

Client Alert

Latham & Watkins
Corporate & Finance Departments

The Implementation of the European Acquisitions Directive by the Regulation on Ownership Control — Novelties Regarding the Acquisition and Increase of Holdings in the Financial Sector

On 13 March 2009, the German Act for Implementation of the European Acquisitions Directive (the **Act**),¹ containing, *inter alia*, amendments to the German Banking Act and the German Insurance Supervision Act, and on 21 March 2009, the Regulation on Implementation of the Acquisitions Directive (Regulation on Ownership Control — the **Regulation**),² containing, *inter alia*, the Regulation regarding the Notifications pursuant to Section 2c of the German Banking Act and Section 104 of the German Insurance Supervision Act entered into effect.

Beside a harmonization throughout the European Community, the Acquisition Directive aims at establishing the necessary legal certainty, clarity and predictability of the supervisory assessment process conducted in connection with the acquisition of a significant participating interest in a credit or financial services institution or an insurance company. In Germany, the implementation of the Acquisitions Directive primarily provides for a fixing and determination of the documents and information to be provided with the notification. The following is an overview of the notification, information and documents required to be provided with the notification and the assessment process conducted prior to the acquisition of a significant

participating interest in a credit or financial services institution.³

Overview of the Notification Obligations Pursuant to Section 2c of the German Banking Act

Section 2c of the German Banking Act provides for certain notification obligations in connection with the acquisition and holding of a significant participating interest in an institution. A significant participating interest is given if at least 10 percent of the capital or the voting rights of the institution are held or if the management of the institution can be materially influenced. Pursuant to Section 2c of the German Banking Act, a notification obligation exists for the intention to acquire a significant participating interest in an institution, the intention to increase the interest,⁴ the intention to decrease or dispose of such interest or give up control and the appointment of a legal or statutory representative and the accession of a general partner.

Notifications have to be filed with the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* — “*BaFin*”) and the German Federal Bank.⁵ After expiry of a period set by

“The Regulation on Ownership Control has increased the legal certainty and predictability of the regulatory assessment process.”

BaFin, the closing of the acquisition of a significant participating interest has to be disclosed (closing notification). Section 1 para 9 sentence 3 German Banking Act provides for an exception to the obligation to file a notification in the event of the acquisition of a significant participating interest by banks in the course of underwriting transactions. This important exception for capital markets transactions has now been codified and applies if the voting rights of the interest are not exercised or used to influence the management of the institution otherwise and the interest is disposed of within one year from the acquisition.

Relevant Assessment Criteria; Information and Documents to be Filed With the Notification

The purpose of the assessment of the potential acquiror conducted by BaFin is to ensure that the acquiror is reliable (trustworthy) and professionally qualified ("fit and proper-test") and fulfills the economic conditions for the intended acquisition. To reach this purpose, the Regulation sets out in detail which documents have to be attached to the notification of the intention to acquire a significant participating interest.

Notification Form. The notification form which is part of the Regulation, has to be completed with the required information about the target institution, the potential acquiror and the intended significant participating interest. The form further contains a list of any annexes provided for in the Regulation. The potential acquiror has to complete the list by naming any annexes provided, any annexes filed subsequently, as the case may be, and any annexes which are not necessary. In the event the acquiror files documents subsequently, it has to be kept in mind that the assessment period does not begin before these additional documents have been filed. Therefore, all annexes should be complete and attached to the notification at the time of the first filing, if possible. In certain cases, the non-necessity of certain annexes has to be explained in a separate annex.

