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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Application of Directive 2007/44/EC 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

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1. INTRODUCTION

1. According to Article 6 of Directive 2007/44/EC[1] 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 (hereinafter: "the Qualifying Holdings Directive" or "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 time limit for this was 21 March 2011. Due to the intensive work of the Commission on a comprehensive programme of financial regulatory reform in order to build a more stable and transparent financial system following the financial crisis and due to the difficulty to assess the application of the Directive over a period of financial crisis work on the report had been postponed.

2. The Qualifying Holdings Directive establishes the legal framework for the prudential assessment of acquisitions by natural or legal persons of a qualifying holding in a credit institution, assurance, insurance or re-insurance undertaking or an investment firm. The Directive amended the European Directives (CRD[2], MiFID[3], Solvency II[4]) applicable to credit institutions, investment firms, and insurance and reinsurance undertakings. It harmonizes the conditions for notifying a proposed acquisition or a disposal of a qualifying holding; defines a clear and transparent assessment procedure; and, specifies a list of strictly prudential assessment criteria. These rules are subject to maximum harmonization, without the Member States being able to lay

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1 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 of 21.09.2007, p.1. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:247:0001:0016:EN:PDF.

2 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 of 30.06.2006

3 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 of 30.04.2004

4 Directive 2007/44/EC amended the EU (Re-)Insurance Directives 92/49/EEC, 2002/83/EC, 2005/68/EC. 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 of 17.12.2009 recasted these three Directives.

down stricter rules. Two of those afore-mentioned Directives, CRD and MiFID, are currently under review. The proposals of the Commission as to those Directives do not amend the rules introduced in 2007.

3. The objectives pursued by the Qualifying Holdings Directive are important to financial markets. More specifically, the objectives of the Directive are:

- To improve the legal certainty, clarity and transparency of the supervisory approval process with regard to acquisitions and increase of shareholdings in the banking, insurance and securities sectors; and

- To ensure that all proposed acquisitions or disposals of a qualifying holding are treated in the same way throughout the EU and across sectors.

4. Achieving the goals of the Directive requires national supervisory authorities in all three sectors to cooperate closely and to promote convergence in their supervisory practices within the common legal framework established by the Directive. In 2008 the former three Level-3 Committees (CEBS, CESR, and CEIOPS) therefore developed non-binding guidelines for the prudential assessment of acquisitions[5] (hereinafter "3L3 Guidelines") in order to ensure convergent decision-making practices within the EU. The objectives pursued in the guidelines are to:

- Reach a common understanding of the five prudential assessment criteria laid down by the Directive;

- Define appropriate cooperation arrangements that ensure an adequate and timely flow of information between supervisors; and

- Establish an exhaustive and harmonised list of information that proposed acquirers should include in their notifications to the competent supervisory authorities.

5. Furthermore, in the banking and investment services sectors, the recently adopted Directive 2010/78/EU[6] enables the European Supervisory Authorities (ESAs) to submit to the Commission for adoption[7]:

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5 The Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR) joint guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector as required by Directive 2007/44/EC. Available at: http://www.eba.europa.eu/getdoc/09acbe4b-c2ee-4e65-b461-331a7176ac50/2008-18-12_M-A-Guidelines.aspx

6 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 331of 12.12.2010, p.120. Available at: http://eur-lex.europa.eu/Result.do?T1=V3&T2=2010&T3=78&RechType=RECH_naturel&Submit=Search

7 In the negotiations on Omnibus II that are currently taking place the co-legislators are discussing an empowerment for EIOPA to develop regulatory technical standards and implementing technical standards for insurances on the same subject.

- Regulatory technical standards to establish an exhaustive list of information to be included by proposed acquirers in their notification to acquire qualifying holdings; and

- Implementing technical standards to establish common procedures, forms and templates for the consultation process within the prudential assessment between the relevant competent authorities.

6. This report describes the impact of and compliance with the Qualifying Holdings Directive (section 2); identifies the main issues emerging from the application of the Directive (section 3); and, draws a number of conclusions (section 4).

2. IMPACT OF AND COMPLIANCE WITH THE QUALIFYING HOLDINGS DIRECTIVE

7. The Commission services conducted a public consultation of stakeholders and sent out a questionnaire, including a request for statistical data, to the competent authorities. Overall, the received responses indicate that the Directive contributed to the reduction of barriers for acquisitions in the financial sector and that domestic and cross-border transactions are treated equally across the EU. Most responses confirm that the Directive has been conducive to reach a common understanding on the prudential assessment of acquisitions in the financial sector across Europe and to a level playing field. However, the responses also reveal that in several Member States (CZ, DE, IE) the Directive has not led to major changes in the legal framework, since similar rules already existed prior to the adoption of the Directive.

