FSMA
FINANCIAL SERVICES AND MARKETS AUTHORITY

Communication

Communication FSMA_2017_18 of 29/09/2017

Communication to persons intending to acquire, increase, reduce or dispose of a qualifying holding in the capital of regulated entities

Scope:

All natural and legal persons intending to acquire, increase, reduce or dispose of a qualifying holding in the following entities (hereafter collectively referred to as "regulated entities"):
- portfolio management and investment advice companies;
- management companies of undertakings for collective investment;
- management companies of public alternative investment funds.

Summary/Objectives:

This Communication aims to provide any person who has decided to acquire, increase, reduce or dispose of a direct or indirect qualifying holding in a regulated entity subject to the supervision of the FSMA with all the information necessary for the smooth conduct of the prudential assessment of their proposal.

Structure:

b) Assessment period
c) Additional information and suspension of the assessment period
d) Assessment criteria
e) Notification of the FSMA's decision to the proposed acquirer
f) Acquisition carried out before the FSMA's decision has been made known or before the end of the assessment period
g) The right of appeal against an decision to object by the FSMA
h) The FSMA's power to conduct ongoing supervision

5. Entry into force and repealing measure

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1. Introduction

From a prudential point of view, it is essential that persons who are likely to exercise a significant influence over the management of regulated entities by virtue of their direct or indirect holdings in the capital of such entities should have the qualities necessary to consider that they will exercise this influence in such a way as to promote a sound and prudent management of these entities.

Not only is this prudential requirement a condition for authorization to be granted, but it continues to apply afterwards, as evident notably in the need to perform a prudential assessment of the qualities of natural persons or legal entities that have decided to acquire or significantly increase a holding in the capital of a regulated entity. However, this a prudential assessment must be performed in such a way that it does not unduly hinder acquisitions in the financial sector.

On 5 May 2017, the European Supervisory Authorities, namely EBA, ESMA and EIOPA, published Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector[1] (hereafter "Joint Guidelines").

The FSMA has signed on to these Joint Guidelines, and this Communication is thus intended to incorporate them into its supervisory practice. The Joint Guidelines are thus an integral part of this Communication, and are annexed hereto (Annex 7).

[1] These Joint Guidelines repeal and replace the guidelines published on the same subject by the previous European supervisory authorities (CEBS, CESR and CEIOPS) in 2008.

2. Situations where the FSMA must be notified of a decision to acquire or dispose of a holding

a) Notifications of an acquisition giving rise to a prudential assessment

Pursuant to the Belgian supervisory legislation that applies to the entities mentioned above[2], there is a legal obligation to notify the supervisory authority of a decision to acquire shares or shareholder rights in a regulated entity, and such notification gives rise to a prudential assessment by the FSMA in cases where, as a result of this acquisition, the acquirer:

- will have a "qualifying holding" in that regulated entity; or
- will increase an existing qualifying holding in such a way that the proportion of the voting rights or of the capital held will reach or cross the thresholds of 20%, 30% or 50%, or that the regulated entity will become its subsidiary.

It should be emphasized that the notification and the prudential assessment to which the acquisition gives rise must, by law, take place prior to the actual acquisition of the shares or shareholder rights.

The concept of "qualifying holding" is defined in law as[3]: "t*he direct or indirect holding of at least 10 per cent of a company's capital or of the voting rights attached to the securities issued by that company, or any other possibility of exercising a significant influence on the management of the company in which an interest is held; voting rights shall be calculated in accordance with the provisions of the Law of 2 May 2007 on disclosure of major holdings and of its implementing decrees; voting rights or shares held as a result of the underwriting of financial instruments and/or of the placing of financial instruments on a firm commitment basis are not taken into account, provided that, on the one hand, these rights are not exercised or used for any other purpose than to intervene in the management of the issuer and, on the other, that they are disposed of within a year of their acquisition.*"

It should be emphasized that, in light of the criterion of significant influence on management, the acquisition of a holding representing less than 10% of the capital or voting rights may give rise to a notification obligation and to a prudential assessment of the proposed acquirer. For the concept of significant influence, please see point 5 of the Joint Guidelines attached here as Annex 7, where it is explained in detail.

As regards the factors to take into account when assessing whether a decision to acquire has been made and the involuntary crossing of a threshold, please see point 7 of the attached Joint Guidelines.

