CBFA

BANKING, FINANCE AND INSURANCE COMMISSION

Circular CBFA_2009_32 of 18 November 2009

Circular to financial institutions on acquisitions, increases, reductions and disposals of qualifying holdings

Scope:

- credit institutions,
- investment firms,
- management companies of undertakings for collective investment,
- financial holding companies,
- insurance undertakings,
- reinsurance undertakings,
- and insurance holdings

governed by Belgian law.

Summary/Objectives:

As a complement to the legal obligations on disclosure imposed upon proposed acquirers, the prudential laws, as amended by the Law of 31 July 2009, provide for the obligation for financial institutions themselves to report to the CBFA on both an occasional and a periodic basis.
As a complement to the communication from the CBFA to proposed acquirers and shareholders, this circular therefore aims to clarify the procedures for implementing these obligations imposed upon financial institutions themselves.

Structure:

Dear Sir or Madam,

FOREWORD

From a prudential point of view, it is essential that people who are likely to influence the management of financial institutions because of their direct or indirect holdings in the capital of such institutions should have the qualities necessary for the supervisor to consider that they will exercise this influence to promote a sound and prudent management of these institutions.

Not only is this a prudential requirement for the authorization to be granted, but it continues to apply afterwards, inter alia in the need to make a prudential assessment of the qualities of natural or legal persons who have decided to acquire or significantly increase a holding in the capital of a financial institution. Such prudential assessment must however be performed in such a way that it does not unduly hinder acquisitions in the financial sector.

THE NEW LEGAL PROVISIONS

The new provisions introduced in this regard in the various Belgian prudential laws by the Law of 31 July 2009 [1] transpose Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 [2], the aim of which is described above. That Directive carries out maximum European and cross-sectoral harmonization, in particular as regards:

- situations in which a prudential assessment should take place (determination of notification thresholds);
- information required of proposed acquirers to enable prudential assessment, taking into account the principle of proportionality;
- criteria on which the prudential assessment must be conducted, and
- the assessment procedure and deadlines.

Moreover, in order to ensure as uniform an application of the Directive as possible across the various Member States of the European Economic Area and in the different financial sectors concerned, the three committees of prudential supervisors established by the European Commission (namely 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) have developed and issued a joint document entitled *Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC* [3]. That document aims to promote convergence of prudential practices on the part of the supervisors in the various Member States and in the various sectors concerned by the implementation of the Directive. In particular, these supervisors have clarified their common understanding of the evaluation criteria listed in the Directive and have established a joint list detailing what information on the proposed acquirer and its project is necessary for the prudential assessment of proposed acquisitions or increases in qualifying holdings in financial institutions.

A French and a Dutch translation of that reference document and its annexes are also available on the CBFA website.

SCOPE OF THIS CIRCULAR.

This circular relates to acquisitions of, increases and reductions in, and disposals of, qualifying holdings in any financial institution governed by Belgian law to which the new legal provisions inserted into the prudential laws by the aforementioned Law of 31 July 2009 apply, namely:

- credit institutions;
- investment firms;
- management companies of collective investment undertakings;
- financial holding companies [4];
- insurance companies;
- reinsurance companies;
- and insurance holding companies.

These institutions are collectively referred to as "financial institutions" in this circular.

This circular repeals and replaces Circular B 953 of 13 April 1993 to credit institutions governed by Belgian law.

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1 Law of 31 July 2009 transposing Directive 2007/44/EC of 5 September 2007 on procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, Belgian Official Gazette (*Moniteur belge* / *Belgisch Staatsblad*) 8 September 2009.
See also the explanatory statement: *Chambre des Représentants* / *Kamer van volksvertegenwoordigers*, 2008-2009, Doc 52 2011/001: *http://www.lachambre.be/doc/flwb/pdf/52/2011/52k2011001.pdf*

2 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.

3 - *http://www.c-ebs.org/getdoc/09acbe4b-c2ee-4e65-b461-331a7176ac50/2008-18-12_M-A-Guidelines.aspx*
- *http://www.ceiops.eu/media/files/publications/submissionstotheec/MA-Guidelines.pdf*
- *http://www.cesr.eu/index.php?docid=5430*

4 Pursuant to 4, § 3, paragraph 2, of the Royal Decree of 12 August 1994 on the supervision on a consolidated basis of credit institutions, investment firms and management companies of undertakings for collective investment.

THE COMMUNICATION FROM THE CBFA TO PROPOSED ACQUIRERS

Taking into account that the main legal obligations for notification to the CBFA of proposed acquisitions of, increases and reductions in, and disposals of, qualifying holdings rest upon the proposed acquirers and the shareholders themselves, the CBFA has issued on its website the *"Communication CBFA_2009_31 to persons intending to acquire, increase, reduce or dispose of a qualifying holding in the capital of financial institutions,"* dated 18 November 2009, which can usefully be consulted. That communication specifies inter alia the circumstances in which persons intending to acquire or dispose are required to notify their project to the CBFA, and the practical details of the procedure for notification and prudential assessment. Annexes to that communication include the notification forms which the ones who propose the acquisition or disposal are urged to use.

PURPOSE OF THIS CIRCULAR

As a complement to the legal obligations on disclosure imposed upon proposed acquirers, the prudential laws, as amended by the Law of 31 July 2009, provide for the obligation for financial institutions themselves to report to the CBFA on both an occasional and a periodic basis [5].

