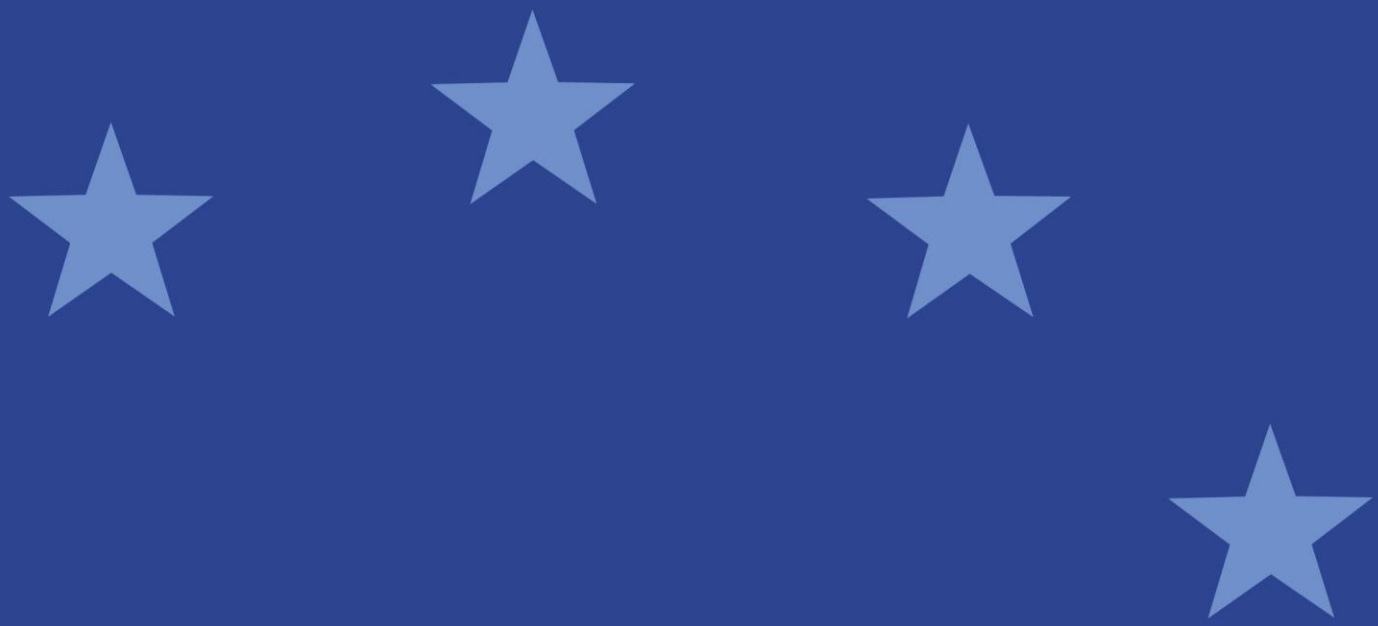
esma European Securities and Markets Authority

Consultation Paper

Draft Regulatory Technical Standards
on information requirements for assessment of acquisitions and increases in holdings in investment firms (MiFID)



8 July 2013 | ESMA/2013/918

European Securities and Markets Authority

Date: 8 July 2013
ESMA/2013/918

Responding to this paper

ESMA invites comments on all matters set out in this consultation paper and, in particular, on the specific questions listed in Annex 1. Comments are most helpful if they:

- indicate the number of the question to which the comment relates;
- respond directly to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives ESMA should consider.

Comments should reach EMSA by **9 September 2013.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal Notice'.

Who should read this paper?

This consultation paper should be read by proposed acquirers of holdings in investment firms as defined in Article 4(1)(1) of MiFID, investment firms, competent authorities and trade bodies.

Contents

Acronyms

CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CESR	Committee of European Securities Supervisors
EBA	European Banking Authority (previously CEBS)
EEA	European Economic Area
EIOPA	European Insurance and Occupational Pensions Authority (previously CEIOPS)
ESMA	European Securities and Markets Authority (previously CESR)
ITS	Implementing Technical Standards
MiFID	Markets in Financial Instruments Directive
RTS	Regulatory Technical Standards

I. Executive summary

Reasons for publication

1. Article 10b(4) of the Markets in Financial Instruments Directive (MiFID[1]) requires Member States to make publicly available the information necessary to carry out the assessment of a proposed acquirer of an investment firm. This information must be provided at the time of the initial notification. This information is aimed at ensuring that competent authorities are provided with adequate and proportionate information in order to assess the acquisition. Article 10a of MiFID, as amended by Article 6(4) of the Omnibus Directive[2], requires ESMA to draft regulatory technical standards (RTS) to establish an exhaustive list of information referred to in Article 10b(4) of MiFID.[3]

2. ESMA is required to submit the draft RTS to the European Commission (Commission) by 1 January 2014.

Contents

3. The proposed RTS set out in this Consultation Paper (CP) are based on the CEBS, CESR and CEIOPS 'Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC'[4] (3L3 Guidelines), as well as the report issued by the Commission (in February 2013)[5] to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions on the application of Directive on acquisitions and increase of holdings in the financial sector.[6]

4. Section II explains the background to the proposals; Section III describes the proposals on the exhaustive list of information to be included by proposed acquirers in their notification.

5. Annex I sets out the legislative mandate to develop draft RTS; Annex II sets out the cost-benefit analysis related to the draft RTS; Annex III lists the questions contained in this CP; and Annex IV sets out the full text of the draft RTS.

Next steps

6. ESMA will consider the responses it receives to this CP in Q4, and will finalise the draft RTS for submission to the Commission by 1 January 2014 for endorsement.

