevant competent authorities before taking a decision on other methods. Any other methods must be notified to the other competent authorities who have authorised regulated entities in that financial conglomerate and to the Commission.

5.6 Under the Banking Consolidation Directive and the Capital Adequacy Directive, the competent authority responsible for consolidated supervision must consult the other competent authorities involved before applying other methods.

23 See final sentence of Article 18(1) of the FGD

24 See Article 56a of the Banking Consolidation Directive (as inserted by Article 29(11) of the FGD) and Article 7(2) and (3) of the Capital Adequacy Directive.

25 See regulation -89(1), -9(1) and 10(1) of the draft Regulations.

26 See Article 18(3) of the FGD.

Moreover, it must notify those competent authorities and the Commission if such measures are applied. Accordingly, the draft Regulations will require the FSA to consult other competent authorities, and to notify competent authorities and the Commission where required to by the relevant Directives²⁷.

6. Information

In order to prevent duplication of requests for information from competent authorities, the FGD provides that where the coordinator requires information about a financial conglomerate which has already been provided to another competent authority, the coordinator should contact that other competent authority where possible²⁸. The draft Regulations²⁹ implement this provision in relation to the FSA.

7. Consultation obligations under the sectoral directives

7.1 Consultation on authorisation

- 7.1a The Banking Consolidation Directive and the Investment Services Directive (93/22/EEC) require a competent authority which is considering an application for authorisation to consult the home-state competent authority of regulated entities which are connected with the applicant (for example, the parent undertaking of the applicant).³⁰ These obligations only apply where the connected entity is authorised to carry out the activities for which the applicant is seeking authorisation. For example, where the FSA is considering an application for permission to carry out regulated activities relating to deposit-taking, the Banking Consolidation Directive only requires the FSA to consult the home-state competent authorities of other credit institutions connected with the applicant. Even if the parent company of the applicant is an authorised insurance undertaking, the FSA is not required by Community law to consult the home-state competent authority of the insurance undertaking.
- 7.1b The FGD amends the sectoral Directives (including the insurance Directives) so as to require competent authorities which are considering an application for authorisation to consult competent authorities which have authorised other entities in that group. This is required regardless of the sector in which that connected entity is authorised to operate. Under FSMA, the FSA is already obliged to consult other competent authorities in these circumstances.³¹ No further implementation measures are therefore needed for these provisions.

27 See Regulations 8(4), 9(4) and 10(5) of the draft Regulations.

28 See Article 11(2) of the FGD.

29 Regulation 12 of the draft Regulations.

30 See Article 12 of the Banking Consolidation Directive and Article 6 of the Investment Services Directive.

31 Section 49 of FSMA.

7.2 *Consultation on change of control*

- 7.2a The sectoral Directives require competent authorities to approve the acquisition of certain holdings (in shareholding or in voting power) in regulated entities which they have authorised. For example, a person who wishes to obtain 20% of the shares in an insurance company established in the United Kingdom must obtain the FSA's consent.
- 7.2b In such cases, the sectoral Directives already require the competent authorities to consult competent authorities which have authorised the proposed acquirer or undertakings which are connected to the acquirer. However, these requirements only apply where the acquirer or connected person operates in the same sector as the undertaking in question. For example, if the subsidiary of a bank authorised in France wished to obtain 10% of the shares in a bank authorised in the United Kingdom, the FSA would have to consult the French banking competent authority before deciding whether to approve the acquisition. On the other hand, if the United Kingdom firm had been an insurance company, no consultation would be necessary. The FGD amends the sectoral Directives so as to require consultation regardless of the sector in which the regulated entity is proposing to acquire a holding in another regulated entity. The draft Regulations will require the FSA to consult in such cases accordingly.³²

Q: Do you have any comments on the draft Regulations?

Regulatory Impact Assessment Statement

The Financial Conglomerates and Other Financial Groups Regulations implement a number of procedural requirements of the FGD by imposing obligations on the FSA. Thus we do not expect these Regulations to produce any direct negative impact on firms.

³² See regulation 13 of the draft Regulations, which amends the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001 (S.I. 2001/2509).

