Comments

of the German Insurance Association

ID number: 6437280268-55

on the public consultation on the application of Directive 2007/44/EC as regards acquisitions and increase of holdings in the financial sector

Gesamtverband der Deutschen Versicherungswirtschaft e. V.

German Insurance Association

Wilhelmstraße 43 / 43 G, D - 10117 Berlin
PO Box 08 02 64, D - 10002 Berlin
Phone: +49 30 2020-5416
Fax: +49 30 2020-6416

51, rue Montoyer
B - 1000 Bruxelles
Phone: +32 2 28247-30
Fax: +32 2 28247-39

Contact:
Dr. Helge Hartig
Legal Affairs

Email: h.hartig@gdv.de

www.gdv.de

Summary

We sincerely appreciate the opportunity to comment on the review of the directive 2007/44/EC. Based on our member's experience with this directive and its transposition in several member states' laws, we believe that certain amendments and clarifications are absolutely necessary. In this regard, the aim of maximum harmonization mentioned in the directive as well as the creation of the single market should be considered when the directive will be amended.

In particular, the definition of "qualified holding" in the Member States and the handling of M&A transactions by the concerned supervisors need more harmonization.

Moreover, a differentiation is needed here between intra-group transactions and other transactions. Where a company belongs to the same group after a transaction, it is not appropriate that such a transaction is subject to the same rules as other transactions. In relation to the benefits, intra-group transactions are too burdensome under regulatory aspects.

With respect to the notification process, we would like to point out to a Commission's communication pursuant to which a system of prior administrative approval is only proportionate to the aim pursued if the same objective could not be attained by less restrictive measures, in particular a system of declarations ex post facto. Having this in mind, the notification process should be a notification procedure and not an approval procedure. Moreover, if a notification has been omitted, the suspension of the voting rights should be permitted. However, there should be no automatism in this regard. The supervisor should decide in each individual case whether or not the voting rights must be suspended.

Moreover, we believe that against the background of the freedom of capital movements provided by the EU Treaty and the passport principle for regulated financial services providers derived thereof, more relief is necessary for proposed acquirers being EEA regulated financial services providers themselves. Finally, with respect to financial institutions that may be "too big to fail", the financial stability debate should be separated from shareholder control regulation. Therefore, the prudential assessment criteria should not be connected with financial stability.

1. INTRODUCTION

We sincerely appreciate the opportunity to comment on the review of the directive 2007/44/EC (the "Directive"). We deem the harmonized assessment procedure a useful tool to increase legal certainty. Based on our member's experience with the Directive and its transposition in several member states' laws, we believe that certain amendments and clarifications are absolutely necessary to better achieve the goals pursued with the Directive. In this regard we would like to point out to the aim of maximum harmonization which is mentioned in recital 6 of the Directive and the single market in general.
Please note that we have answered to those questions only which seemed to be most important and in relation to which we have received sufficient feedback.

2. GENERAL QUESTIONS

2.1 Question 1: In your view, has the Directive and its application reduced barriers to cross-border mergers and acquisitions ('M&A') in the financial sector and resulted in a more equal treatment of domestic and cross-border M&A? What obstacles in the supervisory notification and approval process remain? What in your view are the remaining key obstacles?

General Aspects

The Directive's main objective is "to make sure that all acquisitions of a qualifying holding are treated in the same way throughout the EU and across sectors". However, even the definition of "qualifying holding" is not harmonized in a sufficient manner. As a consequence, a person cannot be sure whether an indirect acquisition of a qualifying holding in a target (being a regulated entity) is interpreted in the same manner in all Member States without seeking additional legal advice in all the countries.

The Commission should make clear that in accordance with Recital 6 of the Directive the aim of maximum harmonization also covers the definition of "qualifying holding" (being the very basic of the assessment procedure). Moreover, the Commission as well as EIOPA should monitor the proper transposition into national law more closely. A harmonized and uniform transposition is not only legally required, but also in the interest of the single market (also for the purposes of directive 2004/109/EC).

We would like to illustrate the different views on the definition of "qualifying holding" furthermore: While some Member States regard the direct acquisition of a qualifying (but non-controlling) holding in the target's parent as indirect acquisition of a qualifying holding in the target, other Member States regard only the direct acquisition of a qualifying holding in the target by the acquirer's subsidiary as indirect acquisition of a qualifying holding in the target. The table below may give an impression of the different interpretations and its consequences.