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[1] Directive 2004/39/EC.
[2] Directive 2010/78/EU.
[3] Note that Article 6(4) of the Omnibus Directive mistakenly refers to Article 10a(4) of MiFID, instead of Article 10b(4). The European Commission has launched the procedure to correct the error, with the competent unit of the Council, and a corrigendum is expected to be published before 1 January 2014.
[4] http://www.esma.europa.eu/system/files/08_543.pdf
[5] http://ec.europa.eu/internal_market/finances/docs/committees/130211_report_en.pdf
[6] Directive 2007/44/EC.

II. Background

1. The 'Directive on acquisitions and increase of holdings in the financial sector' (Directive 2007/44/EC), which amended MiFID (among other Directives), provides procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector.

2. The main objectives of Directive 2007/44/EC are to provide the necessary legal certainty, clarity and predictability regarding the assessment process and the role of competent authorities by:

    i. harmonising the information which the proposed acquirer of a holding in a credit institution, assurance, insurance or re-insurance undertaking or an investment firm is required to provide in the notification of its proposed acquisition to the competent authority responsible for the prudential supervision of the target entity (this information is required to allow competent authorities to assess the proposed acquisition in a complete and timely manner);

    ii. defining a clear and transparent procedure for the prudential assessment of the proposed acquisition by the competent authorities, including setting a maximum period of time for the assessment; and

    iii. specifying clear and consistent criteria of a prudential nature to be applied by the competent authorities in the assessment process.

3. In relation to the information to be provided to the competent authorities, the amended Article 10b(4) of MiFID requires Member States to make publicly available the information necessary to carry out the assessment of the proposed acquirer which must be provided at the time of the initial notification.

4. Article 10a of MiFID, as amended by Article 6(4) of the Omnibus Directive, requires ESMA to draft regulatory technical standards (RTS) to establish an exhaustive list of information referred to in Article 10b(4) of MiFID. These RTS must be submitted to the Commission by 1 January 2014. The draft RTS are set out in Annex IV hereto.

5. Article 10a of MiFID, as amended by Article 6(4) of the Omnibus Directive, also requires ESMA to draft implementing technical standards (ITS) to determine standard forms, templates and procedures to be used in the consultation process between competent authorities referred to in Article 10(4) of MiFID. These ITS must also be submitted to the Commission by 1 January 2014. ESMA does not intend on consulting on proposals for these draft ITS, as cooperation between competent authorities is not a topic that requires input from the public.

6. These regulatory and implementing technical standards may be considered again in light of any further work completed by the ESAs in this area.

7. In 2008, CEBS, CESR and CEIOPS (the three Level 3 Committees of European Financial Supervisors, now replaced by EBA, ESMA and EIOPA) developed '*Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC*' (3L3 Guidelines) which set out identical procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector.

8. The information provisions set out in Appendix II to the 3L3 Guidelines form the basis for the draft RTS set out in Annex IV of this Consultation Paper (CP). ESMA has reviewed the information requirements contained in the 3L3 Guidelines to establish whether they are relevant and appropriate for investment firms.

9. ESMA has also considered the issues raised in the report issued by the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions on the application of Directive 2007/44/EC. This report, published by the Council on 28 February 2013, recognises that, overall, the regime created by Directive 2007/44/EC is working satisfactorily. Nevertheless, the report highlights that some shortcomings could be addressed to ensure consistent application and more legal certainty. In particular, the report states that competent authorities do not apply a coherent approach to the application of proportionality principle when assessing proposed acquisitions in all cases. It also notes that documents required by competent authorities in order to assess the financial soundness criteria differ across Member States.

10. The proposals for clarification on proportionality, documentation, close links, consolidated supervision, third country acquirers, legal structures of acquirers, and shareholding structure of proposed acquirers regard are set out in Section III below.

III. Proposals

III.I Proportionality

1. Paragraph 18 of the 3L3 Guidelines clarifies the application of the proportionality principle. It states: "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 entity, or the level of the holding to be acquired."

2. The aforementioned Commission report on the application of Directive 2007/44/EC noted some evidence that national supervisory authorities do not sufficiently apply the proportionality principle both in terms of the information required and the assessment procedure. Some competent authorities appear to apply a lighter version of the requirements for certain acquisitions. In particular, concerns were raised regarding the assessment of intra-group transactions. 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 of intra-group transactions within cross-border banking groups. By contrast, some other Member States assess all intra-group transactions in the same way as the rest of the notifications..

3. Article 10b(4) of MiFID states that "Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 10(3). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition [underlining added] Member States shall not require information that is not relevant for a prudential assessment."

4. The reference to the nature of the "proposed acquisition" could be interpreted more broadly as referring not just to the percentage holding being acquired, but also to the nature, scale and complexity of the target entity itself, as well as the envisaged plans of the proposed acquirer.

5. Currently, while different information is required depending on the level of the holding proposed in the target entity, the 3L3 Guidelines do not differentiate the information required depending on the nature of the target entity itself. Therefore, the same information is required of a person whether acquiring a controlling holding in (i) a large complex investment firm, or (ii) a small two person operation.

6. ESMA considers that the information requirements set out in the RTS should ensure that the proportionality principle is applied consistently across Member States. In this regard, ESMA considers that it may be appropriate to apply a different version of the requirements where the target entity is a small, non-complex investment firm and the proposed acquirer is an EU-regulated entity, but also taking into account the envisaged plans of the proposed acquirer. For instance, it may not be appropriate to implement a lighter version of the requirements if the proposed acquirer intends on changing the business model of the target entity so that it will become larger and more complex.