HM Treasury Statutory Instrument

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STATUTORY INSTRUMENTS

2004 No.

FINANCIAL SERVICES AND MARKETS

The Financial Conglomerates and Other Financial Groups
Regulations 2004

<i>Made</i> - - - -	2004
<i>Laid before Parliament</i>	2004
<i>Coming into force</i> - -	1st January 2005

Whereas the Treasury are a government department designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to –

- (a) the authorisation of the carrying on of insurance business and the regulation of such business and its conduct(b);
- (b) credit and financial institutions and the taking of deposits or other repayable funds from the public(c);
- (c) measures relating to investment firms and to the provision of investment services(d); and
- (d) collective investment in transferable securities and other liquid assets(e);

Now therefore the Treasury, in exercise of the powers conferred upon them by section 2(2) of the European Communities Act 1972 and sections 183(2), 188(2), 417(1)(f) and 428(3) of the Financial Services and Markets Act 2000(g) hereby make the following Regulations:

PART 1

Introduction

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Financial Conglomerates and Other Financial Groups Regulations 2004 and shall come into force on 1st January 2005.

(2) In these Regulations –

(a) 1972 c.68. By virtue of the amendment of section 1(2) made by section 1 of the European Economic Area Act 1993 (c.51), regulations may be made under section 2(2) to implement obligations of the United Kingdom created by or arising under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed at Brussels on 17th March 1993 (Cm 2183).

(b) S.I. 1997/2781.

(c) S.I. 2001/3495.

(d) S.I. 1993/2661.

(e) S.I. 2002/2840.

(f) See the definition of “prescribed”.

(g) 2000 c.8.

Annex 1

Consultation Draft

“the Act” means the Financial Services and Markets Act 2000;

“Banking Advisory Committee” means the Committee established pursuant to Article 57 of the banking consolidation directive (a);

“capital adequacy directive” means Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions(b);

“competent authority”, except in the term “third-country competent authority”, means any national authority of an EEA State which is empowered by law or regulation to supervise regulated entities, whether on an individual or group-wide basis;

“the conglomerates directive” means Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council(c);

“co-ordinator”, in relation to a financial conglomerate, means the competent authority which has been appointed, for the purposes of Article 10 of the conglomerates directive, as the competent authority which is responsible for the co-ordination and exercise of supplementary supervision of that financial conglomerate;

“financial conglomerate”, except in the term “third-country financial conglomerate”, means any group which, subject to Article 3 of the conglomerates directive, meets the conditions in Article 2(14) of that directive;

“Financial Conglomerates Committee” means the Committee established pursuant to Article 21 of the conglomerates directive;

“relevant competent authorities”, in relation to a financial conglomerate, means those competent authorities which are, or which have been appointed as, relevant competent authorities in relation to that financial conglomerate under Article 2(17) of the conglomerates directive;

“regulated entity” means–

- (a) a credit institution (as defined in the second subparagraph of Article 1(1) of the banking consolidation directive);
- (b) an undertaking pursuing the activity of direct insurance (within the meaning of Article 4 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (d), Article 1 of the first non-life insurance directive and Article 1(b) of Directive 98/78/EC of the European Parliament and of the Council on the supplementary supervision of insurance undertakings in an insurance group(e));
- (c) a management company (as defined in Article 1a(2) of the UCITS directive or which is outside the EEA but which would require authorisation in accordance with Article 5 of the UCITS Directive if it had its registered office in the EEA); or
- (d) an investment firm (as defined in Article 1(2) of the investment services directive, including the undertakings referred to in Article 2(4) of the capital adequacy directive); and

“supplementary supervision” means the supervision of a regulated entity to the extent and in the manner prescribed by the conglomerates directive.

(3) Any expression used in these Regulations, which is defined by the Act, has the meaning given by the Act.

(a) The definition of the banking consolidation directive was inserted in Schedule 3 to the Act by S.I. 2000/2952.

(b) OJ L141 11.6.1993 p.1; amended by the European Parliament and Council Directive 98/31/EC, the European Parliament and Council Directive 98/33/EC and the conglomerates directive.

(c) OJ No. L 35 11.2.2003 p 1.

(d) OJ No. L 345 19.12.2002 p.1.

(e) OJ No. L 330 5.12.98 p.1.

