EXTERNAL GUIDELINE FOR THE APPLICATION OF ARTICLE 62 OF THE BELGIAN BANKING LAW

TYPES OF ACCUMULATION RESTRICTIONS - STRUCTURE OF ARTICLE 62

The legal accumulation restrictions, as stated in Article 62 of the Law of 25 April 2014 on the legal status and supervision of credit institutions and stockbroking firms (hereinafter the "Banking Law"), can be divided into two categories, namely:

> qualitative restrictions: see Article 62, §4, §5, first sentence, and §6, first sentence, of the Banking Law;

> quantitative restrictions: see overarching principle in Article 62, §1, and further elaboration in Article 62, §5, second sentence, §6, second sentence, in conjunction with Article 62, §7 and §9.

According to Article 62, §3, of the Banking Law, all credit institution are required to develop an internal policy on external mandates. This policy may include both qualitative and quantitative provisions.

With respect to the (mixed) financial holding companies and third country branches, Articles 212 and 335, 3°, of the Banking Law contain references to the aforementioned Article 62.

SCOPE OF APPLICATION

The scope of application varies depending on whether the accumulation restrictions are qualitative or quantitative. Quantitative restrictions have a narrower scope of application than qualitative restrictions. The scope of each of these two categories will be further elucidated below on the basis of the following four criteria:

1) Which external mandates?
2) Within which entities?
3) Exercised by whom?
4) Significant or non-significant credit institution or (mixed) financial holding company?

A. QUALITATIVE RESTRICTIONS

1) external mandates as director or manager or participant in administration or policy-making, whether or not representing the credit institution or (mixed) financial holding company,
2) ... of a commercial company, a company having a commercial form, a company with another Belgian or foreign legal form or a Belgian or foreign public institution with industrial, commercial or financial activities
   → associations fall outside the scope of these restrictions;
   → "company" implies a motive of profit
3) ... exercised by members of the bodies of the credit institution or (mixed) financial holding company and any person who, under whatever name and in whatever capacity, participates in the administration or policy-making
4) ... regardless of whether the credit institution or the (mixed) financial holding company is significant.

B. QUANTITATIVE RESTRICTIONS

1) external mandates as director or manager or participant in administration or policy-making, whether or not representing the credit institution or (mixed) financial holding company,

2) ... in commercial companies ...

3) ... exercised by members of the statutory governing body who are not members of the management committee of the credit institution (Article 62, §5, of the Banking Law) and members of the management committee or in the absence of a management committee, the senior management of the credit institution, (mixed) financial holding company or third country branch (Article 62, §6, Article 212 and Article 335, 3° of the Banking Law), except for the mandates representing a Member State,

4) ...where the credit institution or the (mixed) financial holding company is significant.

Where a director within one and the same group both exercises a mandate in a significant institution (credit institution or (mixed) financial holding company) and in a non-significant institution (credit institution or (mixed) financial holding company), it may be that an accumulation of external mandates is not allowed from the first perspective because of the applicability of the quantitative restrictions of Article 62 of the Banking Law, but is allowed from the second perspective because the quantitative restrictions do not apply there. In that case, the strictest perspective shall apply to this person.

QUALITATIVE RESTRICTIONS

- The company representatives who are appointed on the recommendation of the credit institution, must be members of the management committee of the institution or persons designated by the management committee (Article 62, §4, of the Banking Law).
- The members of the statutory governing body who are not members of the management committee of the credit institution can only be a director of a company in which the institution holds a participating interest if they do not participate in the day-to-day management of that company (Article 62, §5, 1st sentence, of the Banking Law).
- The members of the management committee or, in the absence of a management committee, the persons participating in the senior management of the credit institution, shall only carry a mandate that implies participation in the day-to-day management of other companies in the limitative cases stated in the Law (Article 62, §6, 1st sentence, of the Banking Law).

The foregoing also applies to the (mixed) financial holding companies and third country branches (Articles 212 and 335, 3°, of the Banking Law).

These qualitative restrictions, as they appeared in the former Banking Law of 22 March 1993, were further specified in the External Mandates Circular of. 13/11/2006.

QUANTITATIVE RESTRICTIONS

A. BASIC RULES

- The Banking Law contains two quantitative limits: One executive and two non-executive mandates OR 4 non-executive mandates.
- However, these limits are not a right. As a prudential supervisor, the NBB may always require less mandates, following the principle of time commitment.
- All mandates held within the same group count as one. For the concrete interpretation of the term "group", see below.
- The NBB may, by way of derogation, allow one additional non-executive mandate. Should the institution wish to make use of this option, it must submit a documented file to the NBB. The NBB will analyse and assess this from the perspective of "time commitment".

