Guideline for Shareholders

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The Authority for the Financial Markets

The AFM is a strong proponent of fairness and transparency in the financial markets.

As an independent market conduct authority, we contribute to a sustainable financial system and prosperity in the Netherlands.

The European Securities and Markets Authority (ESMA) regularly publishes Q&As with regard to the Market Abuse Regulation (MAR). Although the AFM processes this information in its brochures on a regular basis, it may occur that certain information in this document no longer applies. Therefore, we advise you to consult the ESMA website for the latest information on this subject. In case of any uncertainties with regard to interpretations set out in this brochure, you should also consult the Q&As of ESMA. Click on the following link for a current overview of the latest Q&As:
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In this brochure the Q&As of ESMA have been processed up to and including the version of 20 December 2016.

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Introduction

As of 29 January 2016, Section 5.3 of the Financial Supervision Act (Wet op het financieel toezicht, hereinafter “Wft”) and the Decree on the Disclosure of Major Holdings and Capital Interests in Issuing Institutions have been adjusted as a result of the implementation of Directive 2013/50/EC to amend the Transparency Directive.

For convenience, this guideline refers to the rules for notifying voting rights, share capital, control and share capital interest in issuers as referred to in Section 5.3 Wft. With respect to the Decree on the Disclosure of Major Holdings and Capital Interests in Issuing Institutions, reference is made hereinafter to the “Decree” for the sake of brevity. The other Sections of the Financial Supervision Act are referred to as “Section ... Wft”. References to the Transparency Directive in this guideline are to the amended Transparency Directive including the amendments arising from the implementation of Directive 2013/50/EU.

Questions should be sent by email to melden@afm.nl.

1. Legal terms

This guideline includes various legal terms that are briefly explained below. These terms have been included in the definitions of Section 1:1 Wft and, where applicable, in derogation thereof in Section 5:33 Wft.

Share:

1. a transferable share as referred to in Section 79 (1) of Book 2 of the Dutch Civil Code;

2. a depositary receipt for a share or another transferable security equivalent to a depositary receipt for a share;

3. any other transferable security other than an option as referred to under 4, to acquire a share referred to under 1 or a security referred to under 2;

4. an option to acquire a share referred to under 1 or a security referred to under 2.

Issuing organisation:

This refers to:

I. a public limited liability company incorporated under Dutch law whose shares are admitted to trading on a regulated market;

II. a legal person with a different Member State of origin whose shares are only admitted to trading on a regulated market in the Netherlands;

III. a legal person incorporated under the law of a non-EU Member State whose shares are admitted to trading on a regulated market in the Netherlands.

Affiliated issuer:

This concerns any other issuer:

1. with which the issuer is affiliated within a group or in which the issuer has a holding and whose most recently established revenue amounts to at least 10% of the issuer's consolidated revenue;

2. which, directly or indirectly, provides more than 25% of the issuer's share capital.

Voting/voting rights:

Voting rights which may be exercised in respect of shares, including rights under a contract to acquire voting rights.

Regulated market:

A multilateral system which brings together or facilitates the bringing together of multiple buying and selling interests of third parties in financial instruments – within the system and in accordance with its non-discretionary rules – in a way that results in a contract with regard to financial instruments admitted to trading in accordance with the rules and systems of that market, and which operates on a regular basis and in accordance with the applicable rules on licensing and ongoing supervision.

For the sake of clarity, a regulated market is taken to mean: a regulated market in an EU Member State.

Regulated market in the Netherlands:

A regulated market in which the market holder is recognised within the meaning of Section 5:26 (1) Wft.

Share capital:

The issued share capital of an issuer.

Share capital interest:

An interest in the issued share capital of an issuer.

Substantial holding:

At least 3% of the share capital or the right to exercise at least 3% of the voting rights, whereby the voting rights to which a person is entitled or is considered to be entitled, pursuant to Section 5:45 Wft, is included in the number of votes a person may cast.

Controlled undertaking:

A subsidiary as referred to in Section 24(a) of Book 2 of the Dutch Civil Code or an undertaking over which a person has the power to exercise predominant control.

Threshold:

A percentage of the share capital or the voting rights which, when a person holding or acquiring shares or who may exercise or acquire voting rights reaches, exceeds or falls below such a threshold, may lead to a notification obligation pursuant to the Wft.

The threshold values are: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%.

For the issuers referred to in Section 5:47 Wft, the thresholds are 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

Party obliged to notify:

A person that is obliged to make a notification pursuant to the Wft.

Short position:

a position in the issued capital of an issuing institution that arises from one of the following cases:

a) A short transaction in a share issued by or with the cooperation of an issuing institution[11]

b) Entering into a transaction that creates a financial instrument other than that referred to in item a) or that is linked thereto whereby the result or one of the results thereof is that the party entering into the transaction receives a financial gain in the event that the price or the value of the share falls.

At the time this guideline was published, the states that were considered equivalent to a Member State of the European Union (not being a Member State of the European Union, but being a party to the Agreement on the European Economic Area) comprised the following:

- Iceland,
- Liechtenstein and
- Norway.

[1] 'Share' as defined in Section 5:33 (1) under (b) items (1) and (2) Wft

2. To which companies does the Wft apply and which are subject to the notification obligation?

The notification obligation applies to:

- public limited companies,
- incorporated under Dutch law, and
- whose shares are admitted to trading on a regulated market, or to
- legal persons
- with a different state of origin, and
- whose shares are only admitted to trading on a regulated market in the Netherlands,

or to

- legal persons
- incorporated under the law of a non-EU Member State, and
- whose shares are admitted to trading on a regulated market in the Netherlands.

An organisation meeting the above definition is referred to as “issuer” hereinafter for the sake of brevity.

It is responsibility of the person concerned to confirm whether “admitted to trading on a regulated market” applies (in other words, being listed on a regulated market). We would note, for the sake of completeness, that trading in shares on the unlisted securities market does not fall under these statutory provisions, because in such cases a company has not concluded a Listing Agreement with the market holder of a regulated market.

2.1 When does the Wft apply to which company?

The following table provides an overview of which companies fall under the full regime of the Wft or to which companies Section 5:47 Wft applies.

Incorporated under which law?	Listed where?	Full Wft regime applies	Does Section 5:47 Wft apply?
Public limited company under Dutch law	The Netherlands	Yes	No
Public limited company under Dutch law	Other EU Member State	Yes	No
Public limited company under Dutch law	The Netherlands and in another EU Member State	Yes	No
Public limited company under Dutch law	Not in a EU Member State	No	No
Legal person under non-EU law	The Netherlands	Yes	No
Legal person under non-EU law	Other EU Member State	No	No
Legal person under non-EU law	The Netherlands and in another EU Member State	Yes/No	Yes/No
Legal person under non-EU law	Not in a EU Member State	No	No
Legal person under EU law, not being Dutch law	The Netherlands	No	No
Legal person under EU law, not being Dutch law	Other EU Member State	No	No
Legal person under EU law, not being Dutch law	Not in a EU Member State	No	No

It follows from Section 5:47 Wft that a number of notification provisions do not apply and that different thresholds do apply. Section 5:47 Wft refers to Article 2(1)(j) of the Transparency Directive.

It has to be established which EU country must be considered home or host Member State in the event a legal person is incorporated under non-EU law.

If shares in a company incorporated under non-EU law are only admitted to trading on a regulated market in the Netherlands, all provisions of the Wft will apply.

The Netherlands will, in such cases, serve as the home Member State according to the Transparency Directive. If shares in a company incorporated under non-EU law are admitted to trading on a regulated market in both the Netherlands and in another EU Member State, the company in question may select its home Member State from the Member States in which its shares are admitted to trading on a regulated market.

If this is the Netherlands, for example, all provisions of the Wft apply. However, if, for example, the shares are also admitted to trading on a regulated market in France and France is chosen as the home Member State, Section 5:47 Wft will apply and, as a result, exemption from certain notification obligations will apply, as will different thresholds. In this case, the Netherlands will be considered the host Member State pursuant to Article 2(1)(j) of the Transparency Directive.

An additional example for clarification: a US legal person (legal person incorporated under non-EU law) whose shares are admitted to trading on a regulated market in both the United States and the Netherlands will be subject to the full regime of the Wft. Section 5:47 Wft does not apply to this legal person as the Netherlands is the only Member State in which the shares are admitted to trading on a regulated market, and the Netherlands is thus the home Member State.

Investment company

It is important to note that the Wft does not apply to an investment company whose rights of participation are bought or redeemed, directly or indirectly, upon the request of the participants at the expense of the assets of the relevant investment company.