Annex 1

Consultation Draft PART 2

Exercise of supplementary supervision of regulated entities in a financial conglomerate

Notification of identification as a financial conglomerate and choice of co-ordinator

2.—(1) Where the Authority has become the co-ordinator for a financial conglomerate, it must notify—

- (a) the relevant member of that financial conglomerate ,
- (b) any home state regulator which has given EEA authorisation to any regulated entity which is a member of that financial conglomerate ,
- (c) the home state regulators of the EEA State in which the parent undertaking at the head of that financial conglomerate has its head office, unless that parent undertaking is a regulated entity, and
- (d) the Commission,

that it has been identified as a financial conglomerate for the purposes of Article 4 of the conglomerates directive and that the Authority is the co-ordinator for that financial conglomerate.

(2) Paragraph (3) applies if –

- (a) the Authority is one of the relevant competent authorities of a financial conglomerate , and
- (b) the Authority, in conjunction with the other relevant competent authorities, proposes to waive the criteria specified in Article 10(2) of the conglomerates directive (selection of the co-ordinator) and to appoint a different competent authority as co-ordinator.

(3) Before the Authority, in conjunction with the other relevant competent authorities, waives the criteria specified in Article 10(2) of the conglomerates directive and appoints a different authority as co-ordinator, the Authority must, where required to do so by the conglomerates directive, give the financial conglomerate an opportunity to make representations.

(4) In this regulation, “the relevant member” of a financial conglomerate is—

- (a) the parent undertaking at the head of the financial conglomerate ; or
- (b) where there is no parent undertaking at the head of the financial conglomerate, the regulated entity which—
 - (i) is in the most important financial sector (within the meaning given by Article 3(2) of the conglomerates directive); and
 - (ii) has the largest balance sheet total in that sector.

Exercise of functions under Part IV of the Act for the purposes of carrying on supplementary supervision

3.—(1) This regulation applies where the Authority is considering varying the Part IV permission of any person (“A”) if—

- (a) A is a member of a financial conglomerate; and
- (b) the Authority is acting in the course of carrying on supplementary supervision for the purposes of any provision (other than Article 11, 12, 16, 17 or 18(3)) of Chapter I or II of the conglomerates directive.

(2) Section 49(2) of the Act (obligation to consult home state regulators of connected persons) does not apply.

(3) Before varying the Part IV permission of A, the Authority must—

- (a) where required to do so by the conglomerates directive, obtain the consent of the relevant competent authorities of the financial conglomerate of which A is a member;
- (b) where required to do so by that directive, consult those competent authorities;

Annex 1

Consultation Draft

- (c) where required to do so by that directive, consult the financial conglomerate of which A is a member.

Exercise of functions under section 148 of the Act for the purposes of carrying on supplementary supervision

4.—(1) Paragraph (2) applies if the Authority is considering exercising any of the powers conferred on it by section 148 of the Act (modification or waiver of rules) in the course of carrying on supplementary supervision of a financial conglomerate for the purposes of any provision (other than Article 11, 12, 16, 17 or 18(3)) of Chapter I or II of the conglomerates directive.

(2) Before the Authority exercises such a power in relation to an authorised person who is a member of a financial conglomerate, the Authority must—

- (a) where required to do so by the conglomerates directive, obtain the consent of the relevant competent authorities of the financial conglomerate of which that person is a member;
- (b) where required to do so by that directive, consult those competent authorities; and
- (c) where required to do so by that directive, consult the other members of the financial conglomerate of which that person is a member.

Consultation in the case of major sanctions or exceptional measures

5. – (1) Subject to paragraph (2), before the Authority—

- (a) varies the Part IV permission of a member of a financial conglomerate (“D”),
- (b) publishes a statement under section 205 of the Act (public censure) that it considers that D has contravened a requirement imposed on him by or under the Act,
- (c) imposes a penalty on D in respect of such a contravention under section 206 of the Act (financial penalties), or
- (d) exercises any of its powers (other than its powers under section 381, 383 or 384(2)) under Part XXV of the Act (injunctions and restitution) in relation to D,

the Authority must, if it considers that the action constitutes a major sanction or an exceptional measure and is of importance for the tasks of the home-state regulator of any regulated entity which is a member of the same financial conglomerate as D, consult that home state regulator.

(2) Paragraph (1) does not apply-

- (a) where the Authority considers that there is an urgent need to act;
- (b) where the Authority considers that such consultation may jeopardise the effectiveness of the action mentioned in paragraph (1); or
- (c) where regulation 3, paragraphs (3) and (4) of regulation 8, regulation 9 or regulation 10 applies.

