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EU DIRECTIVE ON ASSESSMENT OF ACQUISITIONS IN THE FINANCIAL SECTOR

This article looks at Directive 2007/44/EC regarding the prudential assessment of acquisitions in the financial sector. The Directive must be implemented in EU member states by 21 March 2009.

What is the purpose of the Directive?

The Directive's aim is to encourage cross-border mergers and acquisitions in the EU's financial sector. It seeks to do this by streamlining the criteria and procedures applied by EU supervisory authorities when assessing acquisitions of significant holdings in companies in the banking, insurance and securities sectors.

The Directive makes the following changes:

- it introduces a clear notification and decision-making process for supervisory authorities, acquirers and target companies;
- it reduces the timeframe for assessment (limiting to one occasion and clear conditions any 'stop-the-clock' intervention by a supervisory authority); and
- it sets out in a clear format the prudential criteria for the assessment.

What institutions will the Directive apply to?

The Directive will apply where the target company is a credit institution, insurance undertaking, assurance undertaking, reinsurance undertaking, investments firm or UCITS management company.

What transactions are affected?

The Directive applies to:

- the acquisition of a "qualifying holding" in a target company (i.e. 10% or more of the capital or voting rights or which makes it possible to exercise a significant influence over the management of the target); and

- an increase in such a qualifying holding whereby the proportion of the voting rights or capital held would reach or exceed 20%, 30% or 50% or so that the company would become the acquirer's subsidiary.

Both domestic and cross-border acquisitions are subject to the Directive.

Notification to the relevant supervisory authority

The acquirer must first notify the relevant supervisory authority (in the target's home member state) of the proposed acquisition. The supervisory authority in Ireland is the Financial Regulator.

The notification submitted must indicate the size of the proposed holding and such other information as required by the supervisory authority for its assessment. A list specifying the information required must be made publicly available by the supervisory authority.

Reduced timeframe for assessment

The timeframe for the assessment by the supervisory authority will be reduced:

- the supervisory authority must acknowledge receipt of the notification within two working days;
- the supervisory authority must complete the assessment within a maximum period of 60 working days from the date of acknowledgement;
- during the assessment and no later than the 50th working day, the supervisory authority may interrupt the process only once and then only for the purpose of requesting additional information. This interruption may not exceed 20 working days but may extend to 30 working days where the acquirer is situated or regulated outside the EU or is unregulated;

- if the supervisory authority opposes the acquisition, it must inform the proposed acquirer within two working days and provide reasons for its decision. If the acquisition is not opposed within the assessment period, then it will be deemed approved;
- having made its decision to allow the acquisition, the supervisory authority may impose a deadline for the completion of the acquisition, which may be extended where appropriate.

Assessment criteria

Supervisory authorities are required to take into account a closed set of five criteria when assessing the proposed acquisition:

- the reputation of the acquirer;
- the financial soundness of the acquirer;
- the reputation and experience of the management of the target company as a result of the acquisition;
- the ability of the target company to continue to comply with its prudential requirements; and
- grounds for suspecting terrorist financing or money laundering in respect of the acquisition or the potential increase in risk of these.

Supervisory authorities may only oppose the acquisition if there are reasonable grounds for doing so on the basis of these five criteria or if the acquirer provides incomplete information.

Where the acquirer is a regulated financial institution in an EU member state other than the target's home member state, the Directive provides for co-operation between supervisory authorities. However, the final decision on the proposed acquisition will remain with the target company's supervisory authority.

Conclusion

The Directive aims to encourage cross-border M&A in the banking, insurance and securities sectors by introducing an EU-wide legal framework for the prudential assessment of such transactions.

The maximum timeframe specified by the Directive for the prudential assessment should help. However, certain of the

assessment criteria are stated in broad terms and differences of interpretation and practice may arise among EU supervisory authorities. Also, the Directive does not affect any separate non-prudential assessment of the acquisition required, for example, by competition law. Therefore, it remains to be seen to what extent the Directive will encourage consolidation within the EU's financial sector.

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