



EUROPEAN COMMISSION

Directorate General Internal Market and Services

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS

PUBLIC CONSULTATION ON

**THE APPLICATION OF DIRECTIVE 2007/44 EC
AS REGARDS ACQUISITIONS AND INCREASE OF
HOLDINGS IN THE FINANCIAL SECTOR**

Important comment: this consultation document does not represent or pre-judge any formal proposals or views of the Commission.

INTRODUCTION

The reform of the EU rules applicable to prior authorisation of acquiring qualifying holdings in the financial sector took place in the context of the lack of sufficient cross-border consolidation in the EU financial sector¹. The aim of the reform was to ensure that supervisory authorities are as specific and transparent as possible if they have doubts about the sound and prudent management of the financial institution concerned, and to minimise the scope for public authorities to invoke prudential rules in order to hinder cross-border mergers and acquisitions for protectionist reasons. Against this background, on 12 September 2006, the Commission adopted a proposal and, after successful negotiations, on 5 September 2007, the Parliament and the Council adopted Directive 2007/44/EC (hereafter '*the Directive*')².

This Directive amended the European prudential Directives (CRD³, MIFID⁴, Solvency II⁵) applicable to credit institutions, investment firms, and insurance and reinsurance undertakings ('*financial institutions*') by introducing identical procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings by EU and non-EU firms in the EU financial sector. Two of those directives, notably CRD and MIFID, are currently under review. The drafts proposed by the Commission do not change the rules introduced in 2007.

The Directive is based on the principle of maximum harmonisation of the procedural rules and assessment criteria throughout the EU, without the Member States being able to lay down stricter rules. Moreover, identical provisions apply in all three financial sectors (banking, insurance, investment services). The main objective of the Directive is to make sure that all acquisitions of a qualifying holding are treated in the same way throughout the EU and across sectors, in particular due to the frequent use of group structures that extend across multiple Member States whereby a single acquisition of a qualifying holding may be subject to scrutiny in several Member States and by several sectoral authorities.

¹ Report of the informal meeting of ECOFIN, 13/9/2004 and the Commission staff working document, '*Cross-border consolidation in the EU financial sector*', 26/10/2005, (SEC(2005) 1398, Part III, p. 28

² Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, OJ L 247/1, 21/09/07

³ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177/1, 30/06/2006.

⁴ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145/1, 30/04/2004.

⁵ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335/1, 17/12/2009

Pursuant to Article 7 of the Directive, Member States had to transpose the provisions thereof by 21 March 2009. According to the information available⁶ all Member States have transposed the Directive.

The Directive does not lay down any implementation measures for the principles enshrined thereof. However, achieving the goals of the Directive requires that national supervisory authorities in all three sectors cooperate closely and that they promote convergence in their supervisory practices, within the common legal framework established by the Directive. The former three Level-3 Committees (CEBS, CESR, and CEIOPS) have therefore elaborated in 2008 non-binding guidelines (*'Level 3 Guidelines'*) on prudential assessment of acquisitions in order to ensure convergent decisional practice within the EU⁷. The guidelines aim at providing a common understanding on the prudential assessment criteria laid down by the Directive; defining appropriate cooperation arrangements between supervisors; and establishing an exhaustive and harmonised list of information that proposed acquirers should include in their notifications to the competent supervisory authorities.

According to Article 6 of the Directive, the Commission has to review the application of the Directive and submit a report to the European Parliament and the Council, together with any appropriate proposals to review the Directive.

The responses to this consultation will provide important information on how the Directive was applied in the EU Member States and will help the Commission to prepare the report on the application of the Directive.

The public consultation is grouped into four sections:

- General questions on the application of the Directive in the EU Member States.
- Specific questions related to the procedure foreseen in the Directive for the prudential assessment of the acquisitions of qualifying holdings in the financial sector
- Specific questions related to the substantial aspects of the prudential assessment of the acquisitions of qualifying holdings in the financial sector
- Other remaining issues

This consultation is open until **10th of February 2012**. Responses should be addressed to **MARKT-02@ec.europa.eu**. The Commission services will publish all responses received on the Commission website unless confidentiality is specifically requested.

⁶ DG MARKT - Transposition table of POST FSAP Directives - State of play as at 27/05/2011

⁷ Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC, CEBS/2008/214; CEIOPS-3L3-19/08; CESR/08-543b

I. GENERAL QUESTIONS

One of the main objective of the Directive was to minimise the scope for public authorities to invoke prudential rules in the assessment of the mergers and acquisitions ('M&A') for hindering cross-border mergers and acquisitions for protectionist reasons.