7. In order to ensure a harmonised and consistent approach across Member States, ESMA considers that any proportionality introduced in this regard would be aimed at small, non-complex investment firms, such as firms:

   i. that do not hold client assets; and

   ii. are not authorised for the investment services and activities of 'Dealing on own account' or 'Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis' (see 3 and 6 of Section A of Annex 1 of MiFID); and

   iii. where relevant, i.e. for firms that are authorised for the investment service of 'Portfolio management' (see 4 of Section A of Annex 1 of MiFID), the assets under management by the firm is below €500 million.

Q1: Should the information requirements for intra-group transactions, where the group is consolidated and regulated, be determined separately, with a 'lighter' version of requirements? If so, could you please provide detail on what requirements may not be necessary when assessing intra-group acquiring transactions, where the group is consolidated and regulated.

Q2. Should the concept of proportionality be considered more broadly, such as in terms of the nature, scale and complexity of the target entity and the envisaged plans of the proposed acquirer where the proposed acquirer is an EU-regulated entity? Do you agree with the suggested information requirements set out in Article 11 of the draft RTS?

Q3. Do you agree with the definition provided of a small, non-complex investment firm? What would be an appropriate 'assets under management' threshold in this regard?

Q4. Do you have any other suggestions in relation to the application of the proportionality principle to the information requirements in these RTS?

III.II Documentation

8. As noted above, the Commission report also highlighted the fact that documents required by competent authorities for the assessment, in particular in relation to the financial soundness criteria, differ across Member States. In order to level the playing field, therefore, ESMA considers it useful to prescribe specific information with regard to documents to be submitted.

Q5. Are there specific documents that cause a difficulty that should be harmonised? If so, please explain which documents cause a difficulty, and why, and provide your suggestions on how they should be harmonised.

III.III Close links

9. One area where ESMA considers that information not currently included in the 3L3 Guidelines may be useful for the assessment process is in relation to the close links of the proposed acquirer. The 3L3 Guidelines note that "To exercise effective supervision' means that the supervisor is not prevented from fulfilling its supervisory duties by the institution's close links to other natural or legal persons. It also means that the supervisor is not prevented from fulfilling its monitoring duties by the laws, regu-

lations, or administrative provisions of another country governing a natural or legal person with close links to the institution, or by difficulties in the enforcement of those laws, regulations, or administrative provisions."

10. ESMA considers that further information in the area of close links would be useful, including, for example, an analysis of whether the proposed acquisition will impact in any way on the ability of the target entity to continue to provide timely and accurate information to its supervisor.

Q6: Do you agree with the proposal to include an analysis of the impact of the proposed acquisition on the target entity's relationship with its supervisor?

Q7: Do you believe that any further information is necessary in relation to the close links of the proposed acquirer?

III.IV Consolidated supervision

11. Article 10b(1)(d) of MiFID (as amended) requires that competent authorities consider as part of the assessment process "whether the investment firm will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directives 2002/87/EC (4)7 and 2006/49/EC (5)8, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities".

12. ESMA considers that additional information may be useful over and above what is currently included in Appendix II of the 3L3 Guidelines to ascertain whether consolidated supervision can be exercised effectively on the target entity's group post the proposed acquisition. In this regard, it is proposed that competent authorities require the submission, where applicable, of an analysis of the impact of the proposed acquisition on the consolidated supervision of the target entity's group.

13. Where a target entity has a waiver from capital requirements on a consolidated basis, ESMA considers that confirmation should be provided that the requirements for having the waiver will continue to be met post the proposed acquisition.

Q8: Do you agree with the proposal to include, as an information requirement, an analysis of the impact of the proposed acquisition on the consolidated supervision of the target entity's group?

Q9: Do you agree that where the target entity has a waiver from capital requirements on a consolidated basis, confirmation should be provided that the requirements for having the waiver will continue to be met post the proposed acquisition?

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[7] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (OJ L 35, 11.2.2003, p. 1). Directive as amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).

[8] Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201).

III.V Third country acquirers

14. Currently, Appendix II of the 3L3 Guidelines does not set out any specific information requirements in relation to third country acquirers. ESMA considers that, as a minimum, the following additional information is necessary in all cases where the proposed acquirer is a third country legal or natural person or it belongs to a non-EEA financial group:

    i. certificate of good-standing by foreign authorities, and

    ii. declaration by foreign authorities [or alternatively: evidence] that there are no obstacles or limitations to the provision of information necessary for the supervision of the target entity.

Q10: Do you agree that as a minimum the above information should be additionally required where the proposed acquirer is a third country natural or legal person?

Q11: Is there any additional information that should be required when the proposed acquirer is located in an off-shore jurisdiction where there are legal barriers to supervision?

III.VI Legal structures of acquirers

15. Some particular legal structures of proposed acquirers may require additional information to be provided due to their unusual nature. One such possible structure would be a sovereign wealth fund, or any state/government-owned entity which may be used as a vehicle to invest in a target entity, or for the acquisition of a target entity. Historically, inconsistent treatment of sovereign wealth funds, and a general lack of transparency, has been a concern for investors and regulators alike. To address these concerns, ESMA considers that the following information could be required from sovereign wealth funds, or any other state/government-owned controller(for example, a corporate holding or investment company):

    i. the Ministry or government department in charge of mandating the fund, or the investment entity;

    ii. details of the mandate (and any restrictions);

    iii. the person (name and position of individual) responsible for making the investment decisions for the fund, or the investment entity;

    iv. the fund's investment policy; and

    v. confirmation of any influence exerted by the Ministry on the day-to-day operation of the fund, or the investment entity, and the target entity.

Q12: Do you agree with the suggested additional information to be required where the acquirer is a sovereign wealth fund, or any other state/government-owned entity?