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[2] Law of 25 October 2016 on access to the business of investment services and on the supervision of portfolio management and investment advice companies (Article 31).
Law of 3 August 2012 on undertakings for collective investment meeting the conditions of Directive 2009/65/EC and on undertakings for investment in receivables (Article 207).
Law of 19 April 2014 on alternative investment funds and their managers (Article 321).

[3] Law of 25 October 2016 on access to the business of investment services and on the supervision of portfolio management and investment advice companies (Article 2, 27°).
Law of 3 August 2012 on undertakings for collective investment meeting the conditions of Directive 2009/65/EC and on undertakings for investment in receivables (Article 3, 32°).
Law of 19 April 2014 on alternative investment funds and their managers (Article 3, 56°).

b) Notification of disposals of shareholder rights that constitute a qualifying holding

The provisions of the law also require that anyone with a qualifying holding must notify the FSMA of its decision to reduce its qualifying holding in such a way that it will no longer be a qualifying holding, or that the proportion of the voting rights or of the capital held will fall below the thresholds of 20%, 30% or 50% or that the regulated entity will cease to be its subsidiary.

Notification is required regardless of the modalities of the transaction in question. That is, it makes no difference whether the transaction is made for consideration or gratuitously.

As in the case of an acquisition or increase of a qualifying holding, so in the case of a disposal, notification must be made prior to the actual disposal proposed by the shareholder. The one disposing of the holding must inform the FSMA of the identity of its acquirer. The notification is intended to inform the FSMA of the proposed change in the shareholding structure of the regulated entity in question, and to enable it to carry out, where necessary, a prudential assessment of that change.

c) Notification, solely for information purposes, of acquisitions or disposals of shareholder rights (threshold of 5%)

Besides the aforementioned obligation to notify the FSMA in view of a prudential assessment of the proposed acquisition, the relevant legislation also requires acquirers of non-qualifying holdings to notify the FSMA of such an acquisition for purely informational purposes where the proportion of the voting rights or of the capital held in the regulated entity reaches or crosses the threshold of 5%.

Similarly, anyone holding shares or shareholder rights in a regulated entity that confer on the holder more than 5% of the voting rights or of the capital but that do not constitute a qualifying holding is required to notify the FSMA of a disposal of all or part of his/her shares or shareholder rights that causes the percentage of capital or of voting rights held to fall below the threshold of 5%.

Unlike in the case of the above-mentioned notifications, which give rise to a prudential assessment, purely informational notifications of acquisitions and disposals of shareholder rights that give rise to a crossing of the 5% threshold need not be made prior to the actual acquisition or disposal. The legal provisions allow for the notification to be made within 10 working days of the acquisition or disposal.

Notifications for information purposes are intended specifically to provide the FSMA with an up-to-date view of the shareholding structure of regulated entities and to ensure, in cases where holdings of less than 10% of the capital and of voting rights are being acquired, that these do not constitute "qualifying holdings" within the meaning of the law.

Where appropriate, if it appears from the FSMA's examination of the capital structure of the regulated entity concerned, the acquisition procedures, the agreements between shareholders, or any other relevant circumstances that the acquirer will exercise a significant influence over the management of the regulated entity as a result of its acquisition or of acting in concert with others, the FSMA will invite the acquirer to submit as soon as possible all the information necessary for the legally mandated prudential assessment.

d) Acquisition or disposal of an "indirect" holding

The above-mentioned notification obligations apply to acquisitions and disposals of both direct and indirect holdings.

Please see point 6 of Annex II of the Joint Guidelines attached here as Annex 7 of this Communication for the specific tests to be carried out in order to determine whether an indirect holding may be considered as qualifying, and the size of the said holding. These tests are based on the control criterion and the multiplication criterion.

If the tests show that an indirect holding can be considered a qualifying holding, the persons who have acquired or disposed of that indirect qualifying holding are required to notify the FSMA.

e) Parties acting in concert

Where several people act in concert, voting rights and shares in the capital held by these persons must be added up to determine whether the thresholds defined by the Law have been crossed.

The factors to be taken into account to determine whether the persons acting in concert are set out in point 4 of the attached Joint Guidelines.

f) Proportionality principle

Point 8 of the Joint Guidelines specifies the implications of the proportionality principle in the context of the prudential assessment of the proposed acquirers.

Specifically, the FSMA highly recommends that those proposing an acquisition or a disposal contact its offices prior to making the official notification of their decision to acquire or to dispose of qualifying holdings in a regulated entity. The benefit of such informal prior contact is to identify the specific information that the proposed acquirer will need to attach to the notification in order for the dossier to be complete.

