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European Fund and Asset Management Association

EFAMA REPLY TO CONSULTATION PAPER ON THE JOINT GUIDELINES FOR THE PRUDENTIAL ASSESSMENT OF ACQUISITIONS AND INCREASE OF HOLDINGS IN THE FINANCIAL SECTOR REQUIRED BY DIRECTIVE 1007/44/EC

EFAMA[1] is grateful for the possibility to comment on the Consultation Paper on the joint Guidelines for the Prudential Assessment of Acquisitions and Increase of Holdings in the Financial Sector required by Directive 1007/44/EC.

GENERAL COMMENTS

We welcome the publication of joint Guidelines to clarify the implementation of the Directive, and we wish to present some concerns specific to the investment management industry.

EFAMA members might on rare occasions reach the qualifying holding thresholds foreseen in the Directive during the course of their activities, but their investment does neither aim at acquiring control of the companies, nor at merging them, and the shares are owned by the funds they manage or by their clients directly. The investment managers are simply fulfilling their fiduciary duty to achieve the best possible investment returns for their clients. Furthermore, UCITS management companies and funds are explicitly prevented by the UCITS Directive[2] from exercising significant influence over an issuer, and client mandates for discretionary portfolios often contain the same requirements.

Proportionality

In order to avoid long delays and excessively burdensome requirements for investment managers not seeking control of the target company, the principle of proportionality enshrined in the Directive should be implemented in the Guidelines as broadly as possible. Specifically, we strongly encourage the application of appropriate, lower standards of evidence to investors not aiming to exercise control of the target institution.

[1] **EFAMA** is the representative association for the European investment management industry. EFAMA represents through its 24 member associations and 42 corporate members about EUR14 trillion in assets under management of which EUR7.3 trillion managed by around 52,000 investment funds at end June 2008. For more information, please visit www.efama.org.

[2] See Art. 25(1)

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This would also reduce the duties of competent authorities and allow them to focus on real cases of changes of control.

Disaggregation
Disaggregation relief is only available for EU-regulated entities in the Directive by reference to Art. 12 (4) and (5) of Directive 2004/109/EC (Transparency Directive). This inconsistency with the Transparency Directive significantly increases complexity and compliance costs for third country groups with an EU investment management subsidiary. EFAMA would appreciate an extension in the Guidelines of such exemption from aggregation also for investment managers with a parent company or subsidiaries in third countries managers where they are not investing for the purposes of control (similarly to Art 23(6) of the Transparency Directive). As an alternative, we suggest that it should be open to local regulators to apply the disaggregation principles to non-EU investment managers, in accordance with the proportionality principle and the intent behind the Directive.

Investment in listed groups with financial subsidiaries
Many large listed groups include one or more regulated entities (e.g., subsidiaries formed for the purpose of group pension management, financing or captive insurance companies which themselves are generally not listed). These subsidiaries would be covered by the Directive. This means that portfolio investment in many listed entities may be inadvertently caught by the regime, potentially leading to restrictions on capital flows into the European Union. The Guidelines should clarify that in these cases no assessment needs to take place, as investment in the mother company would have no impact on the management of the financial subsidiary, nor could the investment manager exercise any direct influence on it.

Applicable law
Any acquisition should only be governed by the laws and regulations of the home country of the main issuer, to the exclusion of any rules applicable in any third country where non-listed subsidiaries of this issuer are located (in order to avoid having the same transaction being subject to multiple, and sometime conflicting, notification/approval regimes from various jurisdictions).

SPECIFIC COMMENTS

Time limits for assessment by the competent authority
Recital 5 of the Directive states that "this Directive should not prevent market participants from operating effectively in the securities market."

However, the assessment period may last 60 working days, plus a possible extra 20 working days. As the approval procedure is an ex-ante procedure, these time limits are

too long for the activities of an investment manager, whose investment decisions need to be implemented quickly, as they are based on prevailing market conditions and prices.

EFAMA would therefore welcome alternatives such as early notification (whereby firms could provide the relevant regulator with a statement of what they may soon acquire in the course of their investment activities that would trigger a notification requirement) or, at the very least, an abbreviated time period for decisions on proposed purchases by investment managers on the basis of the proportionality principle referred to in Recital 5 of the Directive ("the assessment of the compliance with the different criteria should, therefore, be proportionate, among other things, to the involvement of the proposed acquirer in the management of the entity in which the acquisition is proposed"). Such alternatives would be in accordance with the spirit of the proposed rules.

These Guidelines should also foresee that the competent authorities communicate to the acquirer their decision as soon as it is made, and not wait until the full period allowed is expired. Ideally, this should be done within a week, particularly where a regulated company is proposing to hold an interest between 10% and 20% of the target financial institution. This would be in line with the proportionality principle raised in Recital 5 ("the assessment of the compliance with the different criteria should, therefore, be proportionate").

Competent Supervisory Authority (Target Supervisor)
Recital 10 of the Directive states that "the responsibility for the final decision regarding the prudential assessment remains with the competent authority responsible for the supervision of the entity in which the acquisition is proposed". The Guidelines interpreted this principle in Para. 15 by defining as "target supervisors" all competent authorities responsible for the prudential supervision of <u>all</u> subsidiaries of the target institutions.

Furthermore, the Guidelines state that "while the responsibility for the final decision regarding the prudential assessment remains with each of the competent authorities as regards the institution which it supervises, these supervisory authorities should cooperate closely among themselves and take each other's opinion fully into account". This could be interpreted as giving the same responsibility to all involved supervisors, a situation which is bound to create serious practical difficulties in case of disagreement among supervisors when the target company is a large financial group with subsidiaries in many Member States.