Interpretation 1	**Example**	**Interpretation 2**
→ **No** indirect acquisition of qualifying holding in Target by Proposed Acquirer. Reasoning: Indirect acquisition only, if capital/voting rights are attributable to Proposed Acquirer; this is only the case where capital/voting rights are held through **subsidiary** (Intermediate is not Proposed Acquirer's subsidiary)	*Proposed Acquirer* (≥10% and <50%) *Intermediate** *(Parent of Target)* (>50%) *Target***	→ Indirect acquisition of qualifying holding in Target by Proposed Acquirer. Reasoning: Indirect acquisition, if capital/voting rights (≥10%) are acquired in **parent** of the Target (Intermediate is Target's parent)

*Intermediate is not regulated

**Target is regulated

In our view, Art. 1(1) of the Directive only permits interpretation 1 above. Art. 1(1) of the Directive refers to Art. 10(e) of directive 2004/109/EC[1] which extends the cases of holding of capital or voting rights by a person to the case where another person controlled by such person holds the

[1] Regarding the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

capital or voting rights. This concept of control with regard to indirect holdings only applies to the case where a subsidiary of the Proposed Acquirer intends to acquire the capital or voting rights. As a consequence, interpretation 1 is the only way to qualify a certain holding as a "qualifying holding" within the meaning of the Directive. However, this concept of control does not apply where the Proposed Acquirer intends to acquire capital or voting rights in the Target's parent (due to the lack of control over the Target's parent, the capital or voting rights held by the parent are not attributable to the Proposed Acquirer).

Intra-group Transactions

With a view to intra-group transactions within the EU, there are too many administrative burdens in relation to the costs of such transactions. If a company is transferred from one parent to another within the same group, the administrative burden should be significantly lower than for other transactions. Moreover, the following items would help to reduce barriers in cross border M&A transactions and, therefore, are also in the interest of the single market:

- English should be permissible for the notification throughout the EU.
- Reference to information already available/submitted to the supervisor concerned or the group supervisor should be permissible.
- Centralized approach/notification via the group supervisor.

2.2 Question 2: Have you attempted a cross-border acquisition or increase of holdings in the financial sector that required notification with the competent authorities in the State of your target? What was your general experience with the supervisory notification and approval process?

With a view to the intra-group transactions our members have conducted within the EU and which required notification, the general experience with the supervisory authority's handling was unproblematic. However, this should not create the impression that everything is fine. As stated above, the administrative work with respect to intra-group transactions is too burdensome.

2.3 Question 3: If so, what specific problems, if any, have you encountered in the notification process or in any preliminary contacts with the authorities (transparency of process, clarity of information required, timely procedure, etc.)?

The Directive does not contain a harmonization approach where a competent authority objects to a proposed acquisition. However, the supervisor's handling is one of the key issues of the assessment procedure. In this regard, we would like to point out to the position expressed by the European Commission's communication (2005/C 293/02) "Intra-EU investment in the financial services' sector" according to which "a system of prior administrative approval is only proportionate to the aim pursued if the same objective could not be attained by less restrictive measures, in particular a system of declarations ex post facto". The Commission's message reads as follows:

> "Member States must exercise their powers in prudential regulation consistent with fundamental Treaty principles.[…] In this context it should be recalled that any exceptions to the Treaty rights of the free movement of capital and the freedom of establishment must be interpreted restrictively and their scope cannot be determined unilaterally by the Member States without any control by the Community institutions. Thus, while prudential considerations are specifically mentioned as possible, exceptions to the freedom, they, along with other exceptions, are circumscribed by the same qualifications that condition other restrictions.[…]
>
> In order to be proportionate, national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it. With respect to the latter aspect ("what is necessary to attain the objective"), according to ECJ case law, a system of prior administrative approval is only proportionate to the aim pursued if the same objective could not be attained by less restrictive measures, in particular a system of declarations ex post facto. Regarding ex-ante approval systems in the prudential area, these considerations are relevant with respect to the burden of the procedures involved (e.g. formalities of the application: deadlines and delays applicable, degree of quantity and quality of information required as well as documents to be provided) and the time taken to get such an authorization given that these vary considerably across Member States."