8. This positive assessment of the Directive is also confirmed by the statistical data received from national supervisors. Between 2008 and 2011, more than 10,700 proposed acquisitions of qualifying holdings were notified, with more than 84 % of the notifications taking place in three Member States (UK, NL, DE)[8]. National competent authorities authorized the large majority of these notifications and the data do not reveal any significant differences between the treatment of domestic and cross-border transactions. In total, only 50 proposed transactions (less than 0.5%) were prohibited; notifications were withdrawn in about 450 cases (4.3%)[9]. The number of notifications over the period was relatively stable, with a slight decrease since 2010 which can mostly be attributed to a significant drop in notifications in the United Kingdom following administrative changes. Due to the financial crisis 231 crisis-related acquisitions, i.e. public sector-driven acquisitions for stabilisation of financial markets, took place.

9. No substantial compliance issue has emerged in relation to the application of the legal framework in the Member States. However the survey and the public consultation reflect that some minor issues exist which are analysed in the following.

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8 See Figure 1 in the Annex to this Report.

9 See Figure 2 in the Annex to this Report.

3. THE REVIEW OF THE APPLICATION OF THE DIRECTIVE: EMERGING ISSUES

10. Several issues emerge from the review of the application of the Qualifying Holdings Directive.

11. First, there are some concerns as regards the legal certainty of the definition of the notification requirement and its application by national supervisors. It is provided in the Directive, that[10]:

"Member States shall require any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in" a supervised entity[11] "or to further increase, directly or indirectly, such a qualifying holding in" a supervised entity" as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that" the supervised entity "would become its subsidiary (hereinafter referred to as the proposed acquisition), first to notify in writing the competent authorities of" the supervised entity "in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in" relevant articles of the amended directives.

The survey reveals that the following concepts used in the definition of the notification requirement can potentially cause inconsistent application among the Member States:

- The notion of "*indirect qualifying holding*" is not defined in the Directive. Although the 3L3 Guidelines provide some clarification of what constitutes an indirect holding[12], the Member States largely rely on the concepts in their respective national laws. The survey of competent authorities shows that, as a result, different methods are employed to establish the existence of indirect shareholding and hence different interpretations exist as to whether a proposed acquisition of a qualifying holding has to be notified or not. The results of the public consultation confirm that different approaches are taken by the competent authorities of the Member States to determine the existence of an indirect holding, thus leading to a different treatment of similar situations.

- The definition of the notion "*persons acting in concert*" is also not provided in the Directive. The 3L3 Guidelines provide for a very broad explanation of what persons are deemed to be acting in concert[13]. The survey shows that the interpretation of this notion can be divergent to a limited extent. The need for further clarification has been also expressed in the stakeholders' responses to the public consultation. The public consultation also reveals that differences

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10 Article 10, paragraph 3 MiFID; Article 19, paragraph 1 CRD; Article 57, paragraph 1 Solvency II

11 The Qualifying Holdings Directive amends five sectoral directives by including an identical notification requirement. The term "supervised entity" replaces terms "credit institution", "assurance undertaking", "insurance undertaking", "re-insurance undertaking" and "investment firm", which are used in the sectoral directives.

12 Paragraph 15, point 6 of Appendix I of 3L3 Guidelines.

13 Under point 1 of Appendix I of 3L3 Guidelines " persons are 'acting in concert' when each of them decides to exercise his rights linked to the shares he acquires in accordance with an explicit or implicit agreement made between them".

between the definitions, used in the Qualifying Holding Directive, Takeover Bids Directive[14] and Transparency Directive[15], raise some concerns in the private sector.

- Some national supervisors indicated that the notion of a "decision to acquire" should not be applicable in situations where the acquirer crossed a threshold without taking the conscious decision to do so, for example, in case of inheritance or capital reduction of the issuer However it is explained in the 3L3 Guidelines that "notification is also required if the acquirer involuntarily crosses a threshold". The lack of clarity between the provision in the Directive and the explanation provided in the 3L3 Guidelines, as well as the potential risk for uneven application it can cause, was noted in one of the responses to the public consultation.

