



Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo

(only Italian version is authentic)

COMMUNICATION N.3

RE: Directive 2007/44/EC regarding the acquisition of qualified shares in insurance and reinsurance undertakings, banks and investment undertakings.

On March 21, 2009, the term for transposition into Italian law of directive 2007/44/EC of 5 September 2007 expired. It regards “the procedural rules and criteria for the prudential evaluation of acquisitions and increases of shareholdings in the financial sector”, and in particular, in insurance and reinsurance undertakings, banks and European investment undertakings.

On 23 June 2009, a Community bill was approved. It regards the legislative power for the transposition of the directive, from which the amendment of some provisions of the Code of Insurance and the consolidated banking and finance laws.

In this regard, recognised that the harmonisation directive contains sufficiently clear and precise detailed provisions in the determination of the rights and obligations of the recipients, it is held, according to a setting out shared by the Ministry of Economic Development, that these provisions are immediately applicable even if in contrast or not provided by the national regulatory framework in force.

In order to illustrate the consequent regulatory framework and reference regulation for the ISVAP evaluation of the acquisitions in the insurance sector pending the implementation of Directive 2007/44/EC, the provisions of the same directive considered directly applicable to the insurance and reinsurance undertakings, the parent undertakings of insurance groups, as well as undertakings that hold qualifying holdings in the aforementioned undertakings, together with some procedural clarification are reported in annex (annex 1).

This communication will also be published in the ISVAP Bulletin.

Rome, 02 July 2009

President
(Giancarlo Giannini)

Annex 1

Provisions of directive 2007/44/CE, relating to procedural rules and criteria for the prudential evaluation of acquisitions and increases of shareholdings in the financial sector, the direct application to the insurance and reinsurance undertakings, to the parent undertakings of insurance groups, as well as, in the case of control, to undertakings that hold controlling interests in the aforementioned undertakings.

Definitions

For the purposes of this Directive the following definitions shall apply:

- a) "insurance undertaking": insurance undertaking, reinsurance undertaking and parent undertaking of insurance groups;
- b) "control": the control that takes place in the assumptions referred to in article 72 of Legislative Decree no. 209 of 7 September 2005 regarding the Code of Private Insurance.

1. Participations subject to ISVAP authorisation

Pursuant to articles 1 and 15 of Directive 92/49/EEC¹ and Directive 2002/83/EC² and articles 2 and 19 of Directive 2005/68/EC³, as amended by Directive 2007/44/EC, are required to request authorisation pursuant to article 68 of Legislative Decree no. 209 of 7 September 2005 (hereafter "Insurance Code") subjects that intend - alone or in concert⁴ - to directly or indirectly acquire shares in insurance undertakings that, taking into account those already held, give rise to:

- a) a share equal or greater than 10 percent, or reaching or exceeding the thresholds of 20 percent, 30 percent and 50 percent of the share capital or voting rights;
- b) to the possibility to exert significant influence on the management⁵;
- c) to the control, independently from the shareholder.

¹ Directive 92/49/EEC, regarding legislative, regulatory and administrative provisions regarding direct insurance other than life assurance.

² Directive 2002/83/EC relating to life assurance.

³ Directive 2005/68/EC relating to reinsurance.

⁴ In relation to the provisions of article 15 of Directive 92/49/EEC, article 15 of Directive 2002/83/EC and article 19 of Directive 2005/68/EC - subject even "persons who act in concert" to the obligation of authorisation - meaning having acquired shares in concert on the part of multiple subjects who exercise the relative rights on the basis of agreements concluded in any form, when these shares, considered cumulatively, exceed the thresholds indicated in letters a), b) and c). To other agreements for joint exercise of voting rights continue to be subject to the provisions provided by article 70 of the Insurance Code and the provisions of supervision.

⁵ The concept of significant influence, as the element to identify a share to authorise, was already provided by Directives 92/49/EEC, 2002/83/EC and 2005/68/EC; in the Insurance Code, the provision has been implemented by identifying, in presumption, the ability to exercise a significant influence in the surpassing of the 5 percent threshold. This solution is no longer feasible given the maximum harmonisation of the important thresholds provided by Directive 2007/44/EC; the assumptions of significant influence must, therefore, be identified case by case in relation to the ownership structure and government of the insurance undertaking in which the share to be authorised was taken on, having reference in some indices, among which - for example - the possibility to: designate one or more members of the administrative body; influence strategic choices of the undertaking; exercise powers analogous to those of a share that brings about the obligation of preventative authorisation.

Consequently, article 68, paragraph 1 of the Insurance Code should no longer be applied, in the part which provides that it must first be authorised, unless it does not result in significant influence, the acquisition of shares in an insurance undertaking, by any person when it results in, taking the shares already owned into account, a participation higher than five percent of the undertaking's share capital represented by voting rights.

The achievement and/or surpassing of that threshold must, in any case, be communicated to ISVAP pursuant to article 9 of Laws no. 20 and 69 of 9 January 1991, paragraph 1, of the Insurance Code.