Against this background, we propose the Directive should stipulate the following:

- The procedure is a notification procedure, not an approval procedure;
- An acquisition without prior supervisory clearance is nevertheless valid under corporate or civil law;
- The supervisor clearly has the power to suspend the voting rights of the shares acquired through the opposed transaction, and thus has the power to avoid any undue influence over the target. However, there shall be no automatism in this regard. The supervisor must have the discretion to suspend the voting rights as well as not to suspend them.

In the light of the EU Treaty, and the conditions outlined by the Commission's communication as described above, such a notification procedure is a less strict, but equally qualified measure to pursue the goal of avoiding an undue influence over regulated financial services providers.

2.4 Question 4: If you have experience with both local and cross-border bids and notifications, do you see consistent and uniform application of the assessment process across the EU, including the information requirements and assessment criteria?

Please see above under 2.3.

3. SPECIFIC QUESTIONS RELATED TO THE PROCEDURE LAID DOWN IN THE DIRECTIVE

3.1. Question 6: Are there in your view any reasons to amend the definition of the notification requirement (i.e. definition of qualifying holdings/provided thresholds)? Please explain.

Please see under 2.1 and 2.3 above.

3.2 **Question 7:** Do you believe it is sufficiently clear when persons 'are acting in concert' for the purposes of the directive? Have you encountered any difficulties with the application of the definition of acting in concert given in Appendix 1 of the Level 3 Guidelines or with another definition of 'acting in concert' applied by the regulator in relation to the obligations of the Directive? Please explain.

Our members have not experienced any major problems with application of “acting in concert”. However, “acting in concert” is currently discussed in many aspects. For example, the Commission’s Green Paper “The EU corporate governance framework” (COM (2011)164) mentions the “acting in concert” provisions as a possible obstacle to a shareholder cooperation which, however, is desired under the aspect of good governance. Therefore, any action in this field should be in line with other approaches of the Commission.

3.3 **Question 10:** Are there, in your view any other cases than the one laid down in the Directive which would warrant an exemption from the notification requirement? Please explain.

Our members need more relief with respect to the handling of the notification requirements. This is not only about intra-group transactions which are over-regulated as discussed above and in relation to which the German insurance industry would prefer provisions being simplified and reduced, at least where the insurance group members concerned are all regulated entities.

Against the background of the freedom of capital movements provided by the EU Treaty, and the passport principle for regulated financial services providers derived thereof, we believe that more relief is necessary for proposed acquirers being EEA regulated financial services providers themselves. Please note that this is not only about the length of the assessment period but about the whole notification procedure.
We would like to illustrate this a little bit further: For example, an EEA insurer is permitted to carry out insurance business in any other EEA member state without the host member state’s permission. In the light of this, it does not appear legitimate to require the entire prior supervisory clearance (or even an approval) in case such EEA insurer intends to carry out business by acquiring an established insurer. In other words: If an entity is deemed sufficiently fit and proper by the supervisor to carry out regulated financial services, consequently, such an entity must also be deemed fit

and proper to acquire a regulated entity. The only legitimate doubts a supervisor may have are those pertaining to the transaction itself, in particular its financing. The German insurance industry sees double regulation here which should be avoided.
Therefore, we propose that for cases of acquisitions by regulated entities, the supervisor's assessment should be limited to the transaction itself, excluding the assessment of the fitness and the properness of the proposed acquirer.

3.4 Question 11: Do you consider that in your experience cooperation between the target authorities and acquirer authorities in the prudential assessment has been satisfactory in practice? Please explain.

Those members who took part in this consultation experienced a good and intensive consultation procedure between the supervisors concerned. Therefore, the current requirements regarding these procedures do not need to be amended.

3.5 Question 12: If you attempted a cross-border acquisition or increase of holdings, in your experience what consultation took place between the authorities in your jurisdiction and the target authorities?

Our members experienced that the supervisors concerned have exchanged their views on the assessment criteria in a more general manner.

3.5 Question 13: Do you consider that the principle of the sole responsibility of the target authority for the prudential assessment is satisfactory for cross-border acquisitions? Should "acquirer" authorities be given more powers in the context of cross-border acquisitions? Please explain.