The Commission services are interested in receiving stakeholders' views on the following questions:

- (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?**
- (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?**
- (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.)?**
- (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?**

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

A. Notification requirement

The Directive requires "any natural or legal person or such persons acting in concert" to notify any decision to acquire/increase a qualifying holding or to acquire control within a financial institution to the competent authority of the target institution (i.e. Article 10, paragraph 3 MIFID, Article 19, paragraph 1 CRD, Article 57, paragraph 1 Solvency II).

Similarly, a company shall notify to the competent authorities its decision to dispose of the qualifying holding/control it holds within a financial institution (Article 10, paragraph 3 MIFID, Article 20 CRD, Article 57, paragraph 2 Solvency II).

Financial institutions shall inform the competent authorities of any acquisition/disposal of qualifying holdings in their capital by a third party (Article 10, paragraph 5 MIFID, Article 21, paragraph 1 CRD, Article 61 Solvency II).

The Commission services are interested in receiving stakeholders' views on the following questions:

- (5) Please outline your experience regarding the extent and nature of any preliminary contact ('pre-notification') between authority and acquirer. Did you experience any difference between domestic and cross-border acquisitions of holdings and, if so, why?**
- (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.**
- (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.**
- (8) In your experience, have you withdrawn more often your notifications when you attempted a cross-border acquisition of a holding than a domestic acquisition? If that is the case, how do you explain such a difference? Are there any material differences in this regard between acquiring qualifying holdings and acquiring control? Please explain.**

B. Exemption from the notification requirement

The Directive provides for an exemption from the notification requirement of any holdings as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis provided that the attached voting rights are not used and are disposed of within one year (Article 10, paragraph 3 MIFID, Article 21, paragraph 3 CRD, Article 63 Solvency II).

The Commission services are interested in receiving stakeholders' views on the following questions:

- (9) Are there, in your view, any reasons why the exemption from the notification requirement referred to above may not be appropriate? Please explain.**
- (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.**

C. Competent authorities

The Directive provides that the authority responsible for the prudential assessment of an acquisition of a qualifying holding/control is the competent authority of the target institution (*'target authority'*) (Article 19, paragraph 1 CRD; Article 10, paragraph 3 MIFID; Article 57 Solvency II).

However, the target authority shall 'work in full consultation' with the competent authority of the acquirer (*'acquirer authority'*) (Article 10, paragraph 4 MIFID; Article 19b CRD; Article 60 Solvency II).

The Commission services are interested in receiving stakeholders' views on the following questions:

- (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.**
- (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?**
- (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**
- (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.**

E. Time limits

The Directive introduced identical procedural rules for the prudential assessment of acquisitions and increases in holdings in the financial sector. The assessment period is normally limited to a maximum of 60 working days following the notification. This period can be interrupted by the competent authority in order to request additional information. This interruption may not exceed 20 working days if the acquirer is a regulated institution within the EU and may not exceed 30 working days if the acquirer is established outside the EU or is not a regulated institution (Article 19 CRD, Article 10a MIFID; Article 58 Solvency II).

The Commission services are interested in receiving stakeholders' views on the following questions:

(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.

(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.

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

A. Assessment criteria

The Directive provides for the following exhaustive list of criteria for the prudential assessment (Article 10b, paragraph 1 MIFID, Article 19a, paragraph 1 CRD; Article 59, paragraph 1 Solvency II):

- a) reputation of the proposed acquirer
- b) reputation and experience of those who will direct the business
- c) financial soundness of the proposed acquirer
- d) compliance with any relevant prudential legislation, in particular whether the new group structure does not prevent the exercise of effective supervision
- e) suspicion of money laundering and terrorist financing.

The Commission services are interested in receiving stakeholders' views on the following questions:

(17) Do the Level 3 Guidelines provide sufficient clarification of the assessment criteria? Which areas need more clarification?

(18) Do you see consistency and transparency in the application of the assessment criteria between Member States? Are there any specific

⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29/01/2004

criteria that create particular concerns in terms of consistency and transparency?