Q13: Do any other particular legal structures of acquirers create a need for additional information (for example partnerships, trusts)?

III.VII Shareholding structure of proposed acquirers

16. Currently, where the proposed acquirer is a legal person, information relevant to reputation is required under the 3L3 Guidelines for (i) the proposed acquirer, and (ii) any person who effectively directs its business and any undertaking under its control. Separately, information is required on the shareholding structure of the proposed acquirer, specifically the identity of all shareholders with significant influence.

17. ESMA considers that information relevant to the reputation of shareholders that exert significant influence on the proposed acquirer should also be required. It is noted that in the case of large, publicly quoted companies, regulatory action against the company would rarely be relevant to the reputation and integrity of a shareholder. However, experience indicates that shareholders in small companies may exercise influence which is not reflected in the formal management structure. Some natural persons may even seek to limit their personal exposure to reputational damage by installing nominees as directors and managers of regulated entities which the person in question effectively controls.

Q14: Do you agree that information relevant to the reputation of shareholders that exert significant influence on the proposed acquirer should be required?

III.VIII Other

Q15. Is there any other information which should be requested as part of the notification process, or any information that is unnecessary, overly burdensome or duplicative?

Annex I: Legislative mandate

1. Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the ESMA Regulation) empowers ESMA to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the European Commission to adopt regulatory standards by means of delegated acts under Article 290 the Treaty on the Functioning of the European Union (TFEU).

2. The 'Directive on acquisitions and increase of holdings in the financial sector' (Directive 2007/44/EC) amended MiFID, and provides rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in investment firms. In particular, Article 10b(4) of MiFID requires Member States to make publicly available the information necessary to carry out the assessment of the proposed acquirer which must be provided at the time of the initial notification. Article 6(4) of the Omnibus Directive requires ESMA to draft regulatory technical standards (RTS") to establish an exhaustive list of information referred to in Article 10b(4). These RTS must be submitted to the European Commission by 1 January 2014.

Annex II: Cost-benefit analysis

1. Pursuant to Article 10(1) of the Regulation establishing ESMA,[9] ESMA is empowered to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts within the scope of action of ESMA. The same article obliges ESMA to conduct open public consultations on draft regulatory technical standards and to analyse the related potential costs and benefits, where appropriate. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the draft regulatory technical standards.

2. The purpose of the proposed draft RTS is to develop an exhaustive list of information to be included by proposed acquirers in their notification to the relevant competent authority. The aim is to set up a harmonised, common list of information that provides legal certainty, clarity and predictability with regard to the assessment process and to the supervisory decision. The proposed RTS will comprise clearly specified criteria for the prudential assessment which shall be applied consistently across Member States. This not only benefits the proposed acquirers themselves, but also competent authorities in facilitating guidance in the supervisory process.

3. The proposed RTS set out in this Consultation Paper (CP) are based on the existing CEBS, CESR and CEIOPS 'Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC'. There are no fundamental changes, and although the information requirements are clearer and standardised, which is likely to result in some extra costs, these extra costs are not expected to be significant. Any additional costs in this regard are expected to be outweighed by the benefits of clarity and standardisation.

4. For competent authorities, it is likely that a clearer legal framework with specified criteria will clarify the assessment process, reducing the volume of inquiries by proposed acquirers and simplifying internal processes. However, it is possible that the extension of the list of information required from proposed acquirers could lead to additional costs for competent authorities in terms of time and resource.

5. As the proportionality principle underlies the information required from proposed acquirers, which information may be adapted to the nature of the proposed acquirer and the proposed acquisition, the expected costs to the industry are likely to be reduced. However, where the proposed list of information is extended in certain areas, this could potentially increase costs in terms of time and resource, but is balanced by the specification of any additional requirements

6. Currently, there are no specific information requirements in relation to third country acquirers. Therefore, requiring information where the proposed acquirer is a third country legal or natural person, or if it belongs to a non-EU financial group, will lead to additional costs for third country authorities.

[9] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

Annex III: List of consultation questions

Q1: Should the information requirements for intra-group transactions, where the group is consolidated and regulated, be determined separately, with a 'lighter' version of requirements? If so, could you please provide detail on what requirements may not be necessary when assessing intra-group acquiring transactions, where the group is consolidated and regulated.

Q2: Should the concept of proportionality be considered more broadly, such as in terms of the nature, scale and complexity of the target entity and the envisaged plans of the proposed acquirer where the proposed acquirer is an EU-regulated entity? Do you agree with the suggested information requirements set out in Article 11 of the draft RTS?

Q3: Do you agree with the definition provided of a small, non-complex investment firm? What would be an appropriate 'assets under management' threshold in this regard?

Q4: Do you have any other suggestions in relation to the application of the proportionality principle to the information requirements in these RTS?

Q5. Are there specific documents that cause a difficulty that should be harmonised? If so, please explain which documents cause a difficulty, and why, and provide your suggestions on how they should be harmonised.

Q6: Do you agree with the proposal to include an analysis of the impact of the proposed acquisition on the target entity's relationship with its supervisor?

Q7: Do you believe that any further information is necessary in relation to the close links of the proposed acquirer?

Q8: Do you agree with the proposal to include, as an information requirement, an analysis of the impact of the proposed acquisition on the consolidated supervision of the target entity's group?

Q9: Do you agree that where the target entity has a waiver from capital requirements on a consolidated basis, confirmation should be provided that the requirements for having the waiver will continue to be met post the proposed acquisition?

Q10: Do you agree that as a minimum the above information should be additionally required where the proposed acquirer is a third country natural or legal person?