Please see above under 3.3.

Moreover, it should be discussed which role the group supervisor should have here. A more centralized approach may be useful to minimize administrative burden for the insurers concerned.

3.6 **Question 14:** Should institutions at EU level, such as for example the European Supervisory Authorities (ESAs), be involved in the prudential assessment of cross-border acquisitions? Please explain your views.

It could be considered using the mediation procedure pursuant to Article 19 of the ESA regulations (regulations 1093/2010 to 1095/2010) in this regard. However, this procedure is applicable only where diverging views of the concerned supervisors appear. For example, a general empowerment of EIOPA to assess cross-border acquisitions would be not in line with Article 2 (5) EIOPA Regulation. This provision must be read in conjunction with recital 8 of this regulation pursuant to which the day-to-day supervision must be left to the national level.

3.7 **Question 15:** Is the 60 day time limit satisfactory in practice? How often has the 60 day time limit been exceeded in your experience with the notification process? Is there any difference related to the time needed for the assessment of cross-border acquisitions of holdings and domestic acquisitions? Is there any need to increase or shorten this time limit? Is there any need to provide for longer interruption periods? Please explain.

A shorter time limit would be preferable at least with respect to transactions which involve regulated entities on the acquirer side or with respect to intra-group transactions. In addition, it would be advisable that time limits are brought in line with other regulatory time limits regarding the approval of a transaction or similar events. An example would be a merger control as this would facilitate the completion process of a transaction.

3.8 **Question 16:** In your experience, how does the procedure defined in Directive 2007/44 EC relate to other regulatory procedures, such as the ones provided in the EU Merger Regulation8 or under national rules on merger control? Is there any need for convergence? Please explain.

As stated under 3.7 above, it is necessary to bring time limits in line with other regulatory requirements.

4. SPECIFIC QUESTIONS RELATED TO THE ASSESSMENT PROVIDED FOR IN THE DIRECTIVE

4.1 Question 17: Do the Level 3 Guidelines provide sufficient clarification of the assessment criteria? Which areas need more clarification?

Our members having mentioned these guidelines referenced to their limited experience in this regard. They have not encountered any issues with the assessment criteria.

4.2 Question 20: The experience in the financial and economic crisis has triggered several important regulatory initiatives aiming at reinforcing financial stability. Do you consider it necessary to adjust the prudential assessment criteria to address for example concerns about financial stability and the emergence of financial institutions that are "too big to fail" resulting from M&A activity?

In our view, it is not necessary to adjust the prudential assessment criteria. New standards in this respect, if any, should not be discussed in the context of a review of the Directive. The financial stability debate is to be separated from shareholder control regulation. In addition, “size” as reflected in the term “too big to fail” does not properly reflect systemic risk and is therefore not a feature to measure systemic importance in insurance.

4.3 Question 27: Do the Level 3 Guidelines provide sufficient clarification of the information required? Are there any differences between authorities in the Member States as regards the information they require?

Our members have not reported that they encountered any difficulties with regard to the required information.

5. OTHER ISSUES

5.1 Question 32: In your view, have the Directive and the Guidelines provided by the former Level 3 Committees been applied uniformly across the EU? Is there any need to provide for additional binding level 2 legislation for implementing the Directive? Is there any need to replace the Directive with a Regulation to ensure further convergence in the decision-making practice across the EU? Please explain.

In the long term, we would prefer a regulation (also as a delegated act or implementing act in accordance with Articles 290 and 291 EU Treaty, respectively). However, prior to such a regulation some of the points discussed above have to be clarified sufficiently. Among these points is the clarification of the following:

- definition “qualifying holding” (see above under 2.1),
- legal consequence of a supervisor’s non-approval of a transaction (which is not clear currently).

With respect to the latter, we deem the option to suspend the voting rights regarding the shares concerned to be sufficient under regulatory aspects. Moreover, penalties may be imposed. However, we strongly oppose any kind of a supervisor’s reservation of the transaction’s approval which means that the transaction is null and void, for example in Spain. The same applies to any kind of automatic suspension where the notification has been omitted, for example in Poland. In such a case, the supervisor should be required to look into the case and decide the case taking into account the individual circumstances.

Berlin, 7 February 2012