3. Formalities to be completed by the person proposing an acquisition or disposal

a) Official notification to the FSMA

The notification of a decision to acquire shares or shareholder rights in a regulated entity must be made using the forms attached to this Communication:

- Form A: statement by natural persons of acquisitions or increases of qualifying holdings;
- Form B: statement by legal entities of acquisitions or increases of qualifying holdings;
- Form C: statement by trusts or other similar legal constructions of acquisitions or increases of qualifying holdings;
- Form C*bis*: individual statement supplementary to the statement referred to in Form C;
- Form D: statement relating to a disposal or reduction of a qualifying holding;
- Form E: statement relating to acquisitions, increases or disposals of securities or units whereby the threshold of 5% of voting rights or capital is crossed;

It should be noted that notification forms A through E are identical to those that were joined to the previous Communication, CBFA_2009_31 of 18 November 2009. All these forms will be updated in the near future in order to take into account the work undertaken by ESMA to harmonize the content of these forms.

The notification may be submitted in French, Dutch or English. The notification, along with the information dossier that is to accompany it, should be sent by post to the FSMA at the following address:

FSMA - OPM Service
rue du Congrès/Congresstraat 12-14,
1000 Brussels

Moreover, in the interest of the efficient handling of the notification, an electronic copy should be submitted at the same time to the following email address: opm@fsma.be.

b) Joint statements and notification through a representative

1) Parties acting in concert

In the case of persons acting in concert, the legal notification obligation applies to each of the persons. Nevertheless, the FSMA recommends that these persons authorize one representative to make a single notification, in their name and on their behalf, covering all shares or shareholder rights involved in the action in concert.

The joint notification should contain, on the one hand, the information relating to the totality of the shares or shareholder rights that are the subject of the action in concert and, on the other hand, the identification details of each person taking part in the action in concert, as well as the information on the individual holdings of each person involved in the action in concert where these holdings reach or exceed 5% of the capital and/or voting rights of the regulated entity.

If one of these persons also holds, directly or indirectly, shares or shareholder rights in the same regulated entity and can use them freely outside of the action in concert, that person shall submit this information separately and simultaneously to the FSMA, unless the information is already contained in the joint statement by the persons acting in concert.

2) Indirect holdings

In the case of indirect holdings, the legal notification obligation applies to each of the entities within the holding chain. However, all of the individual obligations may be fulfilled by the action of one of these entities, provided that each entity in the chain in whose name and on whose behalf notification is made to the FSMA is clearly identified. A combined notification of this kind presupposes that each entity in question gives the entity making the notification a mandate to do so in its name and on its behalf.

A combined statement may be made by the highest link in the chain of qualifying and controlling holdings. Joint notification may also be made to the FSMA by the proposed acquirer of a direct holding in the regulated entity, on behalf of all the entities that, through this direct holding, will have an indirect holding in the said regulated entity.

A combined notification must in any event provide the relevant information on the chain of qualifying and controlling holdings through which a qualifying holding will be held indirectly. This information may be provided in the form of a diagram indicating the percentage held by each participant, as well as the number and type of securities concerned.

It should be remembered as well that, in such a case, the FSMA may consider that the totality of the entities along the chain meet the legal criteria for prudential assessment if the entity that is at the top of the chain and the one with the direct holding in the regulated entity fulfil them (see point 6 of the Joint Guidelines). Prior contact by the notifier with the FSMA is especially advisable if the notifier wishes the FSMA to implement the above procedure.

3) Possibility of notification through a representative

Persons required to make a notification may entrust a representative to make this notification in their name and on their behalf. In that case, the representative will attach to the notification a copy of the mandate given him/her by the persons in the name of and on behalf of whom he/she is acting.

4. Procedure and assessment criteria applied by the FSMA to a notification of acquisition or increase of a qualifying holding

a) Acknowledgement of receipt for a notification of acquisition or increase

As soon as a notification and the information dossier that must be attached have been received, the FSMA first checks whether all the required information is contained in the notification, before proceeding to an exhaustive analysis of its contents.

If the notification is not complete, the FSMA informs the proposed acquirer of the information that is missing. In such a case, the assessment period defined by the legal provisions does not begin to run.