Information on Reliability; Curriculum Vitae. The annex "form — information on reliability," which contains the declaration of innocence already required under the old regime, needs to be provided by the potential acquiror itself if he or she is a natural person, as well as by each general partner, each representative (managing director or member of the board of directors, as the case may be), each enterprise managed or controlled by the potential acquiror and, if it is intended to exchange the target institution's management at the time of the acquisition, each designated manager. In the form, information on relevant criminal proceedings, proceedings on administrative offences, insolvency proceedings, regulatory measures and assessments conducted in the past, if applicable, need to be provided. If the potential acquiror is a natural person, the acquirer him or herself, otherwise each general partner of the potential acquiror and each representative has to provide a curriculum vitae which includes the following information:

- personal details;
- details about the professional qualification and education, including any degrees acquired, and any measures of continuing education and professional development; and
- a detailed description of the professional experience in chronological order including (i) name and seat of the company which the relevant person has worked for; (ii) kind and duration (by month) of the activity; (iii) power of representation; (iv) internal decision-making authorities; and (v) departments delegated to the relevant person within each company they have worked with.

Since the curriculum vitae is a material basis of the supervisory authorities' assessment of the professional qualification of the relevant person, the document should be prepared with appropriate accuracy.

Verification of Existence/Identity and Other Documents of the Potential Acquiror. To prove its existence, the potential acquiror has to provide a certified copy of an excerpt from

the commercial register, of the deed of incorporation and the articles of association.⁶ Further, a list of general partners and the corporate representatives, as the case may be, a list of shareholders, as well as an up-to-date comprehensive description of its business activities has to be handed in.

Holding Structure of the Potential

Acquiror. If necessary due to the holding structure from the potential acquiror down the chain through to the target institution, the holding structure needs to be displayed in the annex "form — complex holding structures."⁷ If the potential acquiror is part of a group of companies, a description of the corporate group's structure including a structure chart, a comprehensive up-to-date description of the group's business activities and a list of regulated group companies need to be provided. If the potential acquiror is a legal entity, a list of those natural persons or legal entities holding an interest in the potential acquiror of 10 percent or more of the capital or voting rights is required. If the potential acquiror is a natural person, information has to be provided about which other group companies' or other companies' business the acquiror is managing and which other companies are controlled by him or her.

Financial and Other Interests. Moreover, a comprehensive description of the potential acquiror's financial and other interests in the significant participating interest needs to be provided. To facilitate the supervisory authorities' assessment of a conflict of interest, the business relationship between the potential acquiror on the one side and the target institution and any companies and persons allocated to the institution's sphere⁸ on the other side needs to be described. Moreover, information on relatives of the potential acquirer working for the target institution, if any, as well as information on any authorities of the management of the potential acquiror to manage the target institution and information on any current shareholdings in the target institution of holders of capital or voting rights in the potential acquirer need to be given.

Information on Economic Resources and the Financing of the Purchase

Price. To verify its financial status and creditworthiness, the potential acquiror has to disclose its economic resources. If the acquiror is a legal entity, he has to provide financial statements including audit reports, cash flow statements and segment reports of the preceding three financial years. If the acquiror is a natural person, a comprehensive list and description of income sources, an up-to-date statement of assets and liabilities, and financial statements including audit reports of any entities controlled by the potential acquiror are required. If the potential acquiror is part of a corporate group, consolidated financial statements including audit reports have to be provided. If the creditworthiness of the potential acquiror or the corporate group he belongs to has been assessed by a rating agency, the latest rating has to be disclosed and verified by the rating deed. In another annex, the potential acquiror has to describe and verify the availability and the source of the equity or debt he intends to finance the purchase price with and disclose any agreements made in connection with the intended acquisition.

Business Plan. One of the most important annexes is the business plan, which needs to be provided if the potential acquiror by the intended acquisition (or increase) of the interest will reach control of the target institution.⁹ The potential acquiror has to describe the strategic goals and plans pursued with the acquisition and give detailed information on the intended strategic development, the intended development of the financial condition and results of operation, as well as effects on the structure and organization of the target institution. He or she further has to illustrate the motives for the acquisition, aspired synergy effects and information on the integration of the target institution in the acquiror's group structure. For both the target institution and the corporate group, plan balance sheets and plan profit and loss statements for the following three financial years from the intended acquisition as well as forecasted capital ratios, the amount of the expected risk positions and an outlook of intended intra-group business activities have to be provided. The business plan is a

material document for the regulatory assessment conducted by the authorities. It is thus useful to present the business plan personally by way of a presentation to the authorities prior to the official filing of the notification, discuss further details and answer any questions the authorities may have. In addition, such a presentation is a good opportunity to introduce the management of the potential acquiror and, if so intended, the designated management of the target institution.