2.2 Who is subject to the notification obligation?

The Wft speaks of a person subject to the notification obligation if it concerns a person who is obliged to notify pursuant to Section 5.3 Wft. This concerns both natural and legal persons. For the sake of convenience, this guideline uses the term “person” to refer to a natural or legal person under Dutch or foreign law.

Issuer also obliged to notify

An issuer may also become subject to the notification obligation, for example if it repurchases its own shares. This applies if an interest in its own shares reaches, exceeds or falls below a percentage designated as a notification threshold.

As no voting rights can be exercised in respect of shares issued by the issuer that are at the disposal of the issuer itself or its controlled undertaking, only an obligation to notify the share capital interest percentage can arise in this example.

Communities

A “community” as referred to in the Wft means: the community that exists if a good or goods belongs jointly to two or more partners. General examples of communities are: matrimonial

community of property, an undivided estate and unincorporated enterprises (partnerships, limited partnerships, general partnerships and companies established under foreign law which are similar to limited or general partnerships).

No notification obligation exists for communities as such, but a notification obligation may rest on the partners individually. Reference is made to subsections 3.5.5. and 3.5.6. for an explanation of how the shares are to be allocated to the partners.

3. How does the notification obligation arise?

The Wft imposes a notification obligation that has to be discharged to the AFM without delay by anyone who acquires or loses the disposal of shares in the capital of an issuer such that the person knows or should know that the percentage of the shares held by it reaches, exceeds or falls below a threshold. The same applies to votes that can be cast in respect of shares in an issuer.

In addition, the Wft imposes a notification obligation that has to be discharged to the AFM without delay by anyone who acquires or loses disposal of financial instruments that represent a short position with respect to the shares, as a result of which the person knows or should know that the short position held, expressed as a percentage of the capital, reaches, exceeds or falls below a threshold.

Example:

- A person increases its share capital interest percentage and/or voting rights from 4% to 6% and subsequently to 8%. In this case, only the first step needs to be notified (the threshold of 5% is exceeded); the increase from 6% to 8% does not have to be notified (the next threshold is 10%). This also applies to a short position.

- In contrast, in the event of an increase of the share capital interest and/or voting rights from 4% to 6% followed by a reduction to 4%, both changes need to be notified. In this case the threshold has been passed twice. This also applies to a short position.

- If a person acquires a share capital interest percentage and/or voting rights in an issuer for the first time, this need not be reported until it has disposal of 3% or more of the share capital interest and/or the voting rights. This also applies to a short position.

Group structures

If a “parent-subsidiary” relationship exists, a person will be obliged to provide insight into the group structures. The notification must state the name of the relevant controlled undertaking in the event of an indirect interest (see also subsections 4.3 and 4.4). If the structure concerns a chain of controlled undertakings, this must also be notified.

Notification obligation as a result of (denominator) changes

If the share capital percentage or the voting rights percentage of a person changes as a result of (denominator) changes at the issuer, the fact that such percentage has reached, exceeded or fallen below a threshold must also be notified to the AFM. The same applies if a short position changes as a result of (denominator) changes at the issuer.

This concerns situations in which the percentage has reached, exceeded or fallen below the threshold in a passive manner. The issuer is obliged, pursuant to the Wft, to report its denominator changes to the AFM.

It is the responsibility of the person itself to establish whether a (passive) notification obligation exists. The AFM provides an alert function, which means that persons known to the AFM will receive a message as soon as a change in the registered data of the issuer has been incorporated in the public database (see the Update service on the AFM website). The relevant person cannot, however, rely on the fact that no alert message was received, for example as a result of a technical disruption, and that, as a result, no notification – or an incorrect notification – has been made.

Special rights under the articles of association

If a person acquires or loses disposal of one or more shares with a special right under the articles of association with regard to a controlling interest in an issuer, this must be also be notified without delay. This may include matters such as priority shares and so-called “golden shares” that may represent substantial control.

New issuer

The obligation to notify without delay is also imposed on anyone who holds a substantial holding, or one or more shares with a special right under the articles of association, in a public limited company under Dutch law that becomes an issuer. A substantial holding in a legal person incorporated under the law of a non-EU Member State that becomes an issuer must also be notified to the AFM.

Different composition

If a substantial undertaking has a different composition as a result of (for example) an exchange of options for depositary receipts for shares or shares, or the exercise of rights under an agreement to acquire voting rights whereby in comparison to the previous notification a threshold is reached, exceeded or fallen below without this affecting the total percentage of the previously notified holding, this must be notified to the AFM within four trading days of the date on which the holder becomes aware of this or should have become aware of this.

It is emphasised that a person may not only become obliged to notify on the basis of its own actions, but also on the basis of acts of its controlled undertaking or a third party. Subsection 4.5.1 et seq. provides further information in this respect.

4. Determination of the percentage

The share capital interest percentage and/or the voting rights percentage expresses the ratio of the share capital interest or the number of votes to be exercised (the numerator) at the disposal of a person, to, respectively, the total issued capital or the total number of votes that, in theory, can be cast in respect of the issued capital of an issuer (the denominator). The percentages are calculated by means of the following corresponding fractions:

$$\frac{\text{total number of votes held by a person}}{\text{total number of votes in issued capital}} \times 100\% \qquad \frac{\text{total share capital interest held by a person}}{\text{the issue capital}} \times 100\%$$

It is stated, for the sake of clarity, that, although no voting rights can be exercised in respect of shares repurchased by the issuer in its own capital, the related votes are included in the calculation of the denominator of the voting rights fraction.

The Wft states that a notification must provide insight into the composition of the percentages. In order to provide this insight, a distinction is made between direct and indirect disposal of share capital interest and/or voting rights.

The distinction between direct and indirect serves to show in what form disposal exists. Both direct and indirect disposal can be further subdivided according to the actual and potential power to dispose of the shares. This makes it clear whether there is actual right of disposal of share capital interest and/or voting rights or if the situation concerns a right to acquire share capital interest and/or voting rights.

The following combinations with respect to both share capital interest as well as voting rights may therefore occur:

- Direct actual
- Direct potential
- Indirect actual
- Indirect potential

4.1 Direct actual share capital interest and voting rights

Direct actual share capital interest concerns shares in respect of which the holder of a substantial holding has actual right of disposal (for its own account and risk). Direct actual control concerns the votes the holder of a substantial holding can actually cast as a shareholder, pledgee or usufructuary.

4.2 Direct potential share capital interest and voting rights

Direct potential share capital interest and control concerns the interest that a holder of a substantial holding is considered to hold on the basis of an agreement, by means of, for example, the exercise of call options, claims, warrant and conversion rights attached to convertible bonds, by exchanging exchangeable depositary receipts for shares or by concluding negotiable agreements whereby the seller of shares, or depositary receipts for shares, has a right of repurchase. It furthermore concerns the interest that a holder of a substantial interest is considered to hold on the basis of a formal agreement whereby the holder is granted the unconditional right to acquire shares and the attached voting rights in an issuer upon its own initiative on the expiry date of that instrument. This concerns in any case options, futures, swaps, forward-rate agreements and other derivatives contracts.

The above-mentioned financial instruments are only considered options if they grant the holder the right to acquire shares. An option will, in principle, not be considered to exist if settlement in cash is agreed. This is not the case if settlement in cash is formally agreed, but in respect of which it is clear that the relevant parties to the contract actually intended settlement in shares in the issuer.

In the case of an option, the date or the term within which a share or depositary receipt for a share can be acquired, as well as the expiry date, must be stated in the notification to the AFM. For the obligation to notify for written put options, see section 4.5.11.

The rights to acquire shares must be included in the calculation of the numerator. Losing disposal of share capital interest and/or voting rights includes the expiry of potential rights. If a person does not exercise a potential right, but loses its disposal through the passage of time, for example by letting a call option expire, the numerator will change. If the share capital interest percentage and/or the voting rights percentage falls within different thresholds than the percentage that was held directly before the change, this must be notified to the AFM without delay. Put options are not included in the calculation of the numerator, because they constitute a right to transfer and not a right to acquisition.

Although the exercise of potential rights or the exchange of depositary receipts for shares changes the composition of the shares, this does not give rise to a new obligation to notify. An obligation to notify exists only if a substantial interest is composed differently due to an exchange of, for example, options for depositary receipts for shares or shares or the exercise of rights in accordance with an agreement to acquire votes whereby thresholds are reached, exceeded or fallen below in comparison with the previous notification thresholds without this affecting the total percentage of the interest previously notified (see section 3).