If the FSMA determines that the information dossier accompanying the notification of the decision to acquire or increase a qualifying holding is complete or has been adequately completed, it will acknowledge receipt within two working days, in accordance with the legal provisions, and will indicate in this acknowledgement of receipt the date when the assessment period will end.

b) Assessment period

The rules governing the assessment period are laid down in the Belgian supervision laws and specified in point 9 of the Joint Guidelines.

Pursuant to the legal provisions, and unless the FSMA has asked the proposed acquirer to provide additional information (see below), the assessment period is legally set at 60 working days, starting on the date of the FSMA's acknowledgement of receipt of the notification. The end of the assessment period thus calculated is indicated in the FSMA's acknowledgement of receipt of the proposed acquirer's notification (see above).

c) Additional information and suspension of the assessment period

The FSMA may at any time in the course of the assessment process request in writing that the proposed acquirer submit any additional information that the FSMA may judge necessary, in light of the initial information provided, in order to enable it to carry out in a fully informed manner the prudential assessment of the proposed acquisition from the perspective of the prudential criteria stipulated by law.

It should be emphasised that requests for additional information will generally concern items not included in the initial list of required information and will be intended in general to help reach a better understanding or better assessment of the initial information.

It is important that the proposed acquirer promptly provide the additional information requested, in order to avoid an unnecessary extension of the transition period (see below). It should also be emphasized that if the proposed acquirer should fail to provide the additional information requested by the FSMA, the latter may object to the acquisition inasmuch as the additional information is necessary to enable it to assess the proposed acquisition in light of the legal assessment criteria.

When the additional information requested is sent to the FSMA, the latter will acknowledge receipt and specify therewith the new date for the end of the assessment period, taking into account the suspensive effect of the request for additional information.

The assessment period is suspended between the date of the FSMA's request for additional information and the date when it receives the requested information, provided that the request for additional information is made at the latest by the fiftieth working day of the assessment period.

This suspension period is limited, as a rule, to 20 working days. The FSMA may nevertheless decide to extend the suspension period to a maximum of 30 working days if the proposed acquirer is established outside the European Economic Area or if, although established within the European Economic Area, it is not subject to legislation on prudential supervision of the financial sector. In that case, the request for additional information made by the FSMA to the proposed acquirer shall also mention the FSMA's decision to extend the suspension period to 30 working days.

It should be noted that the FSMA may make a further request for additional information at a later date, or may make such a request after the fiftieth day of the assessment period. In that case, however, such requests for additional information do not suspend the assessment period. The FSMA will only make such subsequent or late requests by way of exception, where the additional information in question seems to it to be indispensable for a correct prudential assessment of the project. It is, therefore, in the proposed acquirer's interest to respond to such requests correctly and diligently.

d) Assessment criteria

The FSMA then carries out a prudential assessment of the proposed acquisition from the sole perspective of the criteria laid down for the purpose by law. By way of a reminder, the list of those criteria is as follows:

a/ the reputation of the proposed acquirer;

b/ the reputation and experience of any person who will direct the business of the regulated entity following the proposed acquisition;

c/ the financial soundness of the proposed acquirer;

d/ the capacity of the regulated entity to continue to meet the prudential obligations resulting from its status after the proposed acquisition; and

e/ the absence of any suspicion of money laundering or terrorist financing relating to the acquisition.

Points 10 through 14 of the Joint Guidelines are devoted to articulating a common understanding of the precise scope of each of the five prudential criteria. The FSMA will refer therefore to this cross-sectoral and EU-wide document when it proceeds to evaluate the persons intending to acquire or increase their qualifying holdings in regulated entities governed by Belgian law.

e) Notification of the FSMA's decision to the proposed acquirer

Where, based on its analysis of the information available to it, the FSMA decides to object to the acquisition decided by the proposed acquirer, it must justify its decision and inform the proposed acquirer thereof within two working days of having taken the decision, and at the latest on the last day of the assessment period, taking into account, where applicable, any suspension of that period.

In the absence of such a decision taken by the FSMA by the end of the assessment period, the proposed acquisition will be deemed to have been approved. Although the legislation does not provide for this expressly, the FSMA will also notify the proposed acquirers of its decisions not to object to proposed acquisitions that are submitted to it for prudential assessment.

f) Acquisition carried out before the FSMA's decision has been made known or before the end of the assessment period

Where a proposed acquirer fails to make the requisite prior notification, or if he/she carries out the proposed acquisition or increase of a qualifying share despite being informed of the FSMA's objection, the law authorizes the FSMA to initiate legal proceedings before the President of the Commercial Court, acting in summary proceedings, in view of taking measures as provided for in Article 516, §1, of the Code on Companies.