12. Second, it appears that further action is needed to ensure coherent application of the proportionality principle. The principle is mentioned in recitals 5, 8 and 9 of the Qualifying Holding Directive. Paragraph 18 of the 3L3 Guidelines further clarifies the application of the proportionality principle:

"This principle, which is mentioned in recitals 5, 8 and 9, applies both to the composition of the required information and the assessment procedures. The type of information required from the acquirer may be influenced by the particularities of the acquirer (legal vs. natural person, supervised financial institution vs. other entity, whether or not the financial institution is supervised in the EEA or an equivalent third country, etc.), the particularities of the proposed transaction (intra-group vs. “external” transaction etc.), the degree of involvement of the acquirer in the management of the target financial institution, or the level of the holding to be acquired."

However the results of the public consultation provide for some evidence that national supervisory authorities do not sufficiently apply the proportionality principle both in terms of the information required and the assessment procedure. In particular, concerns have been raised regarding the assessment of intra-group transactions[16]. The survey shows that in such cases the assessment procedure is not always consistent. Some Member States apply a "light-version" of the procedure in such cases or even do not always require a formal notification for intra-group transactions within cross-border banking groups; in contrast, some other Member States, based on the stakeholders' responses to the public consultation, assess all intra-group transactions in the same way as the rest of the notifications. In the view of the private

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14 Article 2(1) (d) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142 of 30.4.2004, p. 12.

15 Article 10(a) of Directive 2004/109/EC of the European Parliament and of the Council 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, OJ L 390 of 31.12.2004, p. 38. Available at: http://eur-lex.europa.eu/Result.do?T1=V3&T2=2004&T3=109&RechType=RECH_naturel&Submit=Search

16 Under paragraph 19 of 3L3 Guidelines "the proportionality principle implies that in the case of intra-group transactions within the group of an existing shareholder without any real or substantial change in the direct or ultimate shareholding of the financial institution, adequate information should be provided to the target supervisor. On the other hand, the shareholder's group should not be re-assessed since the transaction does not affect the influence it exercises over the financial institution".

sector representatives who participated in the public consultation, this constitutes an unnecessary burden.

13. Third, it appears that some assessment criteria laid down in the Qualifying Holdings Directive need to be further clarified. Under the Directive the national supervisory authorities are required inter alia to assess *"the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the [financial institution] in which the acquisition is proposed."*[17] The 3L3 Guidelines[18] also explain the purpose of this assessment criterion and provide an indicative list of the information required for assessing the financial soundness of the proposed acquirer. However the survey and the public consultation show that documents required by the national supervisory authorities for the assessment differ among the Member States. It also appears that it is not sufficiently clear whether the solvency of the proposed acquirer should be assessed under this criterion. Finally, there are some indications that the use of own funds versus borrowed funds is interpreted inconsistently.

14. Furthermore, it appears that at least for a few national supervisory authorities it has not been fully clear what constitutes money laundering and terrorist financing when assessing *"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/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof"*.[19] One Member State pointed out the difficulty in ensuring the transparent application of this assessment criterion due to the sensitive nature of the information involved.

15. Fourth, some inconsistencies have been observed with regard to the application of the provisions of the Directive on the time limits. It is provided in the Qualifying Holdings Directive that[20]:

"The competent authorities shall, promptly and in any event within two working days following receipt of the notification..., as well as following the possible subsequent receipt of the information..., acknowledge receipt thereof in writing to the proposed acquirer.

The survey shows that the acknowledgement of the receipt is understood differently by the national supervisory authorities, i.e. in some Member States it is interpreted as a formal confirmation not involving any assessment of the received documents while in other Member States the acknowledgement is issued after the national supervisory authorities has examined the completeness of the information provided in the received documents. Furthermore, the Directive provides that[21]:

"The competent authorities shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents

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17 Article 10b, paragraph 1, letter c MiFID; Article 19a, paragraph 1, letter c CRD; Article 59, paragraph 1, letter c Solvency II

18 Paragraph 56-66.

19 Article 10b, paragraph 1, letter e MiFID; Article 19a, paragraph 1, letter e CRD; Article 59, paragraph 1, letter e Solvency II

20 Article 10a, paragraph 1 MiFID; Article 19, paragraph 2 CRD; Article 58, paragraph 1 Solvency II

21 Article10a, paragraph 1 MiFID; Article 19, paragraph 2 CRD; Article 58, paragraph 1 Solvency II

required by the Member State to be attached to the notification... to carry out the assessment."