An example as illustration:

A has a substantial interest of 6% in company X consisting of 2% in options (a potential holding) and 4% in shares (an actual holding). A exercises all its options for acquiring shares, as a result of which the substantial interest consists only of 6% in shares (an actual holding).

This leads to a notification obligation under Section 5:41 (1) Wft, since the situation involves (i) a different composition (only an actual holding) due to an exchange, (ii) compared to the previous notification of a threshold being exceeded (the shareholding exceeds the 5% threshold) and (iii) without this affecting the total percentage of the previously notified substantial holding (which is still 6%).

The notification as a result of a different composition due to an exchange applies only if the actual holding reaches, exceeds or falls below a threshold and not if only the potential holding reaches, exceeds or falls below a threshold.

A situation where the composition of a substantial interest changes due to the exercise of rights under an agreement to acquire votes could for example involve securities lending (section 4.5.9).

4.3 Indirect actual share capital interest and voting rights

Indirect actual share capital interest concerns shares that are held by a controlled undertaking of a holder of a substantial interest, or by a third party for the account of the holder of a substantial interest or its controlled undertaking (see Subsection 4.5.3 et seq.).

Indirect actual control concerns the voting rights in respect of which the holder of a substantial interest has concluded an agreement with a third party that provides for durable, joint policy concerning the exercise of the voting rights (see Subsection 4.5.4.). This furthermore includes the votes a controlled undertaking of a holder of substantial holding is able to cast.

4.4 Indirect potential share capital interest and voting rights

Indirect potential share capital interest and indirect potential control includes matters such as (direct) potential ownership of shares and/or voting rights of a controlled undertaking or of third parties that are at the disposal of a holder of a substantial interest.

4.5 Special provisions concerning allocation of share capital interest and/or voting rights

The Wft makes use of the term “disposal of”. This includes all forms of disposal, irrespective of whether it concerns actual or potential, direct or indirect ownership of shares or voting rights. The scope of the act is not limited to situations in which disposal in a legal sense applies, but may also apply to situations in which shares and/or voting rights are allocated to a person other than the one who holds the shares or voting rights in a legal sense. The latter is expressed in the Act by the clause “is considered to have disposal of”. The right of disposal of shares and/or voting rights can also be acquired or lost. The legal basis for the acquisition or loss of the right of disposal is not relevant. For example, having the disposal of shares and/or voting rights can be acquired or lost by means of a transfer, purchase or sale, gift or the creation of a right of pledge.

To establish whether a holding is substantial, a person should include the shares and/or votes it has disposal of or is considered to have disposal of on the basis of Section 5:45 Wft.

4.5.1 Having disposal of share capital interest and/or voting rights

A person has disposal of shares held by it and/or over votes it is able to cast as holder of shares.

Following from the above, the person is considered to have disposal of shares held by a third party for its account as well as over the votes this third party may cast. The latter also applies if the shares and/or voting rights are placed with a bank. The bank will in such cases be the legally entitled party, but beneficial ownership will remain with the person.

A person can also have disposal of the votes that it may cast as pledgee or usufructuary, if the applicable law provides for this and the relevant statutory provisions have been satisfied. In principle, the shareholder holds the voting rights. Upon the creation of a right of pledge or of usufructuary, it may, however, be determined that the voting rights will accrue to the pledgee or usufructuary. It is the person's own responsibility to establish to whom the voting rights accrue pursuant to the agreement concluded between the parties. In this context, a person is considered to have disposal of the voting rights held by a third party, if it has concluded an agreement with that third party that provides for a temporary and paid transfer of these voting rights.

4.5.2 Depositary receipts for shares in an issuer

Depositary receipts for shares constitute a special category. A trust office is the usual issuer of depositary receipts for shares. In the event a trust office issues depositary receipts for shares, it will itself become obliged to notify, because it holds the shares and has disposal of the voting rights attached to these shares. The holder of the depositary receipt is also obliged to notify, because it is the one who holds the depositary receipts.

A holder of a depositary receipt for shares may be entitled to exchange the depositary receipts for the underlying shares. The trust conditions/articles of association of the issuer will show whether the depositary receipts for shares can be exchanged. For the composition and calculation of the share capital interest, the depositary receipts for shares are designated as an actual share capital interest at the disposal of the holder.

For the calculation of the voting rights percentage, a person is considered to potentially have disposal of the voting rights that it would be able to exercise if the depositary receipts for shares were to be exchanged. The depositary receipt holder therefore has a direct, or indirect, actual share capital interest and, if the depositary receipts can be exchanged for the underlying shares, direct, or indirect, voting rights.

In the case of (restricted) exchangeable depositary receipts for shares, the holder of the depositary receipts is obliged to notify how many votes are attached to the shares that are held by the trust office. The voting rights percentage to be reported does not, however, amount to more than the percentage the depositary receipt holder will be able to acquire by means of (restricted) exchange.

If the trust office has granted the depositary receipt holder proxy to exercise the voting rights attached to the shares, the depositary receipt holder is obliged to report these direct voting rights. Exchangeability, restricted or otherwise, of the shares is not relevant in this context.

In the event depositary receipts are converted into shares, the issuer who cooperated in the issue of the depositary receipts is obliged to notify the denominator change without delay. Conversion of depositary receipts into shares can therefore lead to a notification obligation on the part of the trust office as well. This is the case if the percentage of shares held by it in the relevant issuer, or the percentage of votes it is able to cast, reaches, exceeds or falls below a notification threshold.

The conversion will not lead to a notification obligation for the holder of the depositary receipts exchanged for shares. The share capital interest of this person does not change; the depositary receipts and the shares received in exchange both represent, after all, a direct actual share capital interest. It merely concerns a change from direct potential control, by virtue of the depositary receipts, to direct actual control, by virtue of the shares.

If the above conversion does not cause the percentage of the share capital interest to reach, exceed or fall below a threshold, there will be no notification obligation for the holder.

4.5.3 Controlled undertaking

For the application of the Wft, a controlled undertaking will first and foremost refer to a subsidiary within the meaning of Section 24(a) of Book 2 of the Dutch Civil Code. A controlled undertaking will furthermore refer to a company over which a person can exercise predominant control.

The term predominant control refers to the wording of the text in Section 2:406 of the Dutch Civil Code (BW). Briefly, there is a situation of decisive control if more than 50% of the votes can be exercised directly or indirectly by a person, or there is another form of decisive control. This passage does not use the term “overwegende zeggenschap” (“predominant control”) as included in the definitions of Section 1:1 Wft.

A person who holds more than half of the votes to be cast at the general meeting of shareholders of a private or public limited company can become obliged to notify if this company acquires or loses disposal of share capital interest or voting rights in the issuer. Reference is made in this context to the situation that frequently occurs in practice in which depositary receipts are issued by a trust office for the shares in a private limited company which has disposal of share capital interest and/or voting rights in an issuer. This trust office, which is usually a foundation, will, in view of the provisions of the third subsection of Section 24(a) of Book 2 of the Dutch Civil Code, not be obliged to allocate the share capital interest and/or the voting rights in the issuer to itself. The reason is that the trust office holds the shares of the aforementioned private limited company for the account of the depositary receipt holder.

In certain circumstances, the aforementioned private limited company will, however, have to be designated as a controlled undertaking of the depositary receipt holder.

This may be the case if the depositary receipt holder is authorised to determine how the rights attached to the shares in the private limited company are to be exercised, or has to possibility to acquire these shares, for example because its depositary receipts can be fully exchanged for shares.

Perhaps superfluously, it is noted that trust offices that have direct disposal of shares in an issuer are required to allocate these shares to themselves and that they may become obliged to notify as a result. A person is considered to have disposal of shares and the attached voting rights held by the controlled undertaking itself. The controlled undertaking is no longer considered obliged to notify because the parent company is required to notify its (indirect) interests.

Shifts within a group

If it concerns a group, consisting of a parent and one or more controlled undertakings, the controlled undertaking will not be obliged to notify if:

(I) interests are transferred within this group, in whole or in part, between the parent and the controlled undertaking(s) or between the controlled undertakings themselves (situation 1), and

(II) an interest held by one or more controlled undertakings is expanded or reduced to such an extent that those controlled undertakings would be obliged to notify, if they were not part of the group, because their interests had reached the (next) notification threshold (situation 2).

The above is clarified by means of the following case concerning a random group (the G Group).