Q11: Is there any additional information that should be required when the proposed acquirer is located in an off-shore jurisdiction where there are legal barriers to supervision?

Q12: Do you agree with the suggested additional information to be required where the acquirer is a sovereign wealth fund, or any other state/government-owned entity?

Q13: Do any other particular legal structures of acquirers create a need for additional information (for example partnerships, trusts)?

Q14: Do you agree that information relevant to the reputation of shareholders that exert significant influence on the proposed acquirer should be required?

Q15: Is there any other information which should be requested as part of the notification process, or any information that is unnecessary, overly burdensome or duplicative?

Annex IV: Draft regulatory technical standards

DRAFT COMMISSION DELEGATED REGULATION (EU) No .../..

supplementing Directive 2004/39/EC of the European Parliament and of the Council with regard to regulatory technical standards for an exhaustive list of information to be included by proposed acquirers in the notification of a proposed acquisition of a qualifying holding in an investment firm

THE EUROPEAN COMMISSION,
Having regard to the Treaty on the Functioning of the European Union,
Having regard to 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[10], and in particular paragraph 8 of Article 10a,

Whereas:

(1) These regulatory technical standards (hereinafter referred to as RTS) establish an exhaustive list of information to be included by a proposed acquirer in the notification required under Article 10 (3) of Directive 2004/39/EC to enable competent authorities to carry out the prudential assessment of the proposed acquisition. Whilst recognising that the list is to be exhaustive, it can be helpful to further explain the type of information on that list by referring to the most common situations relevant for a particular category of activities.

(2) An exhaustive list of information is required from a proposed acquirer at the time of the initial notification to enable competent authorities to carry out the assessment of the proposed acquisition. This is without prejudice to the right of the competent authority of the target entity to request additional information from the proposed acquirer during the assessment process in accordance with the criteria and timelines set out in MiFID (2004/39/EC).Information is required on the identity of the proposed acquirer. Where the proposed acquirer is a legal person, information is necessary on the identity of the persons who effectively direct the business and on the identity of the persons who are beneficial ownders of the legal person. This information is relevant in order to assess the reputation of the proposed acquirer and the experience of those who will effectively direct the business.

(3) Information is required in relation to all open investigations and proceedings and any investigations or proceedings that resulted in a negative determination against the proposed acquirer in order to assess the reputation of the proposed acquirer.

(4) Financial information is required in order to assess the financial soundness of the proposed acquirer.

(5) Where there is a proposed change in control of the target entity, the proposed acquirer is required to submit a full business plan. Under some circumstances, like in the case of acquisitions by means of a public offer, the acquirer may encounter difficulties in obtaining information which is needed to establish a full business plan. In this case, the acquirer shall indicate these difficulties to the

[10] OJ L 145, 30.4.2004, p. 1.

competent authority of the target and point out the aspects of his business plan that might be modified in the near term.

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL

Article 1
Subject matter

This Regulation sets out rules on the information to be included by a proposed acquirer in the notification of a proposed acquisition to the competent authorities of the investment firm in which the acquirer is seeking to acquire or increase a qualifying holding (hereinafter referred to as the 'target entity') for the assessment of the proposed acquisition.

CHAPTER II
INFORMATION REQUIRED FROM PROPOSED ACQUIRERS

Article 2
Information to be provided by the proposed acquirer

The information to be provided by the proposed acquirer to the competent authority of the target entity shall be that referred to in Articles 3 to 11, depending on whether the information relates to a natural person or a legal person, or a trust.

Article 3
Information relating to the identity of the proposed acquirer

(1) For natural persons, the proposed acquirer shall provide to the competent authority of the target entity the following information relating to the identity of the proposed acquirer:

(a) the person's name, date of birth, place of birth, address and contact details; and

(b) a detailed curriculum vitae or equivalent document, stating relevant education and training, previous professional experience, and any professional activities or other relevant functions currently performed.

(2) For legal persons, the proposed acquirer shall provide to the competent authority of the target entity the following information:

(a) documents certifying the business name and registered address of its head office and contact details;

(b) registration of legal form and incorporation documents in accordance with relevant national legislation;

(c) an up-to-date overview of entrepreneurial activities;

(d) a complete list of persons who effectively direct the business and their detailed curriculum vitae, stating relevant education and training, previous professional experience, and any professional activities or other relevant functions currently performed; and

(e) the identity of all persons who may be considered as beneficial owners of the legal person.

(3) For trusts that already exist or would result from the proposed acquisition, the proposed acquirer shall provide to the competent authority of the target entity the following information:

(a) the identity of all trustees who will manage assets under the terms of the trust document and, where applicable, their respective shares in the distribution of income; and

(b) the identity of all persons who are beneficial owners of the trust property and, where applicable, their respective shares in the distribution of income.

Article 4
Additional information relating to the proposed acquirer

(1) For natural persons, the proposed acquirer shall provide to the competent authority of the target entity the following information:

(a) Concerning the proposed acquirer and any undertaking ever directed or controlled by the proposed acquirer, information on any:

(i) criminal records, or criminal investigations or proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director or bankruptcy, insolvency or similar procedures), notably via an official certificate if available within the relevant Member State or third country;

(ii) details of any open investigations, enforcement proceedings, or sanctions by a supervisory authority which the person is a the subject of and details of any investigations, enforcement proceedings, or sanctions which the person was a subject of and which led to a negative determination;

(iii) details of any refusal of registration, authorisation, membership or licence to carry our trade, business or profession; or the withdrawal, revocation or termination of such a registration, authorisation, membership or licence; or expulsion by a professional body or association; and

(iv) details of any dismissal from employment or a position of trust, fiduciary relationship, or similar situation.