The survey provides some evidence that in some Member States this time limit has been exceeded. Most national supervisory authorities recommended a prolongation of the time limits. On the other hand, the results of the public consultation reveal that private sector stakeholders consider this time limit as being too long and would instead be in favour of shortening it, at least when the acquirer is an EU regulated entity and in the cases of intra-group transactions.

16. Fifth, diverging practices among the Member States as regards conditional approvals of the acquisitions have been observed. The results of the survey showed that in some Member States all proposed acquisitions are approved subject to conditions, while in other Member States the Directive is interpreted as not allowing conditional approvals.

17. Sixth, the survey reveals that the cooperation between different (sectoral and/or national) supervisory authorities is perceived in some cases as formalistic and time-consuming. It appears also that diverging approaches are taken by the competent authorities in different Member States towards the type and comprehensiveness of the information requested from the concerned competent authorities. Furthermore, cooperation with third country supervisory authorities is sometimes perceived as inefficient. The need further to improve cooperation between the competent authorities has been also expressed in several responses to the public consultation.

18. Furthermore, in order to ensure greater convergence of the assessment of proposed acquisitions of qualifying holdings in all areas of the financial sector and to further develop the single market, several stakeholders were in favour of extending the framework to market segments that are currently not covered by the Directive, in particular regulated markets.

19. Finally, the financial crisis has demonstrated that mergers and acquisitions – at least in the banking sector – can lead to financial stability risks. Currently the Directive does not contain an explicit assessment criterion allowing competent authorities to assess the impact of the proposed acquisition on the stability of the financial system. However, financial stability is implicitly addressed by the assessment criteria of the Directive. In particular, the criteria on financial soundness of the proposed acquirer and on compliance with prudential requirements implicitly encompass the assessment of financial stability risks since both criteria have a forward looking element.

It can be noted that an explicit financial stability criterion has been introduced in the US with the Dodd-Frank Act and already been applied when assessing the proposed acquisitions. The results of the public consultation show that, in general, the need to assess the potential impact of the proposed acquisition on the stability of the financial system is recognized by the stakeholders. On the other hand, the survey reveals that the competent authorities have diverging views regarding the need for an explicit financial stability criterion; although it is broadly agreed that financial stability risks have to be taken into account when assessing the proposed acquisitions.

4. CONCLUSIONS

20. The review of the application of the Qualifying Holdings Directive shows that, overall, the regime created by the Directive is working satisfactorily. No substantial compliance issues have emerged in relation to the application of the legal framework in the Member States and the Directive has contributed to the uniform treatment of national and cross-border acquisitions of qualifying holdings in the financial sector. However, it has to be kept in mind that the Directive only started to be applied in 2009 and that due to the economic and financial crisis, the circumstances in the financial sector have been exceptional. It is therefore difficult accurately to assess the effectiveness of the established legal framework for the assessment of mergers and acquisitions in the financial sector.

21. Nevertheless, some shortcomings in the application of the Directive could be addressed to ensure consistent application throughout the EU and across financial sectors and to provide acquirers with more legal certainty. One way to address identified inconsistencies in the application could consist in asking the ESAs to update and clarify the 3L3 guidelines. Such a clarification could, for instance, provide more precise guidance on how to apply the proportionality principle; deal with indirect holdings; apply the time limits; and, ensure that the assessment criteria are interpreted and applied consistently in Member States and cross-sectorally. The Commission intends to ask the ESAs to further clarify the existing guidelines.

22. In order to tackle coordination problems between national supervisory authorities in case of cross-sectoral or cross-border transactions, the ESAs are empowered to develop draft regulatory and implementing technical standards, as already provided for in Directive 2010/78/EU, in order to correct for coordination problems between national supervisors and reduce uncertainties as regards the information that has to be sent to supervisors for the assessment of proposed acquisitions.

23. The Action Plan on Corporate Governance and Company law of 12 December 2012 addresses the issue of acting in concert. The Commission recognises the need for guidance to clarify the conceptual boundaries and to provide more certainty on this issue in order to facilitate shareholder cooperation on corporate governance issues. During 2013 the Commission will work closely with the competent national authorities and ESMA with a view to developing guidance to clarify the rules on acting in concert, notably in the context of the rules applicable to takeover bids. Taking into account progress made in this work, the Commission will consider with the ESAs what further action (if any) may be needed to address specific issues arising from the application of the concept of acting in concert in the context of the Qualifying Holdings Directive.