Any documents and declarations have to be provided in German language; any documents in another language have to be accompanied by an officially certified translation. On a case-by-case-basis, BaFin can waive the requirement of such a translation. If the potential acquiror is a foreign entity having its corporate seat outside of Germany or a foreign person having its domicile or habitual residence outside of Germany, an authorized receiving agent has to be named and a certified copy of the power of attorney has to be provided.

In the event that any information or statements given in the notification or the annexes are changing subsequent to the filing, the potential acquiror has to notify BaFin immediately and provide an updated and revised version of the relevant documents. If the acquiror fails to file such an update or files it later than five business days prior to the elapse of the assessment period, the respective documents are deemed to be incorrect pursuant to Section 7 para 3 of the Regulation and the acquisition may be prohibited according to Section 2c para 1b sentence 2 German Banking Act (for further details, see the next section).

Reasons for a Prohibition

Section 2c para 1b of the German Banking Act enumerates exhaustively and in detail the reasons for which the acquisition may be prohibited. In essence, a prohibition is justified if:

- the potential acquiror or a statutory or corporate representative is not reliable or for other reasons does not meet the requirements for a sound and prudent management of the institution; if it has to be assumed that the capital for financing the

acquisition originates from a criminal action, such requirements are deemed not to be met;

- the institution would presumably fail to meet its numerous regulatory requirements, or by the acquisition would be integrated in a group of companies which would compromise an effective supervision due to the holding structure or economic intransparency of the group;
- the institution would become a subsidiary of an institution seated in a non-EU country which is not efficiently supervised;
- a designated manager of the institution is not reliable or not sufficiently professionally qualified;
- the acquisition would be connected to money laundering or financing of terrorism; or
- the potential acquiror is not sufficiently financially stable, which in particular is given if the acquiror's capital resources and funds do not meet the specific requirements for the institution's equity and liquidity.

Moreover, BaFin may prohibit the acquisition if the information provided by the acquiror or any additionally requested documents are incomplete or incorrect or do not meet the standards of the Regulation. This ground for prohibition once again illustrates the importance of the exact adherence to the Regulation's standards. Finally, BaFin may — preliminarily — prohibit or restrict any acquisition by which an institution would become a subsidiary of a non-EU country if the European Commission resolves so.

Assessment Process and Result of the Assessment

After receipt of the complete notification and all annexes, which BaFin has to confirm to the potential acquiror in written form within two business days, the notification has to be assessed within 60 business days (so-called assessment period). Only a complete notification (which due to the annexes described previously and depending on the acquisition structure may reach an extensive volume) will trigger the start of the assessment period. BaFin may request additional documents until expiry of the 50th business day, in which

case the assessment period will be on hold from the day of the request until receipt of all additionally requested documents for a maximum period of 20 additional business days.¹⁰ In the potential acquiror's own interest, BaFin's additional requests should be fulfilled as soon as possible to stop the suspension of the assessment period.

Within the assessment period, BaFin may prohibit the acquisition for the reasons described previously.¹¹ If it is not prohibited, the acquisition can take place; a written approval by way of a formal order of the authorities will not be issued since the non-prohibition is deemed to approve the transaction. In past transactions, BaFin has been willing to give an indication about the non-prohibition of the acquisition in ongoing discussions prior to elapse of the assessment period. Such discussions can also form a good basis for mutual cooperation. Compared to the former regime under which the period for assessment was three months, the new assessment period of 60 business days (*i.e.* 12 weeks) has only been marginally shortened. The duration of the assessment may interfere with the time schedule of the transaction, which may be disadvantageous in particular if the target institution is a listed company. For that and other reasons it is preferable to communicate constantly with BaFin from the beginning and prior to the official filing rather than just await the expiry of the assessment period.