(b) Information as to whether an assessment of reputation as an acquirer or as a person who directs the business of a credit institution, assurance, insurance or re-insurance undertaking or investment firm has already been conducted by another competent authority, the identity of that authority and evidence of the outcome of the assessment.

(c) Information as to whether a previous assessment as an acquirer or a person who directs the business of a regulated entity other than referred to under (b) has been made by another authority, the identity of that authority and evidence of the outcome of the assessment.

(d) Information regarding the financial position of the proposed acquirer, including details concerning sources of revenues, assets and liabilities, pledges and guarantees, granted or received.

(e) A description of the professional activities of the proposed acquirer.

(f) Financial information including credit ratings and publicly available reports on the undertakings controlled or directed by the proposed acquirer and if applicable, on the proposed acquirer.

(g) A description of the financial and non-financial interests or relationships of the proposed acquirer with the persons listed in the following points:

(i) any other current shareholder of the target entity;

(ii) any person entitled to exercise voting rights of the target entity;

(iii) any member of the board of directors or similar body, in accordance with relevant national legislation, or of the senior management of the target entity; and

(iv) the target entity itself and its group.

With regard to subparagraph (g), financial interests may include interests such as credit operations, guarantees and pledges. Non-financial interests may include interests such as family relationships.

With regard to subparagraph (g)(ii), a person is entitled to exercise voting rights of the target entity in situations such as:

(i) voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;

(ii) voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question;

(iii) voting rights attaching to shares which are lodged as collateral with that person or entity, provided the person or entity controls the voting rights and declares its intention of exercising them;

(iv) voting rights attaching to shares in which that person or entity has the life interest;

(v) voting rights which are held, or may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity;

(vi) voting rights attaching to shares deposited with that person or entity which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders;

(vii) voting rights held by a third party in its own name on behalf of that person or entity;

(viii) voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders.

(h) Information on any other interests or activities of the proposed acquirer that may be in conflict with those of the target entity and possible solutions to those conflicts of interest.

(2) For legal persons, the proposed acquirer shall provide to the competent authority of the target entity the following information:

(a) Concerning the proposed acquirer, any person who effectively directs the business of the proposed acquirer, any undertaking under the proposed acquirer's control, and any shareholder exerting significant influence on the proposed acquirer as identified under point (f) below, information on any:

(i) criminal records, criminal investigations or proceedings, relevant civil and administrative cases, or disciplinary actions, including disqualification as company director or bankruptcy, insolvency or similar procedures, via an official certificate if available within the relevant Member State or third country;

(ii) any open investigations, enforcement proceedings, or sanctions by a supervisory authority which the person is a subject of and details of any investigations, enforcement proceedings, or sanctions which the person was a subject of and which led to a negative determination;

(iii) refusal of registration, authorisation, membership, or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of such a registration, authorisation, membership or licence; or expulsion by a professional body or association.

(b) Information as to whether an assessment of reputation, as an acquirer or as a person who directs the business of a credit institution, assurance, insurance or re-insurance undertaking or investment firm , has already been conducted by another supervisory authority, the identity of that authority and evidence of the outcome of the assessment.

(c) Information as to whether a previous assessment as an acquirer or a person who directs the business of a regulated entity other than referred to under (b) has been made by another authority, the identity of that authority and evidence of the outcome of the assessment.

(d) A description of the financial and non-financial interests or relationships of the proposed acquirer, or, where applicable, the group to which the proposed acquirer belongs, as well as the persons who effectively direct its business with:

(i) any other current shareholders of the target entity;

(ii) any person entitled to exercise voting rights of the target entity;

(iii) any member of the board of directors or similar body in accordance with relevant national legislation, or of the senior management of the target entity; and

(iv) the target entity itself and the group it belongs to.

With regard to the subparagraph (d), financial interests may include credit operations, guarantees and pledges. Non-financial interests may include family relationships.

(e) Information on any other interests or activities of the proposed acquirer that may be in conflict with those of the target entity and possible solutions to those conflicts of interest.

(f) The shareholding structure of the proposed acquirer, with the identity of all shareholders with significant influence and their respective share of capital and voting rights including information on any shareholders agreements.

(g) If the proposed acquirer is part of a group, as a subsidiary or as the parent undertaking, a detailed organisational chart of the entire corporate structure and information on the share of capital and voting rights of shareholders of the entities of the group and on the activities currently performed by the entities of the group.

(h) If the proposed acquirer is part of a group as a subsidiary or as the parent company, information on the relationships between the financial entities of the group and other non-financial group entities.

(i) Identification of regulated entities within the group, and the names of the relevant supervisory authorities.

(j) Statutory financial statements, at an individual and, where applicable, at consolidated group and sub-consolidated levels, regardless of the size of the proposed acquirer, for the last three financial periods, approved, where the financial statements are audited, by the external auditor, including:

(i) the balance sheet;

(ii) the profit and loss accounts or income statement; and

(iii) the annual reports and financial annexes and any other documents registered with the relevant registry or authority in the particular territory relevant to the proposed acquirer.

Where the proposed acquirer is a newly established entity, instead of the information specified in the first sub-paragraph the proposed acquirer shall provide to the competent authority of the target entity the following information:

(i) forecast balance sheets for the first three business years including planning assumptions used; and

(ii) forecast profit and loss accounts or income statements for the first three business years including planning assumptions used.

(k) Information about the credit rating of the proposed acquirer and the overall rating of its group.