24. Furthermore, it might be considered – in light of the financial crisis – to incorporate financial stability aspects more explicitly in the assessment process. This could be achieved by introducing a resolvability assessment before the transactions take place. The Commission intends to carry out an analysis in the course of 2013 assessing the different options, including the need to frame such a criterion in a way that avoids divergent implementation by competent authorities.

25. In line with the objectives of the Qualifying Holdings Directive, a similar legal framework for the assessment of acquisitions and increase of holdings could also be

introduced for regulated markets, as defined in Article 4 paragraph 1 point 14 of MiFID.

26. The currently negotiated proposal for a Council Regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions provides for the ECB to carry out, in close cooperation with national competent authorities, the assessment of applications for the acquisition and disposal of qualifying holdings. The ECB will base its decision on the suitability of the proposed acquirer and the financial soundness of the proposed acquisition on the assessment criteria set out in the Qualifying Holdings Directive and in accordance with the procedure and within the assessment periods set out therein as well as the respective national law transposing the relevant Union law. The scope of the ECB's competences is limited to credit institutions established in participating Member States. No amendments to the Directive are necessary in consequence of the proposed competence of the ECB for assessing applications for the acquisition and disposal of qualifying holdings.

27. Member States, the European Parliament, the European Economic and Social Committee and other interested parties are invited to submit their views on the review described in this report by 31 March 2013. Based on the received comments and the results of the analysis mentioned in paragraph 23, the Commission will communicate by the end of 2013 if the regime for the assessment of qualifying holdings needs to be reinforced.

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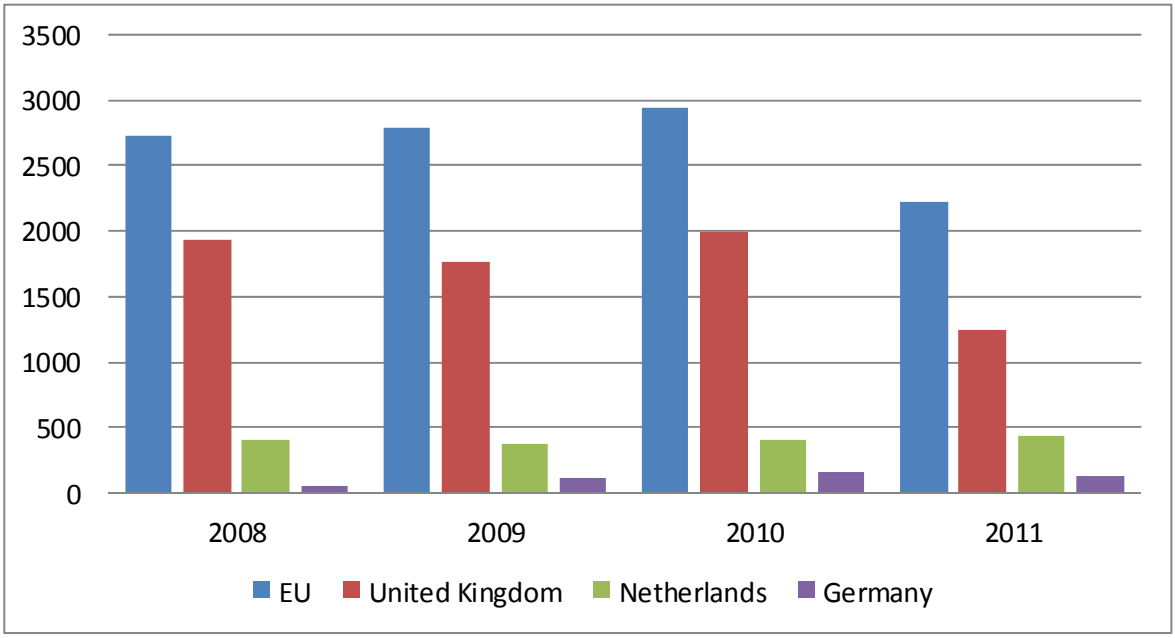
Figure 1: Number of notifications in the EU 2008-2011[22]



[22] The Commission received statistical data from 25 Member States. Furthermore, the data on acquisitions of qualifying holdings in UCITS management companies has been included in the responses by several Member States. An obligation to notify the proposed acquisition of qualifying holding in UCITS management companies is imposed under Article 11(1) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 320 of 17.11.2009, p.32. Available at: http://eur-lex.europa.eu/Result.do?T1=V3&T2=2009&T3=65&RechType=RECH_naturel&Submit=Search

Figure 2: Percentage of withdrawn notifications and prohibited acquisitions in EU 2008-2011