

A Legislator's Job Is Never Easy

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Spring 2005. While Italy's many treasures and delicacies were attracting the first holidaymakers of the season, the Dutch banking group ABN AMRO was fighting a complicated takeover battle involving the Italian bank Banco Antonveneta. The story is well known. The practices to frustrate ABN AMRO's attempts to acquire Antonveneta even resulted in prosecution of a number of high ranking officials. The governor of the Italian central bank had to resign. The CEO of the competing purchaser of Antonveneta shares, Banco Popolare di Lodi, stepped down as well. Rumour has it that he is now contemplating a career as a poet.

The EU legislator responded by issuing Directive 2007/44/EC (informally dubbed the 'Antonveneta Directive'). The Directive amends the procedures and tests that must be applied by Member States when approving acquisitions of financial institutions. Given the background, it is no surprise that the Directive provides for increased procedural transparency, shorter approval deadlines and a limited number of grounds on which approval for an acquisition can be withheld.

The Directive requires that approval may only be withheld on the basis of (a) the reputation of the acquirer; (b) the reputation and experience of management of the financial institution post-acquisition; (c) the financial soundness of the acquirer; (d) the indication that the financial institution will no longer be able to comply with applicable capital and other prudential requirements; or (e) the risk of money laundering or terrorism financing. More general grounds of refusal such as an 'undesirable influence on the target', or a 'detrimental effect on the financial system' which exist in some Member States are no longer allowed. In addition, approval may not be withheld with a reference to the 'economic needs of the market'.

Not very long after the Antonveneta adventure, the hunter became the hunted. ABN AMRO was acquired by a consortium consisting of Royal Bank of Scotland, Banco Santander and Fortis. The consortium is in the process of dividing the bank into three pieces. And that was not the end of it. As part of a capital support transaction with the Dutch State, Fortis transferred its part to the Dutch State.

Now, two years after the entry into force of the Antonveneta Directive, banks and their clients, shareholders and regulators are still recovering from the blows the financial crisis delivered to the banking system. In addition, the ABN AMRO story demonstrated the consequences large takeovers in the banking sector can have. Which includes the disappearance altogether of entire banks.

As a result of the current events, the liberalization of takeovers in the banking sector is no longer high on the agenda of many Member States. Quite the contrary: the European Commission recently announced that it is considering allowing governments to expropriate banks when necessary. A proposal is expected in October. Nevertheless, the provisions of the Antonveneta Directive promoting such liberalization must be applied as of 21 March of this year.

Unless, of course, the EU would issue a new Directive which would abandon or modify the approach of the Antonveneta Directive. But this will take at least several years to draft, adopt and implement. And at that time, things may look different again.