The G Group has a holding of 14% in company X, placed with controlled undertakings A (6%) and B (8%). Situation 1 applies if A transfers its entire holding of 6% in X to B. Situation 2 applies if A reduces its holding X from 6% to 4.5% by selling shares to a third party that does not form part of the G Group.

In other words: if a controlled undertaking loses its status of controlled undertaking (for example, because the parent company disposes of all or some of its shares in the controlled undertaking), that controlled undertaking will, from that moment on, be immediately obliged to notify its substantial holdings and its shares with a special right under the articles of association regarding control of an issuer.

From that moment the provisions of the Wft will apply, apart from any notification obligation already imposed on the parent company. If interests are shifted within the group, i.e. from the controlled undertaking to the parent company or vice versa, or between controlled undertakings, this will not give rise to a notification obligation, provided that the percentage of interests has not reached, exceeded or fallen below any threshold.

It is noted, for the sake of completeness, that a (former) parent company of a (former) controlled undertaking becomes subject to an immediate notification obligation the moment the controlled undertaking loses its status of controlled undertaking, because the parent company loses disposal of the interests held by the (former) controlled undertaking. The parent company will notify the relevant changes to the AFM in the event of the loss of subsidiary status if these changes result in the percentage of an interest falling below a threshold, or relate to one or more shares with a special right under the articles of association regarding control in an issuer.

The parent company will in such cases no longer be considered to have disposal of these shares or voting rights. Furthermore, any person that ceases to be a controlled undertaking and holds a substantial holding, or one or more shares with a special right under the articles of association regarding control of an issuer, has to notify this to the AFM without delay.

4.5.4 Agreement concerning sustained joint voting policy

The AFM takes the view that consultation between shareholders can contribute to awareness of the corporate governance of an issuing institution. Such consultation can help shareholders to express their opinions to an issuer more effectively and clearly. This particularly applies to the preparation of a general meeting of shareholders, where consultation can lead to the granting of voting proxies and voting instructions. Such forms of consultation are generally not based on an agreement to pursue a sustained joint voting policy and therefore do not qualify as “acting in concert”.

If an agreement has been concluded between the parties that obliges them to pursue a sustained joint policy and to exercise their voting rights jointly, each individual party will be considered to have disposal of the voting rights at the disposal of the other parties. In other words, as long as each party concerned retains the freedom to exercise its voting right independently (or have its voting right exercised) – at its own discretion – a sustained joint voting policy will not exist. A sustained policy exists if the agreement, which may have been entered into verbally or in writing, does not apply to only one general meeting of shareholders.

The agreement can also be concluded by, for example, a handshake, on the basis of which the parties in question can mutually deduce that they will exercise their voting rights in a certain way at a number of general meetings of shareholders.

The AFM does not always know whether a long-term agreement to act in concert has been made. The AFM may believe there is cause to request information from the parties in question if the cooperation is oriented around a subject that can lead to a change in the issuer's strategy, for example by the joint nomination of one or more executive or supervisory directors.

There are various facts and circumstances that can cause the AFM to suspect that a long-term agreement to act in concert has been made. The AFM can request information from the parties that are presumed to be cooperating on a strategic issue if, in the run-up to, during, or after a general meeting of shareholders, a number, but not necessarily all, of the following facts or circumstances occur:

- the parties use the same lawyer or legal adviser;
- the parties send the issuer letters with the same purport;
- the parties jointly initiate (legal) proceedings;
- the parties jointly approach the issuer;
- the actual voting behaviour of the parties at the general meetings of shareholders is repeatedly similar;
- the parties have mutually issued or received instructions relating to behaviour or voting;

- a resolution relating to a strategic issue is added, on the initiative of the shareholders, to the agenda of a general meeting of shareholders;
- the shareholders have agreed fees or guarantees;
- the parties are established at the same address (as given in the articles of association);
- the parties publicly announce that they are collaborating;
- the purchasing/selling behaviour of affiliated parties, for example a (legal) entity bound by a formal or actual control structure;
- a (legal) entity which can directly or indirectly exercise a voting right or can exercise certain rights in some other way as a result of which significant influence can be exerted on the commercial or financial policy;
- a natural person who is a family member. This summary of facts and circumstances is not exhaustive.

4.5.5 Allocation by the managing partners of a limited or general partnership

Limited and general partnerships form a special category. They are, pursuant to Section 24(a) (2) of Book 2 of the Dutch Civil Code and Section 5:33 (1) (c) Wft, controlled undertakings of all partners that are fully liable for the debts of the company, which will usually be the managing partners.

This means that each of the managing partners will be required to allocate all of the share capital interest and/or voting rights held by the limited or general partnership, directly or indirectly, to itself. A managing partner will become obliged to notify if – as result of such allocation – the percentage of share capital interest and/or the voting rights held reach, exceed or fall below a threshold. Limited and general partnerships will not be subject to an independent notification obligation in this case.

It is AFM policy that the managing partners of companies incorporated under foreign law, subject to a limited or general partnership regime (such as Limited Partnerships) are required to notify in accordance with the above.

4.5.6 Allocation by joint owners in a community

The partners in a partnership and other joint owners of a community are required to allocate the shares and voting rights held by the community to themselves pro rata to their entitlement in the partnership as direct share capital interest and/or voting rights. The same applies to the limited partner of a limited partnership if it concerns a community between the limited partner and the managing partner(s).

If the joint owners jointly exercise the voting rights, this may represent an agreement that provides for sustained joint policy as regards the exercise of the voting rights (see section 4.5.4 for further information in this respect). The situation may arise that a person, for example a managing partner, is required to allocate the share capital interest and/or voting rights attached to the same shares to itself in different ways. A reasonable application of the Wft entails that the same shares and voting rights should not be allocated more than once to the same person.

This follows from a reasonable application of the law and the transparency intended in the Wft. In some cases, a person will have to allocate the largest interest to itself. If a managing partner is required on the basis of the provisions of section 4.5.5 for example to allocate share capital interest and/or voting rights to itself, allocation on the basis of entitlement will not be appropriate. The notification obligation arises the moment the person acquires disposal of a share capital interest and/or voting right percentage that reaches, exceeds or falls below the next notification threshold. This is not necessarily the same moment as the moment when the percentage of the holding held by the community reaches, exceeds or falls below a threshold.

Community of property

Voting rights that are part of a statutory community of property within the meaning of Section 1:93 of the Dutch Civil Code are allocated to the spouse who has contributed these shares to the community.

Beneficiaries

A notification obligation is imposed on beneficiaries who become joint owner of shares and/or voting rights that are part of the community of the deceased who held a substantial holding or shares with special rights under the articles of association.

4.5.7 Management company of an investment fund

The management company of an investment fund, within the meaning of Section 1:1 Wft, will be considered to have disposal of the shares in issuers placed with the fund and over the attached voting rights. The management company is, after all, able to decide on the exercise of the voting rights attached to the shares placed with the fund. The management company is also able to decide on the purchase and sale of the shares. A notification obligation is not imposed on a depositary pursuant to Section 5:45 (7) Wft because it is not considered to have disposal of the shares and the voting rights. It is noted, for the sake of completeness, that a foreign management company is also subject to a notification obligation.

Section 5:45 (11) Wft provides that a parent company of a management company of an investment firm (investment company or investment fund) and a parent company of a portfolio manager are exempt from the obligation to add the shares and voting rights in an issuer, which are at the disposal of the management company or portfolio manager respectively within the context of their normal business operations, to the shares and voting rights in this issuer held be the parent companies themselves.

The first sentence of Section 5:45 (3) Wft states that a person is considered to have disposal of the shares and the voting rights that are held by its controlled undertaking. This means that this provision does not apply to the relevant parent companies, which is an exception to the rule that a person is considered to have disposal of the shares and voting rights held by its controlled undertaking.

A parent company whose controlled undertaking holds shares in a public limited company under Dutch law whose shares are admitted to trading on a regulated market is obliged without delay to notify the AFM by means of the designated notification form of the name of the controlled undertaking, the name of the supervisory authority (AFM) and submit a declaration that this controlled undertaking is free to exercise the voting rights attached to the shares held by the controlled undertaking. The parent company will continuously update the notified data.

Section 8b (4) of the Decree provides that the AFM may ask a parent company that wishes to qualify for an exemption for certain information, including matters such as the relationship of the parent company with its management company/portfolio manager-controlled undertaking.

It is noted, for the sake of completeness, that if a parent company independently holds shares and/or voting rights in an issuer, whereby its percentage of such shares and/or voting rights reach, exceed or fall below a threshold, it will be required to immediately notify these shares and/or voting rights.