- (19) Are the existing assessment criteria satisfactory in your view? Is there any need to consider clarifying the existing criteria, removing any criteria, or adding additional criteria?
- (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?⁹
- (21) Are you aware of any cases in which additional criteria have been used in practice by prudential authorities?
- (22) In your experience, is it more difficult to get an approval decision for cross-border acquisitions of holdings than for domestic acquisitions? If that is the case, how would you explain such a difference? Are there any material differences in this regard between acquiring qualifying holdings and acquiring control?
- (23) In your experience, have you appealed more often against decisions related to cross-border acquisitions of holdings than those related to domestic acquisitions? In which kind of appeal have you succeeded more often? How would you explain any potential differences? Are there any material differences in this regard between acquiring qualifying holdings and acquiring control?
- (24) In your experience with the notification process, which of the criteria tend to give grounds for a prohibition decision most often? Are there any differences between Member States?
- (25) In your experience, how frequent are prohibition decisions on the grounds of incomplete information? Are there any differences between Member States?
- (26) Please outline the extent to which in your experience approvals of acquisitions of qualifying holdings/control have been subject to conditions or remedies aimed at addressing the supervisors' concerns.

B. Required information

⁹ Such a stability criterion could be applicable in situations where competition authorities have not objected to an M&A transaction but a supervisory authority would like to intervene on micro- or macro-prudential grounds.

The Directive requires the Member States to make publicly available a list specifying the information that is necessary to carry out the prudential assessment. That information shall be proportionate to the nature of the proposed acquisition (Article 19a, paragraph 4 CRD, Article 10b, paragraph 4; Article 59, paragraph 4 Solvency II).

The Commission services are interested in receiving stakeholders' views on the following questions:

- (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?**
- (28) In your experience, has the proportionality requirement referred to above been applied in a satisfactory manner? Please explain.**

C. Competing proposals

The Directive requires treating in a non-discriminatory manner the competing proposals to acquire qualifying holdings within the same financial institution (Article 10b paragraph 5 MIFID; Article 19a, paragraph 5 CRD; Article 59, paragraph 5).

The Commission services are interested in receiving stakeholders' views on the following questions:

- (29) If you have ever been competing with parallel bids of local acquirers, did you perceive the notification and approval process to be fair and non-discriminatory between you as the cross-border acquirer and the local acquirers?**
- (30) In your experience with competing bids/parallel notifications, have you succeeded more often with domestic acquisitions of holdings than with cross-border acquisitions? If that is the case, how would you explain such a difference? Are there any material differences in this regard between acquiring qualifying holdings and acquiring control? Please explain.**

III. OTHER ISSUES

A. Sanctions

The Directive provides for the possibility for the competent authorities to adopt sanctions and other remedial action (suspension of the voting rights, judicial orders) against the persons that fail to comply with the notification requirement or

implement an acquisition despite a prohibition decision (Article 21, paragraph 2 CRD; Article 10, paragraph 6 MIFID; Article 62 Solvency II).

The Commission services are interested in receiving stakeholders' views on the following question:

(31) How have the sanctioning powers referred to above been applied in practice in different Member States, in your experience? Is there any need for further harmonisation in the way those sanctioning powers are applied? Please explain.

B. Harmonisation

The Directive is based on the principle of maximum harmonisation of the procedural rules and assessment criteria throughout the EU, without the Member States being able to lay down stricter rules.

The Directive does not provide for any implementation measures for the principles enshrined thereof. However, the former three Level-3 Committees (CEBS, CESR, and CEIOPS) have elaborated in 2008 non-binding guidelines on prudential assessment of acquisitions in order to ensure convergent decisional practice within the EU. The objectives pursued in the guidelines consist in:

- (i) Reaching a common understanding on the five prudential assessment criteria laid down by the Directive,
- (ii) Defining appropriate cooperation arrangements that ensure an adequate and timely flow of information between supervisors, and
- (iii) Establishing an exhaustive and harmonised list of information that proposed acquirers should include in their notifications to the competent supervisory authorities

In the banking and investment sectors, the recently adopted Directive 2010/78/EU¹⁰ requires the ESAs to submit to the Commission for adoption:

- technical regulatory standards to establish an exhaustive list of information to be included by proposed acquirers in their notification to acquire qualifying holdings;
- implementing technical standards to establish common procedures, forms and templates for the consultation process, within the prudential assessment, between the relevant competent authorities.

¹⁰ Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), OJ L 331/120, 12.12.2010

The Commission services are interested in receiving stakeholders' views on the following 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.

C. Other questions

The Directive provides for a harmonised framework for the prudential assessment of acquisitions and increases of holdings in the areas of banking, insurance, and investment services.

The Commission services are interested in receiving stakeholders' views on the following question:

(33) In your view, is there any need to introduce a similar framework in any other upcoming or existing legislation in the financial sector (i.e. derivatives, regulation of central securities depositories, regulated markets)? Please explain

D. Additional comments

You may provide any other additional comments which you wish.