2. Computation method of the share threshold and conditions regarding aggregation of voting rights

Article 1, second paragraph, letter g) of 92/49/EEC, article 1, second paragraph, letter j) of Directive 2002/83/EC and article 2, third paragraph, paragraph 2 of Directive 2005/68/EC, as amended by Directive 2007/44/EC, provide that the relevant voting rights to identify the shares subject to the authorisation obligation and aggregation conditions are those provided by articles 9 and 10, as well as 12, paragraphs 4 and 5 of Directive 2004/109/CE⁶.

In application of these provisions, in the calculation of the relevant thresholds for authorisation purposes:

- a. voting right must be calculated with reference to all of the shares that provide voting rights, even if their exercise is suspended. In the presence of shares with voting rights belonging to different categories, the calculation must be made with reference to each category: the shares held are the numerator and those to acquire belonging to the same category, and all of the shares issued by the insurance undertaking belonging to that category are the denominator;
- b. voting rights are not taken into consideration when held by investment undertakings or banks in the context of subscription service and/or underwriting or with guarantee to the issuer, pursuant to article 1, paragraph 5, point c) of the FSA (Financial Services Act), as long as the voting rights connected to the share are not exercised or otherwise used to intervene in the management of the issuer, and said rights are ceded within one year of the acquisition;
- c. voting rights are not taken into consideration when inherent to the shares acquired by a *market maker* who is authorised under Directive 2004/39/EC, and who does not intervene in the management of the concerned insurance undertaking, nor exercises any influence on the latter at the end of the acquisition of the shares or in the support of their price;
- d. voting rights are not taken into consideration when inherent to the shares acquired exclusively for the purposes of compensation operations and regulation in the usual cycle of short term regulation (regulated in the three days of trading following the operation), nor those held by those who perform custody services of actions, provided that they can only exercise voting rights inherent to said shares according to instructions provided in writing or by electronic means;

⁶ Directive 2004/109/EC of 15 December 2004, on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

- e. the voting rights of the insurance undertaking held by a management company or by an investment firm in the context of the provision of collective savings management services or portfolio management are calculated separately from the voting rights in the same insurance undertaking held by the company that controls the intermediaries, on the condition that:
 - i. the management company or investment undertaking exercises the voting rights inherent to the share in the insurance undertaking in an independent way⁷ with respect to the parent company and subjects belonging to its group;
 - ii. the voting rights held in the context of portfolio management are exercised by the intermediaries according to the instructions given in writing or by electronic means by the clients of the portfolio management service.

If the parent company or a company part of the group hold a share of the insurance undertaking using services of collective asset management or portfolios provided by a management company or by an intermediary of the group, the parent company shall not take into account the relative voting rights if the intermediaries exercise those rights in an independent way⁸ and the relative brief does not provide clauses that allow the parent company or a subject of its group to interfere with the power of the intermediaries to make decisions in an independent way relating to the exercise of the voting rights.

In addition to the shareholder, the natural or legal person who is entitled to the voting rights must request authorisation in one of the following cases or a combination thereof:

- a. voting rights are attributed on the basis of an agreement that provides the provisional transfer and consideration of the voting rights;
- b. voting rights are attributed to the custodian of the security, as long as the latter controls them and declares the intention to use them;
- c. voting rights are attributed to the usufructuary;
- d. voting rights are attributed, in cases referred to in letters a), b) and c), to an undertaking controlled by that natural or legal person;
- e. voting rights are attributed to the custodian or by virtue of a delegation, as long as they are exercised with discretion in absence of specific instructions from the shareholder;
- f. voting rights are attributed to a third party in his name and on behalf of the natural or legal person.

3. Criteria for evaluation of the application

Based on articles 15 *ter* of Directive 92/49/EEC, 15 *ter* of Directive 2002/83/EC and 19 bis of Directive 2005/68/EC, introduced by Directive 2007/44, ISVAP assesses, for the purpose

⁷ Taking into account the provisions of art. 10 of Directive 2007/14 of the European Commission, of execution of Directive 2004/109/EC.

⁸ See previous note.

of guaranteeing the sound and prudent management of the insurance undertaking referred to in the acquisition project and proportionally to the probable influence of the potential buyer on the same undertaking, the quality of the potential buyer and the financial solidity of the acquisition. The evaluation is conducted based on the following criteria:

- a. the reputation and financial solidity of the potential buyer⁹, in particular in consideration of the type of business exercised or planned by the insurance undertaking to which the acquisition refers to;
- b. the reputation and experience of those who, as a result of the planned acquisition, will hold administrative functions, management and control in the insurance undertaking¹⁰;
- c. the capacity of the insurance undertaking to respect and continue to respect the regulatory provisions and supervisory regulations. In particular, the group of which it will become part must provide a structure that allows effective supervision, to effectively exchange information between the competent authorities and to determine the division of the responsibilities between the competent authorities;
- d. the existence reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering of profits from illegal activities or financing of terrorism are in course or have taken place, or being attempted within the meaning of article 1 of Directive 2005/60/EC or that the proposed acquisition could increase the risk thereof.