(3) Where paragraph (1) does not apply by virtue of paragraph (2)(a) or (b) the Authority must inform the home state regulator of the action that it has taken as soon as reasonably practical.

Authority functions and service of notifications

6. -(1) Any function carried out by the Authority (whether in the capacity of a co-ordinator, a relevant competent authority or otherwise) for the purposes of the conglomerates directive (including a function conferred by these Regulations) is to be treated, in so far as it is not already, as a function conferred on the Authority by a provision of the Act.

Annex 1

Consultation Draft

(2) The Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001(a) apply to any notifications to be given under regulation 2(1)(a) as they apply to any notice, direction or document of any kind to be given under the Act.

PART 3

Supplementary supervision of third-country financial conglomerates and third-country groups

Supervision of third-country financial conglomerates and third-country groups - interpretation

7. For the purposes of this Part—

- (a) “asset management company” means—
 - (i) any EEA firm falling within paragraph 5(f) of Schedule 3 to the Act(b); or
 - (ii) any UK firm whose EEA right derives from the UCITS directive;
- (b) “credit institution” means—
 - (i) any EEA firm falling within paragraph 5(b) of Schedule 3 to the Act; or
 - (ii) any UK firm whose EEA right derives from the banking consolidation directive;
- (c) “investment firm” means—
 - (i) any EEA firm falling within paragraph 5(a) of Schedule 3 to the Act; or
 - (ii) any UK firm whose EEA right derives from the investment services directive;
- (d) “third-country competent authority” means the authority of a country or territory which is not an EEA State which is empowered by law or regulation to supervise (whether on an individual or group-wide basis) regulated entities which are not established in an EEA State;
- (e) “third-country financial conglomerate” means a group—
 - (i) which, subject to Article 3 of the conglomerates directive, meets the conditions in Article 2(14) of that directive, and
 - (ii) in which the parent undertaking has its head office outside the EEA;
- (f) “third-country group” means a group in which the parent undertaking has its head office outside the EEA;
- (g) a regulated entity is in a third-country group if the parent undertaking of the group in which it is a member has its head office outside the EEA.

Supervision of third-country financial conglomerates

8.— (1) Where the Authority is, for the purposes of Article 18(1) of the conglomerates directive (parent undertakings outside the Community), verifying whether the regulated entities in a third-country financial conglomerate are subject to supervision by a third-country competent authority which is equivalent to that provided for by the provisions of Chapters I and II of the conglomerates directive, it must—

- (a) consult the other relevant competent authorities in respect of that third-country financial conglomerate;
- (b) consult the Financial Conglomerates Committee for the purposes of obtaining any applicable guidance prepared by that Committee in accordance with Article 21(5) of the

(a) S.I. 2000/1420.

(b) Paragraph 5 of Schedule 3 was amended by S.I. 2000/2952, S.I. 2003/1473 and S.I. 2003/2066.

Annex 1

Consultation Draft

conglomerates directive (guidance on whether third-country competent authorities likely to achieve objectives of supplementary supervision); and

(c) take into account any such guidance.

(2) Paragraphs (3) and (4) apply if the Authority, for the purposes of Article 18(3) of the conglomerates directive (application of other methods for the purposes of ensuring appropriate supplementary supervision of the regulated entities in a third-country financial conglomerate) exercises its powers to–

(a) vary the Part IV permission of a regulated entity in a third-country financial conglomerate;

(b) disapply or apply in a modified form, the rules specified in subsection (1) of section 148 of the Act (modification or waiver of rules) in accordance with that section;

(c) impose conditions on a person who is, or proposes to be, a controller of such a regulated entity under section 185 of the Act (conditions attached to approval of change of control); or

(d) give a notice under section 186 or 187 of the Act (notice of objection to acquisition of, or existing, control) to a person who is, or proposes to be, a controller of such a regulated entity.

(3) Before taking the action specified in paragraph (2), the Authority must–

(a) where the Authority is the co-ordinator, consult the relevant competent authorities in respect of that third-country financial conglomerate ; or

(b) where the Authority is not the co-ordinator, obtain the consent of the co-ordinator for that third-country financial conglomerate to take that action.

(4) If the Authority decides to take that action, it must, where required to by the conglomerates directive, notify–

(a) the home state regulator of each regulated entity in that third-country financial conglomerate, and

(b) the Commission,

that it has done so.