Conclusion

As indicated previously, the implementation of the goals of the Acquisitions Directive by the Regulation has led to a material improvement of the legal certainty and transparency of the shareholder control procedure.

The effort of the potential acquiror for preparing and filing the notification should be kept in mind when setting up the schedule of a transaction. Since the 60 business days assessment period does not begin to elapse prior to receipt of the complete notification including all annexes by BaFin, the acquiror should aim at having the preparation and set-up of the acquisition structure completed at the intended time of filing of the

notification and to have all annexes ready in order to avoid a subsequent delivery of documents. If the potential acquiror is sufficiently informed about the assessment process, applies appropriate accurateness and constantly and cooperatively communicates with the authorities, particularly with BaFin, there should be no obstacles to a smooth and efficient progression of the assessment process and an early indication of BaFin regarding the non-prohibition of the acquisition.

Endnotes

- ¹ German Act for the Implementation of the 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; German Federal Law Gazette (*Bundesgesetzblatt*) I 2009, 470.
- ² German Federal Law Gazette (*Bundesgesetzblatt*) I 2009, 562.
- ³ The provisions of the Regulation regarding the acquisition and increase of a significant participating interest in an insurance company and the amendments of the German Insurance Supervision Act are not subject of this *Client Alert*.
- ⁴ A notification has to be filed upon reaching or exceeding the thresholds of 20 percent, 30 percent and 50 percent of the capital or the voting rights, or upon the gaining of control of the institution by the intended increase of the interest, cf. Section 2c para 1 sentence 6 German Banking Act.
- ⁵ For information purposes, it is useful to also provide the notifications to the Audit Association of German Banks (*Prüfungsverband deutscher Banken e.V.*) as well as the Federal Association of German Banks (*Bundesverband deutscher Banken e.V.*) — Deposit Protection Fund (*Einlagensicherungsfonds*), if the target institution participates in the Deposit Protection Fund. Moreover, a shareholder control procedure according to the articles of association of the Federal Association of German Banks and the charter of the Deposit Protection Fund may be conducted in addition.
- ⁶ If the potential acquiror is a natural person, he or she has to provide a certified passport copy to proof his or her identity.
- ⁷ In this case, usually a number of notifications needs to be filed since each company of the holding structure is a separate potential acquirer and has to file a separate notification.

- ⁸ Such are companies controlled by the target institution, holders of a minimum of 5 percent of the capital or voting rights in the target institution, managers and members of the supervisory board of the target institution, cf. Section 12 para 2 of the Regulation.
- ⁹ If no control is gained by the acquisition (or increase) of the interest, the notification has to be attached by the documents described in Section 15 para 2 and 3 of the Regulation, which have to include information on the intended strategic development and strategic goals, the intended duration of the participation, the influence on the target institution intended to be exercised in the future as well as statements on the willingness and economic ability to provide additional capital to the target institution, if necessary.
- ¹⁰ If the potential acquiror is seated or regulated outside of the European Economic Area or is a non-regulated natural person or entity, cf. Section 2c para 1a sentence 9 German Banking Act, the assessment period may be extended by additional 10 business days to a total of 90 business days. This is important in particular for financial investors who are not active in the bank business themselves.
- ¹¹ If the holder of a significant participating interest (i) meets one of the reasons for a prohibition of the transaction described previously, (ii) has

not met its notification obligation prior to the acquisition and has not caught up with meeting its obligation within a time period set by BaFin, or (iii) has acquired (or increased) the interest despite a prohibition by BaFin (this once again illustrates that the legal validity of the acquisition remains untouched from the regulatory assessment and a prohibition, as the case may be), BaFin may alternatively prohibit the exercise of voting rights or enact an order that the interest in the institution may be disposed of with BaFin's prior approval only (cf. Section 2c para 2 German Banking Act).

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