In addition to the aforementioned communication from the CBFA to proposed acquirers and shareholders, this circular therefore aims to clarify the procedures for implementing these obligations imposed upon financial institutions themselves.

PROCEDURE FOR THE TRANSMISSION OF THE INFORMATION REQUIRED

According to Circular CBFA_2009_16 of 25 March 2009 and Circular CBFA_2009_21 of 20 May 2009, financial institutions should transmit to the CBFA the required information and documents using the eCorporate communication platform.

OCCASIONAL STATEMENTS

Under the aforementioned legal provisions, financial institutions must inform the CBFA as soon as they become aware of any acquisition or disposal of their shares or units whereby the one acquiring or the one disposing crosses a notification threshold as defined by the law. Such is the case where the holding concerned:

- acquires or loses the characteristics of a qualifying shareholding (i.e. a shareholding of more than or equal to 10% of the capital or voting rights, or below this threshold but giving the shareholder a significant influence on the management of the financial institution).
- exceeds or falls below a 20%, 30% or 50% threshold,
- entails that the financial institution becomes or ceases to be the subsidiary of the one acquiring or the one disposing.

Attention is drawn to the fact that although the reporting obligations of the proposed acquirer or of the disposing shareholder on the one hand, and of the financial institution on the other hand, complement each other, they are not identical. Thus, while the proposed acquirers or the disposing shareholders must meet their legal obligation to notify the CBFA prior to the realization of their proposed acquisition or disposal as soon as they have made their decision, the obligation of financial institutions to communicate to the CBFA any acquisition or disposal of their shares or units arises *"as soon as they become aware"* of it. According to the circumstances, such communication may therefore be required prior to the realization of the operation, where the financial institution concerned is informed in advance of the decision of the proposed acquirer or of the disposing shareholder to carry it out. On the other hand, such communication may be required only after the event, if the financial institution becomes aware of the acquisition or disposal of its securities or units after the transaction has effectively been carried out.

Such communications to the CBFA may be based on information obtained from various sources by the financial institution. Thus the requirement for communication to the CBFA applies inter alia where the acquisition or disposal is reported to the financial institution pursuant to Article 515 of the Code on Companies or where the financial institution has to record transfers of registered shares or members' units in the shareholders or membership register. More generally, this obligation shall also apply where

[5] See: - Article 24, § 8, of the Law of 22 March 1993 on the legal status and supervision of credit institutions (hereinafter "the Banking Law").
- Article 23*bis*, § 8, of the Law of 9 July 1975 on the supervision of insurance companies (hereinafter the "Insurance Supervision Law");
- Article 24, § 8, of the Law of 16 February 2009 on reinsurance (hereinafter the "Reinsurance Law");
- Article 67, § 8, of the Law of 6 April 1995 on the legal status and supervision of investment firms (hereinafter the "Investment Firms Supervision Law").
- Article 159, § 8, of the Law of 20 July 2004 on certain forms of collective management of investment portfolios (hereinafter the "UCI Law").

credible information is directly or indirectly communicated to the financial institution outside of any obligation under the law or the institution's articles of association. The CBFA also advises financial institutions to check, after each ordinary or extraordinary general meeting of shareholders, whether the register of attending shareholders shows any changes in the shareholder structure that might require them to make an occasional statement to the CBFA.

In such situations, financial institutions are invited to fill out and send to the CBFA the occasional statement document as attached as Annex CBFA_2009_32-1.

It should further be noted that a financial institution is not exempted from complying with its obligation of occasional statement to the CBFA on the grounds that the proposed acquirer or the shareholder who have decided to transfer all or part of their qualifying shareholding have fulfilled their own legal obligation of prior notification to the CBFA.

As a complement to the legal obligation on occasional reporting of acquisitions and disposals of qualifying holdings by financial institutions, the CBFA also invites them to inform the CBFA promptly, as part of the ongoing dialogue that is necessary for optimal prudential supervision, of any acquisition or disposal of their shares or membership units which, although not falling under the legal obligation of occasional reporting, may have a significant effect on the prudential assessment of the situation of the financial institution. Such is for instance the case where the financial institution becomes aware of an acquisition or disposal whereby the one acquiring or the one disposing has crossed or will cross the 5% threshold, and therefore must itself notify the CBFA for information.

ANNUAL STATEMENTS

The aforementioned legal provisions also provide that financial institutions should communicate at least once a year to the CBFA the identity of their shareholders or members who, directly or indirectly, alone or in concert, own qualifying holdings in their capital, as well as the proportion of capital and voting rights thus held.

Financial institutions are invited to make this annual statement in the month following their ordinary general meeting, based on all sources of reliable information at their disposal, including statements of acquisition or disposal addressed to them pursuant to Article 515 of the Code on Companies, the register of their shareholders or members, and the list of shareholders present at the latest ordinary general meeting.

They are invited to fill out and send to the CBFA the annual statement as attached as Annex CBFA_2009_32-2.

A copy of this circular is being sent to your company's or institution's auditor(s).

Yours faithfully,

Jean-Paul SERVAIS
Chairman

Annexes: - *CBFA_2009_32-1 / Change in the capital and its composition - Occasional statement;*
- *CBFA_2009_32-2 / The capital and its composition - Annual statement.*

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