Supervision of third-country banking groups

9. –(1) Where the Authority is, for the purposes of Article 56a of the banking consolidation directive^(a), verifying whether the credit institutions in a third-country group are subject to supervision by a third-country competent authority which is equivalent to that governed by the principles laid down in Article 52 of that directive (supervision of credit institutions), it must –

(a) consult any home state regulator which supervises a credit institution in that third-country group;

(b) consult the Banking Advisory Committee for the purposes of obtaining any applicable guidance prepared by that Committee in accordance with the second paragraph of Article 56a of that directive (guidance on whether third-country competent authorities likely to achieve objectives of supervision); and

(c) take into account any such guidance.

(2) Paragraphs (3) and (4) apply if the Authority exercises, for the purposes of the fifth paragraph of Article 56a of the banking consolidation directive (alternative techniques for the purposes of achieving the objectives of the supervision of credit institutions) its powers to –

(a) vary the Part IV permission of a credit institution in a third-country group;

(a) Inserted by article 29(11) of the conglomerates directive.

Annex 1

Consultation Draft

- (b) disapply or apply in modified form, the rules specified in subsection (1) of section 148 of the Act (modification or waiver of rules) in accordance with that section;
 - (c) impose conditions on a person who is, or proposes to be, a controller of such a credit institution under section 185 of the Act (conditions attached to approval of change of control); or
 - (d) give a notice under section 186 or 187 of the Act (notice of objection to acquisition of, or existing, control) to a person who is, or proposes to be, a controller of such a credit institution.
- (3) Before exercising its powers to take the action specified in paragraph (2), the Authority must—
- (a) where the Authority is responsible for supervising that third-country group for the purposes of Article 53 of the banking consolidation directive if alternative techniques were not applied, consult the home state regulators which are involved in the supervision of any of the credit institutions in that third-country group; and
 - (b) where the Authority is not so responsible, obtain the consent of the home state regulator which would be responsible for supervising that third-country group for the purposes of Article 53 of the banking consolidation directive if alternative techniques were not applied.
- (4) If the Authority decides to take that action, it must, where required by the banking consolidation directive, notify—
- (a) any home state regulator which supervises a credit institution in that third-country group, and
 - (b) the Commission,
- that it has done so.
- (5) Where the Authority has, for the purposes of Article 30 of the conglomerates directive (asset management companies) included an asset management company in the scope of supervision of a credit institution in a third-country group, each reference in this regulation to a “credit institution” is to be treated as including a reference to that asset management company.

Supervision of third-country groups subject to the capital adequacy directive

10. –(1) Paragraph (2) applies if—

- (a) the Authority is, for the purposes of Article 56a of the banking consolidation directive, as applied by Article 7(2) of the capital adequacy directive (groups containing both credit institutions and investment firms), verifying whether any of the regulated entities in a third-country group are subject to supervision by a third-country competent authority which is equivalent to that governed by Article 7(2) of the capital adequacy directive; or
 - (b) the Authority is, for the purposes of Article 56a of the banking consolidation directive, as applied by Article 7(3) of the capital adequacy directive (groups containing investment firms but no credit institutions), verifying whether any of the regulated entities in a third-country group are subject to supervision by a third-country competent authority which is equivalent to that governed by Article 7(3) of the capital adequacy directive.
- (2) Where this paragraph applies, the Authority must—
- (a) consult any home state regulator which supervises an investment firm or a credit institution (if any) in that third-country group,
 - (b) consult the Banking Advisory Committee for the purposes of obtaining any applicable guidance prepared by that Committee in accordance with the second paragraph of Article 56a of that directive (guidance on whether third-country competent authorities likely to achieve objectives of supervision), and
 - (c) take into account any such guidance,

Annex 1

Consultation Draft

before completing the verification specified in paragraph (1).

(3) Paragraphs (4) and (5) apply if the Authority exercises, for the purposes of the fifth paragraph of Article 56a of the banking consolidation directive (alternative techniques for the purposes of achieving the objectives of supervision) as applied by Article 7 of the capital adequacy directive, its powers to—

- (a) vary the Part IV permission of an investment firm or credit institution in a third-country group;
- (b) disapply or apply in modified form the rules specified in subsection (1) of section 148 of the Act (modification or waiver of rules) in accordance with that section;
- (c) impose conditions on a person who is, or proposes to be, a controller of such an investment firm or credit institution under section 185 of the Act (conditions attached to approval of change of control); or
- (d) give a notice under section 186 or 187 of the Act (notice of objection to acquisition of, or existing, control) to a person who is, or proposes to be, a controller of such an investment firm or credit institution.