B. CONCEPT OF GROUP & PRIVILEGED COUNTING

For the purpose of the quantitative accumulation limits, the exercise of several mandates, whether or not involving participation in day-to-day management, in companies that are part of the group to which the credit institution belongs or of another group is considered as one single mandate (Article 62, §9, first paragraph, of the Banking Law). The effect of this rule is simply referred to as "privileged counting " here.

a) Definition of "group" – starting point and scope

- Article 62, § 9, second paragraph, of the Banking Law contains the definition of "group" for the purposes of Article 62. A “group” is defined as a set of companies that consists of a parent company, its subsidiaries, the companies in which the parent company or its subsidiaries have a direct or indirect holding within the meaning of Article 3, 26°, of this Law, as well as companies forming a consortium and the companies controlled by the latter companies or in which the latter companies have a holding within the meaning of Article 3, 26°, of this Law".
- It can be concluded from the above definition that "group" may designate both a downward constellation (starting from a parent company one looks down to its subsidiaries), and a lateral constellation (in the case of a consortium). Both constellations also include the holdings.
- In the event of a downward constellation, the highest point of departure for the group to which the credit institution itself belongs is the entity that is the starting point of the prudential consolidated position at EEA-level[1].[1] For this, reference can be made to the definitions contained in Article 164, §2, 3°, 4°, 6°, 7°, 9° and 10° of the Banking Law.
- The scope in the event of a downward constellation is based on accounting consolidation. The above definition of "group" after all contains a number of terms which are further defined in Article 3, 26°, of the Banking Law, i.e. the terms "parent company", "subsidiary" and "holding". This article also contains the definition of "control", which is required for the terms "parent company" and "subsidiary". Finally, Article 3, 26°, of the Banking Law also contains the definition of "affiliated companies", leading to the definition of "consortium". There is a further referral to the general company law definitions contained in the implementing decrees of Article 106, §1, of the Banking Law (Royal Decrees of 23 September 1992 on the annual accounts and consolidated annual accounts of credit institutions).

b) Types of groups that can benefit from privileged counting

- Unlike in the past[2], Article 62, §9, first paragraph of the Banking Law refers to all groups, i.e. the group to which the credit institution belongs and other groups

c) Method of counting

- A single mandate that implies participation in the day-to-day management means that all mandates which are exercised in companies or entities that are part of that group, are indeed considered as one single mandate implying participation in the day-to-day management[3]. In other words, if there is a combination of executive and non-executive mandates, then the executive mandate outweighs the non-executive mandate. After all, an executive mandate involves a greater time commitment.
- It is possible that a director has recourse to several privileged countings from one single perspective (i.e. viewed from one single credit institution). In that case, the various privileged countings are considered separately, and are therefore not further reduced to one mandate.

d) Application at holding company level

1 See explanatory notes to the amendment to Article 62 of 21 March 2014.
2 Article 62, §9, first paragraph, was amended by the Law of 18 December 2015. Prior to that date, its scope was limited to the group to which the credit institution belongs and "groups a company of which has close links with the credit institution or its parent company".
3 See explanatory notes to the amendment to Article 62 dd. 21 March 2014.

- Article 212 of the Banking Law contains governance provisions that have a direct effect on the legal personality of the (mixed) financial holding company. As regards Article 62 of the Banking Law, Article 212 refers to: "62, §§1 to 4, §5, first sentence, and §§6 to 9, ...". The executive directors of such holding companies, to whom the accumulation restrictions apply (as opposed to the non-executive directors to whom the accumulation restrictions do not apply), can therefore also benefit from privileged counting if they exercise several mandates within the group.

C. ESTATE PLANNING COMPANIES

- Only mandates in estate planning companies that qualify as commercial companies shall be taken into account. This is in line with Article 91, paragraph 5, of CRD IV, which states that managerial positions in organizations that do not primarily pursue commercial goals shall not be taken into account for applying quantitative accumulation restrictions ("zero counting"). The general company law principles apply: qualification as a commercial company depends on the object clause in the company's articles of association, analysed in light of the acts of commerce as stated in Article 2 of the Commercial Code. Moreover, Article 62, §9, last paragraph, of the Banking Law, explicitly refers to the Articles of Association.
- In this sense, estate planning companies whose purpose is limited to the regular management of family assets fall outside the scope of the quantitative accumulation restrictions.
- Institutions shall request all necessary information from their (prospective) directors so that they can verify whether the company where the external mandate is exercised is a commercial company.

D. MANAGEMENT COMPANIES

- Principle of transparency (« look through »): a management company shall not be used to circumvent the counting of mandates in respect of a natural person. A mandate within a commercial management company must, for example, not be a cover for several mandates where the natural person acts as permanent representative of the management company.
- For the purposes of the quantitative restrictions of Article 62 of the Banking Law, the NBB will take into account all mandates where the natural person acts as permanent representative of a management company.
- The mandate in the management company itself, on the other hand, does not have to be counted, on the condition that the sole purpose of the management company is to exercise director mandates, this in order to avoid "double counting" of mandates.

E. THE EXCEPTION OF ONE ADDITIONAL NON-EXECUTIVE MANDATE

- In individual cases, the supervisory authority may grant a derogation from the maximum number of mandates provided for in §§ 5 and 6 of Article 62 of the Banking Law, by allowing one additional mandate to be exercised that does not imply participation in the day-to-day management (Article 62, §7, of the Banking Law).
- The supervisory authority shall inform the European Banking Authority on a regular basis about the use it makes of the authority to derogate.
- The NBB will allow these derogations by way of exception and only if the institution/the person involved can motivate the derogation by making clear that sufficient time is available for the exercise of the mandate within the credit institution /the (mixed) financial holding company / the third country branch.