New Rules in respect of Acquisitions in the Irish Financial Sector

DILLON EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

NEW RULES IN RESPECT OF ACQUISITIONS IN THE IRISH FINANCIAL SECTOR

Introduction

On 10th June 2009, the European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009 (the "Regulations) came into effect in Ireland implementing Directive 2007/44/EC into domestic law. The main objectives of Directive 2007/44/EC are to: (i) harmonise across EU member states the conditions under which the proposed acquirer of a holding in a financial institution is required to provide notification of its intent to the competent authority responsible for the prudential supervision of the target financial institution; (ii) define a clear and transparent procedure for the prudential assessment of the proposed acquisition by the competent authorities, including setting the maximum period of time for completing the process; (iii) specify clear criteria of a strictly prudential nature to be applied by the competent authorities in the assessment process; and (iv) ensure that the proposed acquirer knows what information it will be required to provide to the competent authorities in order to allow them to assess the proposed acquisition in a timely manner.[1] The Directive also brings into focus in the assessment of proposed acquisitions in the financial sector any suspicion of terrorist financing and money laundering and therefore adds to the existing EU legislation in place to combat terrorist financing and to facilitate the imposition of financial sanctions in respect of such activity.

The Regulations amend and supplement existing Irish laws and regulations relating to the acquisition and disposal of holdings in credit institutions, insurance, assurance and reinsurance undertakings, investment firms and market operators of regulated markets and UCITS management companies.

The Irish Financial Services Regulatory Authority (the "Financial Regulator") is the body designated to supervise acquiring or disposing transactions in the Irish financial sector.

[1] "Guidelines for the Prudential Assessment of Acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC" which is available online at the following web address: http://www.c-ebs.org/getdoc/6268b37d-77db-4e29-8fbe-33b0a8984ec7/3L3-MA-Guidelines.aspx

The Financial Regulator has issued a form to be completed to notify of a proposed acquisition of, or increase in, a direct or indirect qualifying holding in respect of any of the following categories of Irish authorised entities (the "Notification Form") pursuant to the Regulations:

- credit institution;
- insurance or assurance undertaking;
- reinsurance undertaking;
- investment firm or a market operator of a regulated market;
- UCITS management company.

The Notification Form requires, inter alia, information on the details of proposed acquirer(s), the rationale for a proposed acquisition, the impact of a proposed acquisition on the target entity and details as to how a proposed acquisition will be financed.

The Rules for Notification and Assessment of Acquiring and Disposing Transactions in the Financial Sector pursuant to the Regulations (the "New Rules")

Application

The New Rules apply to:

- an acquisition, directly or indirectly, of a "qualifying holding" in a target entity; and/or
- the direct or indirect increase in a "qualifying holding" whereby the resulting holding would reach or exceed 20%, 33% or 50% ("prescribed percentages") of the capital of or voting rights[2] in, a target entity or a target entity would become the proposed acquirer's subsidiary.

In accordance with the Regulations a "qualifying holding" means 10% or more of the capital of, or voting rights in, a target entity or a holding which makes it possible to exercise a significant influence over the management of a target entity.

[2] The rules regarding the calculation of voting rights in Regulations 9 and 10, paragraphs (4) and (5) of Regulation 12 and Regulations 14(5), 15 to 17 and 21(6) of the Transparency (Directive 2004/109/EC) Regulations 2007 (S.I. No. 277 of 2007) and the conditions regarding aggregation of voting rights in Regulation 18 of those Regulations shall be taken into account in accordance with the Regulations.

The proposed acquirer must, using the Notification Form, provide prior notification to the Financial Regulator of a proposed acquisition in a target entity which would constitute a qualifying holding or would increase a qualifying holding pursuant to the Regulations in the manner more particularly described above.

It should also be noted that the disposal of a qualifying holding or a holding which dilutes the remaining interest to or below 20%, 33% or 50% or results in the entity ceasing to be a subsidiary of the disposer is also required to be notified in advance to the Financial Regulator. Furthermore, in accordance with the requirements of the Regulations the target entity itself, where it becomes aware of such an acquisition or disposal, must notify the Financial Regulator.

Timeframe for Assessment

The New Rules provide a timeframe for the assessment by the Financial Regulator of a proposed acquiring transaction. The New Rules provide that:

- a complete notification must be acknowledged in writing by the Financial Regulator within two working days of receipt of the Notification Form;
- the Financial Regulator is required to carry out the assessment of a proposed acquisition within sixty working days of the date of the written acknowledgement of the completed Notification Form; and
- the Financial Regulator may request additional information in respect of a proposed acquisition no later than the fiftieth working day. If such a request is made, the assessment may be interrupted by a maximum of twenty working days.