The following applies to portfolio managers, as referred in Section 5:45 (11) (b) Wft. Section 10 of the Decree implements Section 5:45 (11) Wft, which states that Section 5:45 (3) first sentence Wft does not apply to a person whose controlled undertaking is a portfolio manager that performs its services relating to individual asset management independently from other services provided by it.

4.5.8 Power of attorney

A person becomes obliged to notify if it is authorised to exercise its voting rights in an issuer independently and without instructions from the person who granted the proxy.

The authorised person is considered to have disposal of the votes, which means that, to the extent a substantial holding is involved, it is required to notify a direct, or indirect, actual voting right. The person who granted the proxy, if it concerns a substantial holding, is required to notify a direct, or indirect, actual voting right.

In the event a proxy is granted for only one general meeting of shareholders and the authorised person has disposal of votes that can be cast independently, a single notification to the AFM will suffice - for both the person granting the proxy and the authorised person - provided that the notification, in addition to the details referred to in Section 5 (1) of the Decree to the extent applicable, states the date of the general meeting of shareholders for which the person obliged to notify is authorised, and the number of votes this person will have disposal of after the general meeting of shareholders.

A depositary receipt holder who has acquired a voting right (has been authorised) is required to notify its control and direct or indirect actual voting rights to the AFM as well. A distinction should be made in this context between proxy that relates to depositary receipts that were issued with the issuer’s cooperation, and situations in which this does not apply.

The question of whether the depositary receipts are exchangeable (either restricted or otherwise) or not is irrelevant if the depositary receipts were issued without the cooperation of the issuer.

The person who grants the proxy (for example the trust office) will in such cases notify a direct potential voting right. The person granting the proxy can still cast its vote at the general meeting of shareholders as before. This will at most constitute attributable non-performance with respect to the authorised person, but its vote will not be invalid. The authorised holder of a depositary receipt is granted a proxy on the basis of the trust conditions and not on the basis of a statutory right.

If a holder of depositary receipts issued with the issuers cooperation is granted a proxy, it is important whether the holder of the depositary receipts has already been authorised or if this has not yet happened. If the holder of depositary receipts has not (or not yet) received the proxy, the holder of the depositary receipts will be required to notify a direct or indirect potential voting right.

If the holder of depositary receipts has received a proxy, it will be required, if a substantial holding is involved, to notify a direct or indirect actual voting right.

The person granting the proxy will be required to notify its potential voting rights. In such cases it is irrelevant whether the depositary receipts can be exchanged, either with restrictions or otherwise.

It is noted, for the sake of clarity, that the transition from direct to potential voting rights need not be notified to the AFM within four trading days, neither by the person granting the proxy nor by the authorised person.

4.5.9 Securities lending and repurchase agreements

In practice, use may be made of securities lending agreements and repurchase agreements (repos).

In a securities lending agreement, one party makes financial instruments available to the other party, or the parties make such instruments available to each other, on a loan basis. The borrower becomes the owner of the financial instruments made available to it. The borrower must return the same quantity to the lender.

Collateral is provided for the loan in all cases. Usually, collateral is provided by the borrower in the form of financial instruments lent to the lender in the form of (i) a counter loan as settlement or (ii) in the form of a simple transfer. The lender becomes the owner of the financial instruments provided as collateral.

In a repo, the seller transfers a certain quantity of financial instruments to the buyer against payment of a purchase price and a certain fee, and the seller and the buyer at the same time agree that the buyer will return the same quantity of financial instruments of the same type after a certain period. The fee paid by the seller to the buyer is for the former's use of the purchase price during the term of the repo. The seller thus gains access to a cash sum in exchange for the lending of financial instruments.

Property law

In terms of property law, the effects of securities lending agreements and repos are the same: legal title passes to the borrower/buyer in all cases.

Economic motivation

The difference between a securities lending agreement and a repo usually lies in the economic motivation of the parties: with securities lending, the reason for the lender to lend financial instruments is usually to obtain a higher return on an equity portfolio, while the borrower has an actual need to acquire financial instruments because it is holding a short position and has an obligation to deliver the financial instruments on a certain date. In the case of a repo, the principal motivation for the seller is usually a need for cash liquidity.

Reporting requirements

The notification obligations relating to securities lending agreements and repos are as follows.

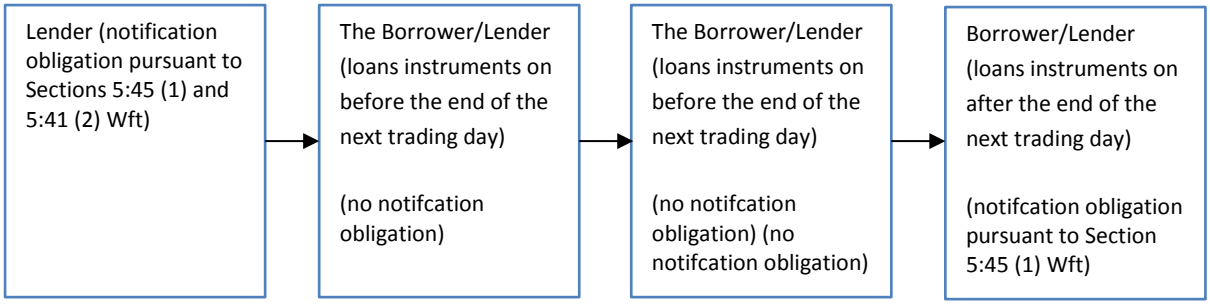
The borrower/buyer does not have to notify the transaction if it relends the securities before the end of the following trading day or otherwise loses the right of disposal with regard to the securities. If the borrower/buyer retains possession of the securities beyond the end of the following trading day, it must notify the transaction on the basis of Section 5:38 in conjunction with Section 5:45 (1) Wft.

A right of recall is usually stipulated in the event of the lending and borrowing of securities. If a right of recall has not been stipulated, the above-mentioned notification obligation will apply in full.

If the lender has stipulated a right of recall, it can terminate the agreement and have the securities returned at any time of its choosing.

When securities are lent, the lender's holding becomes potential rather than actual (in connection with the right of recall). The lender had already reported the actual holding on the basis of Section 5:38 in conjunction with Section 5:45 (1) Wft. The change from actual to potential only involves an additional notification obligation for the lender if as a result of the loan a threshold is reached, exceeded or fallen below in comparison to the composition of its most recent notification without this affecting the total percentage of the notification previously made. When securities are lent and borrowed, it may therefore be the case that the holdings are included several times in the public database.

The following diagram is provided for clarification:



Securities lending and repo agreements should be treated in the same way, since these agreements all involve the passing of legal title.

There will in principle be no new notification obligation for the original legal owner, unless as a result of the loan the composition of its interest reaches, exceeds or falls below a threshold in comparison with the composition of its most recent notification. A notification obligation will apply to the new legal owner if it retains possession of the shares beyond the end of the following trading day.

4.5.10 Merger or division of an issuer

A change in the share capital interest of an issuer as a result of a merger or division must be designated, pursuant to the Wft, as a denominator change in respect of which the party obliged to notify has a notification obligation. The following situations can be distinguished in this context:

a. If the legal merger of two issuers (A and B) constitutes the incorporation of a new legal person (C) which acquires the assets of A and B by operation of law, the shareholders of A and B will have to de-notify their holdings in A and B (after all, the fact that A and B cease to exist and the consequent disappearance of shares A and B mean that they lose disposal of these shares and, in any case, fall below a threshold because their holdings are reduced to nil). Whether they will be required to notify their new holding in C will depend on whether they will again acquire a substantial holding or a shareholding with special rights under the articles of association regarding control in C.

b. If the legal merger between issuers A and B mentioned above occurs because A acquires the assets of B by operation of law and B ceases to exist, a distinction must be made between those with holdings in A and those with holdings in B. Those with holdings in B will in any event lose disposal of their holding in B (since this is exchanged for shares in A) and will have to notify this.

c. If they subsequently acquire a substantial holding and/or shares with special rights under the articles of association regarding control in A, they will be obliged to notify this as well. A notification obligation may also arise for those with a holding in A. Although they do not acquire or lose disposal of shares in A, the exchange of shares in B for shares in A does mean that the denominator of A will increase and this may cause those with a holding in A to fall below a threshold.

d. In the event of a split-up, i.e. a division in which B ceases to exist and B's assets are acquired by issuers D and E, those with a holding in B will acquire shares in D and/or E instead of their holding in B. This means that they lose disposal of their holding in B and they will become obliged to notify. Whether they will also be obliged to notify this acquisition will depend on whether they acquire a substantial holding and/or shares in D and/or E with special rights under the articles of association regarding control.

e. In the event of a division in which, for example, part of B is split off and acquired by issuer D, those with a holding in B will acquire shares in D. They may be obliged to notify this acquisition, namely if they acquire a substantial holding and/or shares with a special right under the articles of association regarding control in D. A notification obligation may furthermore arise in respect of shares in B if a person obliged to notify reaches or falls below a threshold.