(4) Before exercising its powers to take the action specified in paragraph (3), the Authority must—

- (a) where the Authority is responsible for supervision of that third-country group for the purposes of Article 53 of the banking consolidation directive, as applied by article 7 of the capital adequacy directive if alternative techniques were not applied, consult the home state regulators which are involved in the supervision of any of the investment firms or credit institutions (if any) in that third-country group; and
- (b) where the Authority is not so responsible, obtain the consent of the home state regulator which would be responsible for supervision of that third-country group for the purposes of Article 53 of the banking consolidation directive, as applied by Article 7 of the capital adequacy directive if alternative techniques were not applied.

(5) If the Authority decides to take that action, it must, where required by the banking consolidation directive or the capital adequacy directive, notify—

- (a) the home state regulators which are involved in supervision of any of the investment firms or credit institutions (if any) in that third-country group, and
- (b) the Commission,

that it has done so.

(6) If the Authority has, for the purposes of Article 30 of the conglomerates directive (asset management companies), included an asset management company in the scope of supervision of—

- (a) credit institutions and investment firms in a third-country group, or
- (b) investment firms in a third-country group,

each reference in this regulation to an “investment firm” is to be treated as including a reference to that asset management company.

Annex 1

Consultation Draft PART 4

Provisions relating to information

Disclosure of confidential information

11. In regulation 2 of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001(a) (interpretation)-

(a) after the definition of “Authority worker”, insert–

““conglomerates directive” means Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council(b);”;

(b) in the definition of “single market directive information”, after “single market directives”, insert “or the conglomerates directive”.

Obtaining information – avoidance of duplication of reporting

12.—(1) Paragraph (2) applies if the Authority is the co-ordinator for any financial conglomerate.

(2) If the Authority requires any disclosed information in connection with its functions as the co-ordinator, it must so far as possible, obtain that information by requesting the home state regulator which holds that information to disclose it to the Authority.

(3) In this regulation, “disclosed information” means information which a regulated entity in a financial conglomerate has disclosed to its home state regulator.

PART 5

Miscellaneous

Consultation on change of control

13.—(1) The Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001(c) are amended as follows.

(2) In regulation 2 (definitions), after the definition of “EEA credit institution”, insert–

““EEA insurance undertaking” means an EEA firm falling within paragraph 5(d) of Schedule 3 to the Act;”.

(3) In regulation 3, for “paragraph (1), (2) or (3)”, substitute “paragraph (1), (2), (3) or (4)”.

(4) In regulation 4(a), for “paragraph (1), (2) or (3)”, substitute “paragraph (1), (2), (3) or (4)”.

(5) In regulation 5–

(a) in paragraph (1), for sub-paragraph (c), substitute–

“(c) the acquirer is any of the following–

(i) an EEA investment firm;

(ii) an EEA credit institution;

(iii) an EEA insurance undertaking; or

(iv) the parent undertaking of an EEA firm of the kind specified by paragraph (i), (ii) or (iii);”;

(a) S.I. 2001/2188; regulation 2 was amended by S.I. 2001/3264, S.I. 2003/693 and S.I. 2003/2066.

(b) OJ No. L 35 11.2.2003 p 1.

(c) S.I. 2001/2509; amended by S.I. 2003/2066 regulation 6.

Annex 1

Consultation Draft

(b) in paragraph (2), for sub-paragraph (c), substitute–

“(c) the acquirer is any of the following–

(i) an EEA investment firm;

(ii) an EEA credit institution;

(iii) an EEA insurance undertaking; or

(iv) the parent undertaking of an EEA firm of the kind specified by paragraph (i), (ii) or (iii);”;

(c) in paragraph (3), for sub-paragraph (c), substitute–

“(c) the acquirer is any of the following–

(i) an EEA investment firm;

(ii) an EEA credit institution;

(iii) an EEA insurance undertaking;

(iv) an EEA management company; or

(v) the parent undertaking of an EEA firm of the kind specified by paragraph (i), (ii), (iii) or (iv);”;

(d) after paragraph (3), insert–

“(4) This paragraph applies where–

(a) a person (“the acquirer”) proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within section 178(1) or (2) of the Act;

(b) that UK authorised person has permission to effect and carry on contracts of insurance (within the meaning of the Regulated Activities Order);

(c) the acquirer is any of the following–

(i) an EEA investment firm;

(ii) an EEA credit institution;

(iii) an EEA insurance undertaking; or

(iv) the parent undertaking of an EEA firm of the kind specified by (i), (ii) or (iii); and

(d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person.”.