In the time period of the transposition of the Directive, ISVAP will evaluate the authorisation applications in the light of the aforementioned criteria - also taking into account the applicative guidelines issued by the level-3 Committees (CEBS, CESR and CEIOPS)¹¹ - and of the provisions¹² in force, because they are compatible. This latter also refers to the documentation required in the application package.

4. Authorisation procedure

Articles 15 *bis* of Directive 92/49/EEC, 15 *bis* of Directive 2002/83/EC and 19 of Directive 2005/68/EC, introduced by Directive 2007/44/EC, govern the deadlines for the evaluation of share acquisition requests to authorise.

The Community regulation surpasses the procedural provisions referred to by article 10 bis of Law no. 241 of 7 August 1990, as well as those referred to in article 68, paragraph 5 of

⁹ The reputation of the potential buyer include the possession of the good repute requirements referred to in article 77 of the Insurance Code, correct behaviour and business relations, as well as professional competence.

¹⁰ Reputation and experience of the company management means the good repute requirements, professionalism and independence referred to in article 76 of the Insurance Code. This criteria finds application in the case where, following the acquisition of the share, the potential buyer is able and intends to nominate new company management.

¹¹ See "*Guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by Directive 2007/44/EC*", CEBS, CEIOPS and CESR, available on website: <https://eiopa.europa.eu/CEIOPS-Archive/Documents/Guidelines/MA-Guidelines.pdf>

¹² Among the relevant provisions in force, in particular, Decree no. 186 of 24 April 1997, ISVAP provision 1617 G of 21 July 2000, and the ISVAP circulars 185 of 20 October 1992 and 251 of 3 July 1995.

the Insurance Code (in relation to the maximum deadline of 120 days) and relative implementation provisions.

In order to facilitate the progress of the authorisation procedure, taking into account the short times for the beginning of the process and its conclusion, full cooperation is essential between the potential buyer and ISVAP, implemented through regular contacts, also by telematic means, to be initiated even before the formal presentation of the acquisition application, notwithstanding the provision of article 69, paragraph 1 of the Insurance Code regarding the communication of the intention to buy.

Pursuant to the Community regulation, within two working days from receipt of the application, ISVAP sends to the potential buyer the procedure initiation communication, confirming receipt of the application and all of the information requested, and indicating the deadline for the conclusion of the proceeding.

In the case of an irregular or incomplete application, within two working days from its receipt, ISVAP sends a communication to the potential buyer indicating the cause of the irregularity or incompleteness, and requesting any missing documents. The communication of the start of the proceeding is sent within two working days from receipt of the revised and completed application.

ISVAP rules on the application within 60 working days from the date of the communication of the start of proceeding.

In the communication of the start of proceeding or after, provided that it is within 50 working days from the sending of the aforementioned communication ISVAP may request further information from the potential buyer, whenever it considers clarifications or additions necessary for the purposes of its assessments. The request shall be made in writing and shall specify the additional information needed. In these cases, the process deadline is suspended for one time only, until receipt of the reply of the potential buyer.

The suspension shall not exceed 20 working days. Said deadline may, however, be extended up to a maximum of 30 working days if the potential buyer resides in a foreign country or is subject to foreign laws, or is not a supervised subject.

No later than two working days from receipt of the additional information or from the expiration of the maximum suspension deadline without receipt of the requested information, ISVAP communicates to the potential buyer in writing the reopening of the proceeding deadline. Any further completion or clarification requests on the received information shall not bring about a new suspension of the deadlines.

In the course of the proceeding, ISVAP may make further inquiries through inspections or obtain opinions of other administrations or national or foreign authorities. In these cases, the deadlines of the proceedings are not suspended. However, the failure of timely receipt of information or opinions that ISVAP has requested from other administrations or authorities, and which it considers necessary for the issuing of the authorisation may constitute grounds for the rejection of the application.

Pursuant to articles 15 *quater* of Directive 92/49/EEC, 15 *quater* of Directive 2002/83/EEC and 20 of Directive 2005/68/EC, introduced by Directive 2007/44/EC, the assessment of the acquisition is the subject of a prior consultation with the competent

authorities of the country in which the purchasing company has its registered office when the subject intends to acquire shares in an insurance undertaking is:

- a. a bank, insurance or reinsurance undertaking, investment firm or management company pursuant to point 2 of article 1 *bis* of Directive 85/611/EEC, authorised in another Member State of the European Union or in a sector other than that in which the acquisition is proposed;
- b. the parent undertaking of the aforementioned company, or the natural or legal person that controls one of the aforementioned company.

In these cases, the deadlines of the proceedings are not suspended. However, the failure to receive the opinion of the supervisory authority of the buying company in time for the adoption of the authorisation within the deadline of the conclusion of the proceeding constitutes a reason for rejection of the application.

ISVAP communicates the authorisation or rejection of the application to the potential buyer the authorisation, complete with the relevant reasons, within two working days from its adoption and, in any case, within the expiration of the deadline for the conclusion of the proceeding.

Failure to adopt the application rejection within the deadline of the conclusion of the proceeding equates to an authorisation (silent assent).