Prudential Assessment

The Financial Regulator may, based on a prudential assessment of the proposed acquisition, decide to oppose or to approve of a proposed acquisition. The New Rules provide that in assessing a proposed acquisition, the Financial Regulator shall have regard to the following:

(a) the likely influence of the proposed acquirer concerned on the financial institution concerned; and

(b) the suitability of the proposed acquirer and the financial soundness of the proposed acquisition concerned against all of the following criteria:

(i) the reputation of the proposed acquirer;

(ii) the reputation and experience of the individuals who will direct the business of the financial institution as a result of the proposed acquisition;

(iii) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the financial institution;

(iv) whether the financial institution will be able to comply and continue to comply with the prudential requirements of existing legislation;

(v) whether the group of which it will become a part has a structure which makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

(vi) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing (within the meaning of Article 1 of Directive 2005/60/EC13) is being or has been committed or attempted, or that the proposed acquisition could increase the risk of money laundering or terrorist financing.

The New Rules provide that a proposed acquisition shall not be examined in terms of the economic needs of the market and that the Financial Regulator shall cooperate with other supervisory bodies of the other EU member states as appropriate if the proposed acquirer is an insurance or re-insurance undertaking, a credit institution, UCITS management company, or the market operator of a regulated market authorised by a competent authority in another member state. The Regulations provide that a “UCITS management company” and “market operator of a regulated market” have the same meaning in the Regulations as in the European Communities (Markets in Financial Instruments) Regulations 2007 discussed in further detail below.

Compromise or Arrangement

The New Rules provide that if a transaction is both a proposed acquisition and a compromise or arrangement for the purposes of sections 201 and 202 of the Companies Act

1963 the court shall not make an order under section 201 of that Act in relation to the transaction until after the end of the assessment period in relation to the transaction under the New Rules.

Completion Deadline

The Financial Regulator may pursuant to the Regulations set a maximum period within which the proposed acquisition is to be completed. The Financial Regulator may also impose additional conditions or requirements to be met in respect of a proposed acquisition. If the Financial Regulator opposes a proposed acquisition, it must, within two working days of the decision being made and before the end of the assessment period, inform the proposed acquirer in writing and outline the reasons for its decision. A decision by the Financial Regulator to oppose a proposed acquisition may be appealed to the Irish Financial Services Appeals Tribunal.

If a proposed acquirer purports to complete a proposed acquisition for which it did not receive the prior approval of the Financial Regulator in accordance with the Regulations title to any shares or interest in the target entity will not be considered to have legally passed to the acquirer and any action based on such acquisition shall be considered void.

There is no mechanism available whereby an acquisition which contravened the New Rules can seek retrospective approval by the Financial Regulator, the courts or otherwise.

Amendments to existing Laws and Regulations in respect of Requirements for Notification and Assessment of Acquisitions in the Financial Sector

The Regulations amend and supplement as appropriate the procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings in certain entities operating in the financial sector in Ireland whose operations are governed by the following regulations:

(i) European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992;
(ii) European Communities (Non-Life Insurance) Framework Regulations 1994;
(iii) European Communities (Life Assurance) Framework Regulations 1994;
(iv) European Communities (Reinsurance) Regulations 2006; and

(v) European Communities (Markets in Financial Instruments) Regulations 2007.

Conclusion

The Regulations have amended and supplemented the existing legislation governing the operation of credit institutions, insurance, assurance and reinsurance undertakings, investment firms, market operators of regulated markets and UCITS management companies with regard to the notification procedures to be followed in respect of acquiring and disposing transactions as appropriate.

Importantly the Regulations provide that credit institutions, insurance, assurance and reinsurance undertakings, investment firms, market operators of regulated markets and UCITS management companies are obliged to notify the Financial Regulator of the names of shareholders or members who have qualifying holdings and the size of each holding at times specified by the Financial Regulator and at least once a year. The Regulations are intended to create greater transparency in the financial sector and to assist the Financial Regulator in fulfilling its supervisory role and aid relevant firms by providing detailed information on the notification and assessment procedures to be followed with regard to acquiring and disposing transactions in the financial sector.[3]

Date: **October, 2009**
Author: **Edel Coughlan**

[3] Explanatory Note in the Regulations

DILLON EUSTACE

CONTACT US

Our Offices

Dublin
33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax: +353 1 667 0042

Cork
8 Webworks Cork,
Eglinton Street,
Cork, Ireland.
Tel: +353 21 425 0630
Fax: +353 21 425 0632

Boston
26th Floor,
225 Franklin Street,
Boston, MA 02110,
United States of America.
Tel: +1 617 217 2866
Fax: +1 617 217 2566

New York
245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo
12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Karen Jennings
e-mail: karen.jennings@dilloneustace.ie
Tel : +353 1 667 0022
Fax: + 353 1 667 0042

DISCLAIMER:
This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:
© 2009 Dillon Eustace. All rights reserved.

DILLON EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.
www.dilloneustace.ie

In alliance with Arendt & Medernach