In order to achieve an efficient and fast assessment procedure, EFAMA strongly believes that the Guidelines should better clarify supervisory responsibilities and detail cooperation procedures.

It would also be helpful to detail the degree of reliance by the target authority on the acquirer supervisor (whose opinion should also be taken fully into account). It should be possible to enumerate the details where the target supervisor could rely on the acquirer

supervisor (e.g. reputation, financial soundness, prudential requirements and AML suspicions).

Furthermore, the requirement for the acquirer to notify each competent authority (including those responsible for the prudential supervision of the subsidiaries) will create practical difficulties in case of holdings in large financial groups with subsidiaries in many Member States. How can an investment manager be sure of all the subsidiaries owned by a financial institution? If all supervisors are to be notified, we would propose that the supervisor of the mother company notify the competent authorities in the Member States where the subsidiaries are located.

1st Assessment Criterion - Reputation (Para. 41 and 42)
EFAMA members will be among the acquirers who do not intend to exercise a decisive influence over the target institution. We greatly appreciate the statement that the proportionality principle will apply, and that significantly lower standards of evidence will be required of them.

As the acquirer is a regulated entity, the target supervisor should be able to rely on the opinion of the acquirer's supervisor with regard to this criterion.

2nd Assessment Criterion - Reputation and Experience (Para. 50)
We believe that investment managers would fall within the scope of this exception when they invest on behalf of their clients.

3rd Assessment Criterion – Financial Soundness (Para. 55)
The requirement that the acquirer should produce financial soundness forecasts for three years would be excessively onerous for investment managers who invest in the target company for purely financial reasons.

We note that Para. 59 does indicate that the proportionality principle should apply, depending on the nature of the acquisition (asset and fund managers would not be involved in the management of the target institution), and that according to Para. 64 much of the assessment will rely on the home regulator's assessment.

However, we do not consider that these, as they stand, are sufficient. Where an acquisition has purely financial investment purposes, a clause equivalent to that in Para. 50 should provide an exception to this criterion. If this in not possible, the Guidelines should recognise that where an acquisition is made purely for investment purposes (possibly limited to such positions being between 10-20%), then the acquiring firm should be deemed to meet the third criterion if it meets its home state prudential requirements.

4th Assessment Criterion - Compliance
Para. 65 makes reference to the target firm becoming part of the group of the acquirer. This would certainly not be the case where the acquisition is made for purely financial investment purposes by an investment manager. We believe therefore that this criterion should only be applied where the target firm is to become part of the acquirer's 'group'.

Furthermore, where an acquisition is for purely financial investment purposes, there should be no requirement for a business plan, as stated in Para.68. The requirement in Para. 76 that the business plan should cover at least the next three years seems unworkable, inapplicable and irrelevant where the acquisition is made for purely financial investment purposes.

Appendix I – Glossary

"Acting in Concert"
The source of the definition of "acting in concert" in Appendix I is unclear, and is neither derived from the Directive, nor from the underlying sectoral directives. EFAMA believes that this definition is too vague, and recommends using the text from one of the previous Directives covering this concept – either the Transparency Directive or the Takeover Directive[3].

Crossing a Threshold Involuntarily
Notification to the competent authority should only be required after the acquirer becomes aware of crossing a threshold. A "knowledge test" should be provided here in order to define the point of notification immediately after the point of discovery.

Third Countries Considered as Equivalent
For the sake of legal certainty, it would be helpful to have a list published on a central website of the third countries that (a) are considered as equivalent and (b) have adequate arrangements for supervisory exchanges of information, as it will be very difficult in practice to check whether the conditions mentioned in Appendix I are met.

Appendix II – List of Information Required for the Assessment of an Acquisition

We welcome the possibility of express exemptions from the submission of all of the information on the list, for example in cases where the supervisor already possesses some information or can obtain it from another supervisor (Para. 8 of the Guidelines). Supervisors should use this possibility to the fullest extent possible to avoid duplications.

We regret that while Para.7 of the Guidelines states that the list is exhaustive, Para. 9 expressly mentions the possibility for a target supervisor to request "additional information" (therefore triggering the interruption of the assessment period), specifying

[3] Directive 2004/25/EC

that "this additional information is not included as such on the list of required information". As a result, regulators may seek to require information not on the list, unduly delaying the approval process. It should be clarified that such requests should be fully justified and only occur where the original information did not fully meet the requirements of the list, that such requests should be kept to a minimum, and that they should be made as early in the process as possible.

The information to be provided pursuant to Appendix II is very detailed and gathering it will require a cumbersome and time-consuming procedure. EFAMA believes that the list is too extensive, especially in the case of investment managers that are already authorised and supervised in their home country. The proportionality principle should be applied here to the fullest extent and certain requirements should not be applied to investment managers (e.g. the requirement to set out all underlying shareholders of the acquiring entity). Further, the proposal to require disclosure of information regarding the intention of the acquirer to increase, maintain or reduce its shareholding could be problematic in the case of an asset or fund manager, where investment intentions are often of great commercial significance and confidentiality. Such disclosure could even lead to "front-running"or market abuse violations. In addition, investment managers may change their mind depending on market conditions and therefore the "intended" transactions might not take place.

We have particular concerns about information requirement 2b(20), as, for large groups, this would be an extremely onerous and time consuming exercise, considering that large financial groups may have several hundred group companies, each with many directors. This requirement should be restricted to 'relevant companies in the group', i.e. the head company and any which will have direct control of the target company.

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