4.5.11 Cash-settled instruments

Cash-settled instruments can be used by their holder to influence the exercise of voting rights on the underlying shares without there being a legal basis for this. These instruments include contracts for difference, whereby it is agreed that settlement will be made otherwise than in shares, (total return) equity swaps and cash-settled call options.

Concerning cash-settled instruments, an agreement is usually concluded between a bank and a counterparty with regard to the value of the underlying share (or entitlement thereto) that is traded on a regulated market, in which it is further agreed that there will be no entitlement to acquire the share on settlement. The bank or third party with the payment obligation is thus able to undertake to pay the counterparty the difference between the current value of a share and any appreciation in the value of the underlying shares on termination of the agreement, and any distributions on the share. The bank receives payment from the counterparty in consideration. As the writer of these cash-settled instruments, the bank will usually have purchased the underlying shares in order to hedge its risk.

As the holder of the instrument, the counterparty has no legal right to the underlying shares or the related voting rights: indeed, it is agreed that there will be no entitlement to a share on settlement. Nevertheless, due to the nature of these cash-settled instruments, the holder of these instruments has an economic interest.

Because the holder has an economic interest, the bank (which only holds the underlying shares to hedge its risk) may be inclined to exercise the rights associated with the underlying share according to the preference of the holder. The holder of these cash-settled instruments could thus be in a position to influence the exercise of the voting rights on the underlying shares. Despite the fact that the contracting parties have agreed that there will be no entitlement to acquisition of a share on settlement, there can be situations involving these instruments in which the contracting parties concerned nevertheless settle the transaction in shares. If the bank has purchased the shares in order to hedge its risk, it is not unusual for the bank to decide to settle an agreed amount in shares (despite there being no legal entitlement to this) rather than in cash.

For completeness, it is noted that instruments giving the right to physical settlement also fall under Section 5:45 (10) Wft as well as financial instruments giving entitlement to settlement in cash.

A person is considered to have disposal of shares and the associated voting rights if:

a. it holds a financial instrument whose appreciation in value is partly related to the value appreciation of shares or distributions associated therewith, and which does not entitle it to acquire a share; or

b. it may be obliged to purchase shares on the basis of an option; or

c. it has concluded another contract whereby it acquires an economic interest comparable to that of holding a share.

Item a)

The instruments referred to in a) could be contracts for difference or total equity return swaps.

The addition of "distributions associated therewith" is made in order to make the situation in which the value appreciation of a financial instrument depends not only on the appreciation of the underlying shares but also distributions thereon subject to the obligation to notify. The passage "whose appreciation in value is partly related to the value appreciation of shares" is included to clarify the point that in some cases value appreciation is not exclusively determined by the appreciation of the underlying shares in question.

The ultimate appreciation of the financial instrument can most certainly be affected by possible declines in value of the underlying shares. The point is that there is a net value appreciation. In addition, the value appreciation of a financial instrument compared to that of the underlying shares will not be one-for-one in all cases. The extent of the obligation to notify depends on the degree to which the price of the financial instrument reacts to the price of the underlying shares.

Item b)

The situation referred to in b) is that in which a person can be obliged to purchase shares on the basis of an option. This can be the case if the person has written put options (and thus entered into an obligation to purchase). A person who writes a put option does not in principle have the possibility to influence the policy of the issuer through the exercise of the rights associated with the shares. However, on expiration of the financial instrument, the writer (if the buyer does not exercise its put option) may be obliged to purchase the shares, whereupon the possibility of exercising influence on the policy of the issuer through exercise of the rights associated with its shares arises.

It may also be the case that the holder of the put option could be inclined to exercise the rights associated with the underlying shares in accordance with the preferences of the writer of the put option. The writer of the put option could thus be in a position to influence the exercise of the voting rights on the underlying shares.

Item c)

The provision in c) is included to avoid a situation in which the obligations to notify could be circumvented by using constructions other than financial instruments, also in view of future innovation in the financial instruments available.

It should be clearly understood that both the capital interest and the voting interest have to be notified for cash-settled instruments.

5. How is the share capital interest percentage calculated?

The share capital interest percentage expresses the ratio of the nominal value of the shares to be allocated to a person (numerator) to the total issued (nominal) share capital of the issuer (denominator).

Withdrawal or issue of shares or changes in the nominal value of shares may change this denominator. A person that disposes of a share capital interest in an issuer will, in the calculation of the percentage, have to make use of the denominator as at the moment the notification obligation arises (see section 4 for an overview of the calculation). If a person acquires more shares within the context of a share issue, the denominator after the share issue will have to be used. The market price of a share or a depositary receipt has no effect on the denominator or the numerator.

The following applies with respect to the calculation of the capital interest for cash-settled instruments:

The notification obligation for cash-settled instruments was introduced in the Netherlands in 2012. At that time, this notification obligation concerned only the capital interest and was included in Section 5:45 (10) Wft.

Cash-settled instruments now also fall under the Transparency Directive. As a result, the coming into effect of the Implementation Act for the amended Transparency Directive on 29 January 2016 means that the notification obligation for cash-settled instruments has been extended to include notification of both the capital interest and the voting interest. Section 12 of the Decree states that in the case of a financial instrument that gives entitlement only to settlement in cash, the number of votes (as well) should be calculated on the basis of the delta-adjusted calculation method.

In response to a proposal by ESMA, the European Commission has established technical regulatory norms with respect to (i) the calculation method for the number of votes in an issuing institution if a financial instrument is linked to a basket of shares or share index and (ii) the methods for establishing the delta for the calculation of the number of votes with respect to financial instruments that provide only for settlement in cash.

The European Commission adopted these technical regulatory norms on 17 December 2014, which apply with effect from 26 November 2015 (the Delegated Regulation).[2] The "Policy rule for the method of calculation of shares to which financial instruments relate and the notification requirement for indices and baskets" was withdrawn on 25 May 2016.

6. How is the voting rights percentage calculated?

6.1 Calculation methods

Two calculation methods are distinguished for the calculation of the number of votes in an issuing institution held or considered to be held by a person with an obligation to notify (Section 12 of the Decree). In the case of financial instruments that provide for settlement in cash only, the calculation is made on the basis of the delta-adjusted calculation method. This is the same as the calculation method used for the capital interest for such instruments. In the case of other forms of settlement, the calculation is made using the nominal calculation method.

6.1.1 Nominal calculation method

The percentage of voting rights relating to financial instruments that do not provide for cash settlement (in other words, all financial instruments other than cash-settled instruments) must be calculated using the nominal calculation method.

The voting rights percentage in this case expresses the ratio of the number of votes a person is entitled to cast at a general meeting of shareholders (numerator) to the theoretical maximum number of votes to be cast in respect of the shares in this issuer (denominator). Although no votes can be cast in respect of shares repurchased by the issuer, these are included in the calculation of the denominator. Voting right restrictions under the articles of association do not affect the denominator.
Reference is made to section 7.2.1 for an explanation of the influence of voting right restrictions under the articles of association on the numerator.

The calculation of the voting right percentage is not essentially different from the calculation of the share capital interest percentage. The share with the lowest nominal value represents one vote in accordance with Book 2 of the Dutch Civil Code. The total number of votes than can be cast at a general meeting of shareholders in respect of the issued share capital is calculated by dividing the nominal value of the total issued share capital of an issuer by the nominal value of the smallest share issued by the relevant issuer.

If a person who acquires or loses disposal of shares wishes to calculate its voting right percentage, the number of shares that have to be allocated to this person will have to be established analogously to the calculation of the share capital interest.

[2] Delegated Regulation (EU) 2015/761 of the Commission of 17 December 2014 in addition to Directive 2004/109/EC of the European Parliament and the Council with certain technical regulatory norms for substantial interests.