(6) For regulation 6, substitute–

“6. The requirement specified by this regulation is that the Authority must consult the home state regulator of any EEA firm that is mentioned in paragraph (1)(c), (2)(c), (3)(c) or (4)(c) of regulation 5.”.

(7) After regulation 6, insert–

“7. – (1) Where paragraph (2) applies, the requirement specified by paragraph (3) is prescribed for the purposes of section 183(2) of the Act (and so must be complied with by the Authority before it determines whether to approve of the change of control or to give a warning under section 183(3) or 185(3) of the Act).

(2) This paragraph applies where–

(a) a person (“the acquirer”) proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within section 178(1) or (2) of the Act;

(b) that UK authorised person has an EEA right to carry on activity in an EEA State other than the United Kingdom which derives from any of–

(i) the insurance directives;

(ii) the banking consolidation directive;

Annex 1

Consultation Draft

- (iii) the investment services directive; or
 - (iv) the UCITS directive; and
 - (c) the UK authorised person is a member of a financial conglomerate (within the meaning of Directive 2002/87/EC of the European Parliament and of the Council^(a)).
- (3) Subject to paragraph (4), the requirement specified by this paragraph is that the Authority must, where it considers that the action it proposes to take under section 183(1) of the Act is of importance for the tasks of the home-state regulator of any EEA firm which is a member of that financial conglomerate, consult that home state regulator.
- (4) Paragraph (3) does not apply-
- (a) where the Authority considers that there is an urgent need to act;
 - (b) where the Authority considers that such consultation may jeopardise the effectiveness of any action to be taken by the Authority; or
 - (c) where the Authority has already consulted that home state regulator regarding that matter in accordance with regulation 3, 8, 9 or 10 of the Financial Conglomerates and Other Financial Groups Regulations 2004.
- (5) Where paragraph (3) does not apply by virtue of paragraph (4)(a) or (b), the Authority must inform the home state regulator in question as soon as possible.”.

References to existing directives

14.—(1) In section 119(2B) of the Building Societies Act 1986 (definition of “Banking Consolidation Directive”)^(b), at the end insert “(as last amended by Directive 2002/87/EC of the European Parliament and of the Council)”.

(2) In section 17(7C) of the Bank of England Act 1998 (power to obtain information)^(c), after “Council Directive 2000/12/EC of the European Parliament and the Council”, insert “(as last amended by Directive 2002/87/EC of the European Parliament and of the Council)”.

(3) In article 2(3) of the Cash Ratio Deposits (Eligible Liabilities) Order 1998 (interpretation)^(d), at the end, insert “(as last amended by Directive 2002/87/EC of the European Parliament and of the Council)”.

(4) In the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001^(e), in regulation 2(5)(e)(i) and regulation 3(3)(e)(i) (content of consent and regulator’s notice), after “first non-life insurance directive”, insert “(as last amended by Directive 2002/87/EC of the European Parliament and of the Council)”.

Two of the Lords Commissioners of Her Majesty’s Treasury

^(a) OJ No. L 35 11.2.2003 p 1.

^(b) 1986 c.53; definition inserted by S.I. 1996/1669, substituted by S.I. 2000/2952.

^(c) 1998 c.11; section 17(7C) was inserted by S.I. 2001/3649.

^(d) S.I. 1998/1130; article 2(3) was amended by S.I. 2000/2952.

^(e) S.I. 2001/2511; regulation 2 was amended by S.I. 2002/765 and S.I. 2003/2066 and regulation 3 was amended by S.I. 2003/1473 and S.I. 2003/2066.

Annex 1

Consultation Draft EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement, in part, Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (“the conglomerates directive”).

Regulation 14 makes consequential amendments to references in UK legislation to Community legislation which is amended by the Directive.

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