(3) Where the proposed acquirer is an entity established in a third country or is part of a group established outside the Union, the proposed acquirer shall provide to the competent authority of the target entity the following additional information:

(a) a certificate of good-standing by foreign authorities; and

(b) a declaration by foreign authorities [or evidence] that there are no obstacles or limitations to the provision of information necessary for the supervision of the target entity,

(4) Where the proposed acquirer is a sovereign wealth fund, the proposed acquirer shall provide to the competent authority of the target entity the following additional information:

(a) the Ministry or government department in charge of mandating the fund;

(b) details of the mandate and any restrictions;

(c) the name and position of the individuals responsible for making the investment decisions for the fund;

(d) the fund's investment policy; and

(e) details of any influence exerted by the Ministry or government department on the day-to-day operation of the fund and the target entity.

Article 5
Information relating to the proposed acquisition

(1) The following information relating to the proposed acquisition shall be provided by the proposed acquirer to the competent authority of the target entity:

(a) identification of the target entity;

(b) details of the proposed acquirer's intentions with respect to the proposed acquisition, such as strategic investment or portfolio investment;

(c) information on the shares of the target entity owned, or contemplated to be owned, by the proposed acquirer before and after the proposed acquisition:

(i) the number and type of shares (i.e. ordinary shares or other) of the target entity owned, or contemplated to be owned, by the proposed acquirer before and after the proposed acquisition;

(ii) the share of the overall capital of the target entity that the shares owned, or contemplated to be owned, by the proposed acquirer represent before and after the proposed acquisition;

(iii) the share of the overall voting rights of the target entity that the shares owned, or contemplated to be owned, by the proposed acquirer represent before and after the proposed acquisition, if different from the share of capital of the target entity; and

(iv) the value, in euro and in local currency, of the shares of the target entity owned, or contemplated to be owned, by the proposed acquirer before and after the proposed acquisition.

(d) Any action in concert with other parties. The determination whether the proposed acquirer is acting in concert with other parties shall include the following considerations: the contribution of other parties to the financing, the means of participation in the financial arrangements and future organisational arrangements.

(e) Content of contemplated shareholder's agreements with other shareholders in relation to the target entity.

(f) The proposed acquisition price and the criteria used when determining such price.

Article 6
Information on the new proposed group structure and its impact on supervision

(1) For legal persons, the proposed acquirer shall provide to the competent authority of the target entity the following information:

(a) An analysis of the impact of the proposed acquisition on the consolidated supervision of the target entity and the group that it will belong to post acquisition.

(b) Where a target entity has a waiver from capital requirements on a consolidated basis, confirmation of whether the requirements for the waiver will continue to be met post the proposed acquisition, along with accompanying explanation.

(2) The following information relating to the proposed acquisition shall be provided by the proposed acquirer to the competent authority of the target entity: an analysis of whether the proposed acquisition will impact in any way, including as a result of close links of the proposed acquirer, on the ability of the target entity to continue to provide timely and accurate information to its supervisor.

Article 7
Information relating to the financing of the proposed acquisition

(1) The proposed acquirer shall provide a detailed explanation on the specific sources of funding for the proposed acquisition.

(2) The explanation referred to in paragraph 1 shall include:

(a) details on the use of private financial resources and the availability of the funds;

(b) details on access to capital sources and financial markets including details of financial instruments to be issued;

(c) information on the use of borrowed funds contracted with the banking system including the name of relevant lenders and details of the facilities granted, including maturities, terms, pledges and guarantees;

(d) information on any financial arrangement with other shareholders of the target entity;

(e) information on assets of the proposed acquirer or the target entity which are to be sold in the short term, such as conditions of sale, price, appraisal, and details regarding their characteristics.

Article 8

Additional information requirements where there is a proposed change in control in the target entity

(1) Where there is a proposed change in control of the target entity, the proposed acquirer shall provide a business plan to the competent authority of the target entity which shall comprise a strategic development plan, estimated financial statements of the target entity and the impact of the acquisition on the corporate governance and general organisational structure of the target entity.

(2) The strategic development plan referred to in paragraph 1 shall indicate, in general terms, the main goals of the proposed acquisition and the main ways for achieving them, including:

(a) the rationale of the proposed acquisition;

(b) medium-term financial goals which may be stated in terms of return on equity, cost-benefit ratio, earnings per share, or in other terms as appropriate;

(c) the possible redirection of activities, products, targeted customers and the possible reallocation of funds or resources anticipated impacting on the target entity;

(d) general modalities for including and integrating the target entity in the group structure of the proposed acquirer, including a description of the main synergies to be pursued with other companies in the group as well as a description of the policies governing intra-group relations.

In relation to paragraph (2)(d), for institutions supervised in the Union, information about the particular departments within the group structure which are affected by the transaction shall be sufficient.

(3) The estimated financial statements of the target entity referred to in paragraph 1 shall, on both an individual and, where applicable, consolidated basis, for a period of 3 years, include the following:

(a) a forecast balance sheet and income statement;

(b) forecast prudential capital requirements and solvency ratio;

(c) information on the level of risk exposures including credit, market and operational risks as well as other relevant risks;

(d) a forecast of provisional intra-group transactions.

(4) The impact of the acquisition on the corporate governance and general organisational structure of the target entity referred to in paragraph 1 shall include the impact on:

(a) the composition and duties of the board of directors, or similar body in accordance with relevant national legislation, and the main committees created by such decision-taking body including the management committee, risk committee, audit committee, remuneration committee and any other committees, including information concerning the persons who will be appointed to direct the business;

(b) administrative and accounting procedures and internal controls: principal changes in procedures and systems relating to accounting, internal audit, compliance (including anti-money laundering)

and risk management including the appointment of key functions (internal auditor, compliance officer, risk manager);

(c) the overall IT systems architecture including any changes concerning the outsourcing policy, the data flowchart, the in-house and external software used and the essential data and systems security procedures and tools including back-up, continuity plans and audit trails;

(d) the policies governing outsourcing. Information provided here shall include areas concerned, selection of service providers, and the respective rights and obligations of the principal parties as set out in contracts such as audit arrangements and the quality of service expected from the provider;

(e) any other relevant information pertaining to the impact of the acquisition on the corporate governance and general organisational structure of the target entity, including any modification regarding the voting rights of the shareholders.