6.1.2 Delta-adjusted calculation method

In the case of financial instruments that provide for settlement in cash only, the calculation is made on the basis of the delta-adjusted calculation method (Section 12 of the Decree). As stated above, in response to a proposal by European Securities and Markets Authority, the European Commission has established technical regulatory norms for (i) the calculation method for the number of votes in an issuing institution if a financial instrument is linked to a basket of shares or share index and (ii) the methods for determining the delta for the calculation of the number of votes with respect to financial instruments that provide only for settlement in cash. The European Commission adopted these technical regulatory norms on 17 December 2014, and they came into effect on 26 November 2015.[3]

The Delegated Regulation includes the following provisions:

Regarding financial instruments linked to a basket of shares or a share index, the technical regulatory norms state that the voting rights will be calculated on the basis of the weight of the share in the share basket or index if one of the following conditions is met:

a) the voting rights in a certain issuer that are held through financial instruments linked to the share basket or index represent 1% or more of the voting rights associated with the shares in the issuer in question;

b) the shares in the share basket or index represent 20% or more of the value of the securities in the share basket or index in question.

If a financial instrument is linked to a series of share baskets or indices, the voting rights held through the separate share baskets or indices are not aggregated for the application of the above-mentioned thresholds.

Regarding the methods for establishing the delta for the calculation of the number of votes relating to financial instruments that provide for cash settlement only, the technical regulatory norms prescribe the following:

1. The number of voting rights relating to financial instruments that provide for cash settlement only with a linear payment profile that is symmetrical to the underlying share is calculated on a delta-adjusted basis with a cash position of 1.

2. The number of voting rights relating to financial instruments that provide for cash settlement only without a linear payment profile that is symmetrical to the underlying share is calculated on a delta-adjusted basis with the use of a generally accepted standard price determination model.

[3] Delegated Regulation (EU) 2015/761 of the Commission of 17 December 2014 in addition to Directive 2004/109/EC of the European Parliament and the Council with certain technical regulatory norms for substantial interests.

3. A generally accepted standard price determination model is a model used widely in the financial sector before the financial instrument is used and that is sound enough to take account of the elements relevant to the valuation of the instrument. At the very least, all the following elements are relevant to the valuation:

    a. interest;
    b. dividend distributions;
    c. term to due date;
    d. volatility;
    e. price of the underlying share;

4. When establishing the delta, the holder of the financial instrument guarantees the following:

    a. that the model used is adequate for the complexity and the risk of each financial instrument;

    b. that the same model is used consistently for the calculation of the number of voting rights of a particular financial instrument.

5. The information technology systems used for the calculation of the delta ensure that reporting of the voting rights is consistent, correct and timely.

6. The number of voting rights is calculated daily on the basis of the latest closing price of the underlying share. The holder of the financial instrument notifies the AFM when it reaches, exceeds or falls below a notification threshold.

6.2 Voting right restrictions

Following the establishment of the number of votes to be allocated, it will subsequently have to be established to what extent a person can actually exercise voting rights in respect of these at a general meeting of shareholders. As voting rights are attached to the nominal value of the share, a person's voting right should, in principle, be equal to the share capital interest percentage. This is however not always the case. Provisions in the articles of association may override this proportionality. It was therefore decided that the statutory notification obligation should concern the share capital interest as well the voting rights.

The following provisions of the articles of association may be important in this respect.

6.2.1 Voting right restrictions

A few issuers have included a provision in their articles of association that restricts the number of votes to be cast by one person at a general meeting of shareholders. Such a provision may lead to an increase in the share capital interest of a person in an issuer, for example through the acquisition of shares, without a change in the voting rights to be exercised.

In most such cases, the number of voting rights to be exercised will be limited to an actual number.

6.2.2 Certification of shares

If depositary receipts for shares can be exchanged, the depositary receipt holder is entitled to exchange the depositary receipts for the underlying shares. In practice, it is often the case that the depositary receipts can only be exchanged to a limited extent. This is usually due to a regulation contained in the articles of association, also referred to as the “x% regulation”. This regulation restricts the power of disposal of a single person to a certain percentage of the entire issued capital (or a part thereof).

This also means that the number of potential votes attached to the depositary receipts is, in principle, also limited to this percentage.

It may be the case that a person will be required to allocate the shares at the disposal of third parties or controlled undertakings to itself for example. In such cases, it could notify a voting right percentage that exceeds the percentage of the x% regulation. The articles of association of the issuer will provide a definitive answer concerning the scope of the x% regulation.

It is moreover the case for some issuers that the transfer or ownership of shares can only be restricted in respect of persons that comply with a certain quality requirement.

7. How is a short position calculated?

The calculation of a short position as referred to in Section 5.3 Wft must be based on the following:

i) A short transaction in a share via a short transaction in the index or the basket of shares will not qualify, unless the share in the index or basket represents 1% or more of the total number of issued shares, or the share represents 20% or more of the value of the securities in the index or basket, or both conditions are met[4];

ii) A position in a financial instrument, including those listed in Annex I Part I of the Delegated Regulation[5] will qualify if this position confers a financial advantage in the event of a decrease in the price or value of the share (Article 6 (2) of the Delegated Regulation);

iii) It is irrelevant whether a cash settlement or physical delivery of the underlying assets has been agreed (Article 7 (a) of the Delegated Regulation);

iv) Short positions in financial instruments that give rise to a claim to unissued shares and subscription rights, convertible bonds and other comparable instruments are not be considered as short positions for calculating a short position (Article 7 (b) of the Delegated Regulation);

v) The short position must be calculated using the delta-adjusted model described in Annex II Part 1 of the Delegated Regulation (Article 10 (1) of the Delegated Regulation);

vi) Account must be taken of transactions in all financial instruments, whether on or outside a trading platform, that confer a financial advantage in the event of a decline in the price or value of the share (Article 10 (3) of the Delegated Regulation);

vii) Allocation is made on the basis of Articles 12 and 13 of the Delegated Regulation;

viii) No set-off is permitted between a long position and a short position. However, purchase and sale transactions in the same financial instrument relating to the same issuing institution during the trading day may be set off (netted), whereby at the end of the day the total of the gross short position in the issuing institution in question must be notified (if this attains, exceeds or falls below a threshold value).

[4] Since the policy rule for the method for calculating shares to which financial instruments are linked and the notification obligation for indices and baskets will very probably be withdrawn, on this point consistency is sought with the Delegated Regulation (EU) 2015/761 of the Commission of 17 December 2014 in addition to Directive 2004/109/EC of the European Parliament and the Council with certain regulatory norms for substantial interests.

[5] Delegated Regulation (EU) no. 918/2012 of the European Commission of 5 July 2012.

i)
this point is consistent with the Delegated Regulation[6]).

The position held by the party in question via or by means of an index or basket of shares must be calculated using publicly available information on the composition of the index or basket concerned. Parties are assumed to have made their best efforts to obtain the most recent information with regard to the composition.

vii)
Article 12 of the Delegated Regulation applies. However, the investment strategy described in Article 12 (2)(a) can only refer to short positions.

The management entity as described in paragraph 3 will of course only aggregate the short positions held in the funds and portfolios under its management for which the strategy is focused on short positions concerning a particular issuing institution.

Article 13 of the Delegated Regulation applies. However, only the short positions of all the legal entities constituting a group will be aggregated and may not be set off. The notification thresholds as stated in Section 5:38 (4) and Section 5:39 (3) Wft do of course apply.
Notification of the short position to the AFM is made taking into account Section 5.3 Wft and the Disclosure of Major Holdings and Capital Interests in Securities-Issuing Institutions Decree.

viii)
It is a statutory requirement that gross short positions are to be notified in the event that a threshold is reached, exceeded or fallen below. These may therefore not be set off against the long position.

After discussion with various participations in the consultation regarding the draft policy rule, the policy rule has been amended to correspond more closely to actual practice, while the relevant information in the public database will continue to be available to investors.

The policy rule is now formulated so that purchase and sale transactions in the same financial instrument relating to the same issuing institution during the trading day may be set off (netted), whereby at the end of the day the total of the gross short position in the issuing institution in question must be notified (if this attains, exceeds or falls below a threshold value). This therefore applies to shares, but also to derivative instruments if these have the same features. This is in line with the system that already applies regarding the requirement to notify long positions that attain, exceed or fall below a threshold value.

For example: the sale of option “C XYZ Jun 8” on trading day 1 may be netted off against a purchase of the same option “C XYZ Jun 8” on trading day 1. This sale of option “C XYZ Jun 8” may not be netted off against the purchase of an option “C XYZ Oct 8”, or against the purchase of a

[6] Delegated Regulation (EU) 2015/761 of the Commission of 17 December 2014 in addition to Directive 2004/109/EC of the European Parliament and the Council with certain technical regulatory norms for substantial interests.

future in the same underlying share. The sale may also not be netted off against a purchase of shares.