These measures may include:

1° formally suspending, for a period of a maximum of one year, the exercise of all or part of the rights attaching to the securities in question;

2° suspending, for a period to be set by the FSMA, the holding of a general meeting that has already been convened;

3° ordering the sale, under its supervision, of the securities concerned to a third party not linked to the current shareholder, within a period to be set by the FSMA and that is renewable.

Moreover, the FSMA may demand the cancellation of all or part of the deliberations of a general meeting held after the date of the acquisition.

Furthermore, attention is drawn to the fact that it is a criminal offence for a proposed acquirer deliberately to fail to make the legally required notifications or to act in spite of the FSMA's objection.

Thus a proposed acquirer who decides to execute the proposed transaction without waiting to be notified of the FSMA's decision or before the end of the assessment period will incur legal consequences should the FSMA subsequently decide to object to the transaction in question[4].

Where circumstances require that the terms and procedures for an agreement between the person disposing and the person acquiring be set down in writing without waiting for the FSMA's decision or the end of the assessment period, it is strongly recommended that this agreement be accompanied by the suspensive condition that no objection by the FSMA is issued within the period set down by law.

[4] It should be noted that the same legal consequences may also apply to shareholders who have involuntarily crossed a legal threshold - that is, without having carried out any acquisition, subscription or disposal of securities or any other legal act whatsoever - and who, although aware of this crossing, neglected to make a notification and to submit the requisite information to the FSMA; such legal consequences may also apply to shareholders who, alerted by the FSMA of their involuntary crossing of a threshold, neglect to respond to its request to regularize their situation.

g) The right of appeal against a decision to object by the FSMA

In accordance with Article 14 of the consolidated laws governing the Council of State, an appeal to the Council of State (rue de la Science/Wetenschapsstraat 33, 1040 Brussels) may be lodged by proposed acquirers against a decision taken by the FSMA to object to their proposed acquisition.

h) The FSMA's power to conduct ongoing supervision

In addition to the legal provisions that require the FSMA to conduct a prudential assessment of proposals to acquire, increase or dispose of some or all qualifying holdings, the prudential laws[5] also confer upon the FSMA powers it may use, independently of any change in shareholding structure, in respect of shareholders in regulated entities whom it has reason to believe exercise an influence that is liable to compromise the management of the said entities.

In order to enable the FSMA to carry out this ongoing supervision, any new items of information that may have a material impact on its assessment of the 5 criteria set out in point d) above must be communicated to the FSMA without delay.

5. Entry into force and repealing measure

This Communication enters into force on 1 October 2017.

It repeals and replaces Communication CBFA_2009_31 of 18 November 2009 to persons intending to acquire, increase, reduce or dispose of a qualifying holding in the capital of financial institutions. An updated version of the forms in annex to the aforesaid Communication will be provided later, in order that they may take into account the work, at European level, regarding the harmonization of the forms.

Yours sincerely,

The Chairman,

Jean-Paul SERVAIS

[5] Law of 25 October 2016 on access to the business of investment services and on the supervision of portfolio management and investment advice companies (Article 32).
Law of 3 August 2012 on undertakings for collective investment meeting the conditions of Directive 2009/65/EC and on undertakings for investment in receivables (Article 208).
Law of 19 April 2014 on alternative investment funds and their managers (Article 322).

Annexes:

- *FSMA_2017_18-1 / Form A: statement by natural persons of acquisitions or increases of qualifying holdings*
- *FSMA_2017_18-2 / Form B: statement by legal entities of acquisitions or increases of qualifying holdings*
- *FSMA_2017_18-3 / Form C: statement by trusts or other similar legal constructions of acquisitions and increases of qualifying holdings*
- *FSMA_2017_18-4 / Form Cbis: individual statement supplementary to the statement referred to in Form C*
- *FSMA_2017_18-5 / Form D: statement relating to a disposal or reduction of a qualifying holding*
- *FSMA_2017_18-6 / Form E: statement relating to acquisitions, increases or disposals of securities or units whereby the threshold of 5% of voting rights or capital is crossed*
- *FSMA_2017_18-7 / Joint guidelines of the ESAs (EBA, EIOPA and ESMA) on the prudential evaluation of acquisitions and increases in qualifying holdings in financial sector entities published on 5 May 2017*