Article 9

Additional information requirements where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity which does not reach or exceed 20%

(1) Where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity which does not reach or exceed 20%, the proposed acquirer shall provide a document on strategy to the competent authority of the target entity containing, where relevant, the following information:

(a) The strategy of the proposed acquirer regarding the proposed acquisition. This shall include information on:

(i) the period for which the proposed acquirer intends to hold its shareholding after the proposed acquisition; and

(ii) any intention of the proposed acquirer to increase, reduce or maintain the level of his shareholding in the foreseeable future.

(b) An indication of the intentions of the proposed acquirer towards the target entity, and in particular whether it intends to act as an active minority shareholder, and the rationale for such an action.

(c) Information on the financial position of the proposed acquirer and its willingness to support the target entity with additional own funds if needed for the development of its activities or in case of financial difficulties.

(2) Notwithstanding paragraph 1, the competent authority of the target entity shall be able to request the more detailed information set out under Article 10 in cases where the shareholding to be acquired remains below the threshold of 20%, if, depending on the global structure of the shareholding of the target entity, the 'influence' exercised by that shareholding is considered to be equivalent to the influence exercised by shareholdings considered under Article 10.

Article 10
Additional information requirements where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity exceeding 20% and which does not reach or exceed 50%

1) Where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity exceeding 20% and which does not reach or exceed 50%, the proposed acquirer shall provide a document on strategy to the competent authority of the target entity containing, where relevant, the following information:

    a) the policy of the proposed acquirer regarding the acquisition including the period for which the proposed acquirer intends to hold his shareholding after the proposed acquisition and any intention of the proposed acquirer to increase, reduce or maintain the level of his shareholding in the foreseeable future;

    b) an indication of the intentions of the proposed acquirer towards the target entity, and in particular whether or not he intends to act as an active minority shareholder, and the rationale for such an action;

    c) information on the financial position of the proposed acquirer and its willingness to support the target entity with additional own funds if needed for the development of its activities or in case of financial difficulties;

    d) details on the influence that the proposed acquirer intends to exercise on the financial position including dividend policy, the strategic development, and the allocation of resources of the target entity;

    e) a description of the proposed acquirer's intentions and expectations towards the target entity in the medium-term, covering all the elements mentioned above under paragraph 2 of Article 8.

CHAPTER III

INFORMATION TO BE SUBMITTED BY THE PROPOSED ACQUIRER WHEN THE PROPOSED ACQUIRER IS AN EU-REGULATED ENTITY AND THE PROPOSED ACQUISITION IS IN A SMALL, NON-COMPLEX INVESTMENT FIRM

Article 11
Information to be submitted by the proposed acquirer when the proposed acquirer is an EU-regulated entity and the proposed acquisition is in a small, non-complex investment firm

(1) Notwithstanding the requirements in chapter II, where the proposed acquirer is an EU-regulated entity and the target entity meets the criteria set out under paragraph 2 below, the proposed acquirer shall submit the following information to the competent authority of the target entity:

    (a) where the proposed acquirer is a natural person:

        (i) the information set out in paragraph 1 of Article 3,

(ii) the information set out in points (d) to (h) of paragraph 1 of Article 4,

(iii) the information set out in Articles 5 and 7,

(iv) the information set out in paragraph 1 of Article 6,

(v) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity which does not reach or exceed 20%, a document on strategy as set out in paragraph 1 of Article 9, and

(vi) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity exceeding 20%, a document on strategy as set out in paragraph 1 of Article 10.

(b) where the proposed acquirer is a legal person:

(i) the information set out in paragraph 2 of Article 3 and, where relevant, paragraph 3 of Article 3,

(ii) the information set out in points (d) to (m) of paragraph 2 of Article 4 and, where relevant, the information set out in paragraph 4 of Article 4,

(iii) the information set out in Articles 5 and 7,

(iv) the information set out in paragraph 1 of Article 6,

(v) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity which does not reach or exceed 20%, a document on strategy as set out in section 1 of Article 9,

(vi) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target entity exceeding 20%, a document on strategy as set out in paragraph 1 of Article 10,

(2) The requirements set out in paragraph 1 shall apply to acquisitions in target investment firms that meet all of the following criteria:

(a) firms that do not hold client assets; and

(b) are not authorised for the investment services and activities 'Dealing on own account' or 'Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis' (see (3) and (6) of Section A of Annex 1 of MiFID); and

(c) where relevant, i.e. for firms that are authorised for the investment service of 'Portfolio management' (see (4) of Section A of Annex 1 of MiFID), the assets under management by the firm is below €500 million.

CHAPTER IV
VALIDITY OF INFORMATION

Article 12
Validity of information

(1) The proposed acquirer shall confirm to the competent authority of the target entity that all of the information submitted is true, accurate and complete.

(2) The competent authority of the target entity may ask the proposed acquirer to provide reasonable additional evidence to verify the statements submitted pursuant to paragraph 1 including any confirmation from other authorities, domestic or otherwise. Where relevant, those statements shall also be accompanied by legal documentation confirming the accuracy of the data.

CHAPTER V
FINAL PROVISIONS

Article 13
Entry into force

(1) This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

(2) This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President]
[Position]