In addition, the total gross short position at the end of the trading day in question may be calculated by adding up all the short positions there are at product level to arrive at a total gross short position in an underlying share.

An example as illustration:

The issuing institution's total issued capital is 1000.

Assuming a position of 0 at the start of the trading day in question, the following transactions in a single issuing institution are initiated during the trading day:

Purchase or sale	Product	Instrument	Number
Purchase	Share	XYZ	5
Sale	Share	XYZ	-20
Purchase	Share	XYZ	25
Purchase	Share	XYZ	15
Purchase	Option	C XYZ Jun 8	25
Sale	Option	C XYZ Jun 8	-10
Purchase	Option	P XYZ Jun 8	5
Sale	Option	P XYZ Jun 8	-5
Sale	Option	C XYZ Oct 8	-20
Sale	Future	XYZ futures Jun 13	-5
Sale	Future	XYZ futures Jun 13	-5

The above transactions lead to the following positions at the end of the day (netted off by same instrument, but not by underlying share).

Product	Position	Percentage
Share	25	2.50%
Option C XYZ Jun 8	15	1.50%
Option P XYZ Jun 8	0	0.00%
Option C XYZ Oct 8	-20	-2.00%
XYZ futures Jun 13	-10	-1.00%

This results in the total long and short positions shown in the next example. The individual long positions per instrument are thus summed to produce a single long position and the individual short positions to produce a single gross short position.

Long/short	Position	Percentage
Long	40	4.00%
Gross short	-30	-3.00%

Based on the notification threshold of 3%, this leads to notification to the AFM of a substantial interest (long position) of 4% and a short position of 3%.

8. The moment at which the notification obligation arises and the term within which notification must take place

The notification obligation arises at the moment that a person acquires or loses disposal of shares and/or votes whereby the percentage reaches, exceeds or falls below a threshold. Or, if a person acquires or loses disposal of financial instruments whereby the short position it holds reaches, exceeds or falls below a threshold. The AFM must also be informed in the event of a (denominator) change at the issuer which changes the capital or the voting rights or short position of a person to such an extent that the relevant percentage reaches, exceeds or falls below a threshold (see Section 3 for further information).

Legislation in this respect clearly assumes own responsibility on the part of the person obliged to notify. If the acquisition or loss of shares is based on an agreement, usually a sale or purchase agreement, the notification obligation arises the moment the agreement becomes effective. The moment at which the shares are acquired or transferred (i.e. the time of transfer) from a property law perspective is not relevant, because this moment is usually later than the moment defined by the law of obligations.

An agreement with a resolutory condition still constitutes an agreement and therefore a notification obligation exists. In the case of an agreement subject to suspensive conditions, the agreement - and therefore also the notification - has not yet arisen. The moment a notification obligation arises is decisive for the data on which the calculation of the percentages must be based.

The term within which the actual notification must be made is determined by the moment at which the person knows or should know that the notification obligation has arisen. A person should know, within at most two trading days after it has acquired or lost disposal of shares or voting rights or a short position, whether or not it has reached, exceeded or fallen below a threshold.

The moment it knows that it has reached, exceeded or fallen below a threshold, the person is obliged to notify without delay. A person can establish at what time it acquired or lost disposal of the shares on the basis of, for example, the transaction confirmation provided by the bank or broker. If someone acquires the disposal of shares under inheritance law and wishes to establish whether a notification obligation has arisen, this can be done by, for example, calculating the share of the inheritance. The data as at the time of the death of the deceased are relevant with respect to the calculation of the percentage.

“Without delay” means that the time between the moment a person becomes, or should have become, aware of reaching, exceeding or falling below a threshold, or aware of the acquisition or loss of the disposal of one or more shares with a special right under the articles of association regarding control, and the moment the AFM receives the notification, must be as short as possible given the circumstances.

It may be expected of a person who already holds a “critical” percentage of share capital interest and/or voting rights in an issuer, that it, in anticipation of the arising of a notification obligation, will keep itself informed of the consequences of its acts with respect to the percentage of share capital interest and/or voting rights at its disposal and that are relevant to that notification obligation (see also section 3 concerning the alert message). The AFM will strictly verify whether the notification was made without delay. This also in view of the possible consequences of the notification for the share price, whereby carelessness creates the (risk of) abuse of inside information.

If a public limited company incorporated under Dutch law becomes an issuer, a person that knows or should know that it holds a substantial holding or one or more shares with a special right under the articles of association regarding control is required to notify this to the AFM without delay. Substantial holdings in a legal person incorporated under the law of a non-EU Member State must be reported without delay as well, if this legal person becomes an issuer.

In the case of a notification that a person is required to make because a change has occurred in the denominator of the issuer, the notification must be made at the latest on the fourth day after the processing of the denominator change in the public database. Section 3 also deals with this passive notification obligation.

Lastly, a notification concerning a change of composition must be notified within four trading days after the date on which the holder is aware or should be aware that this has occurred.

9. The manner in which notifications have to be made

The Decree stipulates that the notifications that are required pursuant to the Wft must be made in writing. “In writing” includes “electronically” pursuant to the Online Administrative Business Act.

Those obliged to notify may submit their notifications via the Internet. The AFM has made an extranet available for this purpose known as Loket AFM. An access code is required to log in to Loket AFM. It is essential, with a view to the duty to notify without delay, that users who wish to submit electronic notifications must apply to the AFM for their log-in name and access code in time. Users logging in for the first time must agree in writing to certain rules concerning the use of Loket AFM by signing a statement of use and sending this to the AFM. The AFM website provides further information on applying for access codes. In the unlikely event a notification cannot be submitted electronically to the AFM, use can be made of the notification forms available on the AFM website, which have to be sent to the AFM by regular mail and by fax.

10. Processing of notifications

Following receipt of a notification from a person obliged to notify, the AFM will report this immediately to the issuer in which the substantial holding or a short position has been reported and to the person itself by means of an email.

The AFM's notification to the relevant person serves as proof that this person has complied with its obligation to notify. The AFM does not provide any information on the substance of the notification in this context.

Subject to the possibility of suspending the processing of the notification (see section 13), the AFM will process the data contained in the notification in the public database as referred to in Section 1:107 Wft within one working day of the working day on which the notification was received. After the notification has been processed in the public database, the AFM will inform the relevant issuer of the substance of the notification by means of an email. The notification will lose any of its potential effect on the share price if it is processed quickly in the public database. The AFM may suspend the processing of the notification in the public database for as long as it is obtaining information, or having information obtained.

This can occur if the AFM has a reasonable suspicion that a person has submitted an incorrect notification. The manner in which the AFM may suspend processing is further dealt with in section 13. In the event of the suspension of processing, the AFM will process the notification within one working day of the working day on which it received the requested information, or, if the requested information was not obtained, as soon as the AFM considers processing in the public database possible.

10.1 Publication of notifications in the public database on the AFM website

As discussed above, notifications to the AFM are made digitally or in writing. The AFM maintains, pursuant to the Wft, three public databases for the information, namely: the issued capital public database, the substantial holdings public database and the executive and supervisory directors public database. These databases contain the data that are notified. The public databases can be consulted free of charge via the AFM website. The substantial holdings public database will include the name of the person obliged to notify, the name of the issuer, the total share capital interest and/or voting rights percentage at the person's disposal, as well as the composition of this percentage.

The date on which the notification obligation arose will also be published. If it concerns an indirect interest, the names of the relevant controlled undertakings will have to be reported as well and these will, possibly with an attached organisational chart, be published on the AFM website. Third parties that take note of the publication can relate the notified percentage to the denominator data as at the date on which the notification obligation arose.

10.2 Protection of personal data

Section 1:107 (3) Wft stipulates that the addresses of natural persons are not to be included in the public database. This in view of the protection of privacy.

11. Exemption from the notification obligation

Section 5:46 (1) Wft contains an exemption from the notification obligation for (financial) undertakings, institutions and agencies that applies exclusively to the extent the shares or voting rights or financial instruments that represent a short position with respect to the shares or the capital are held for the exercise of their normal professional or business activities, and for a short duration. A short duration will be taken to mean a period of at most three trading days after disposal of shares and attached voting rights was acquired or lost.

The exemption as referred to in Section 5:46 (2) Wft applies to depositaries of shares to the extent that the shares and the attached voting rights are held for the exercise of their business activities, and they cannot freely exercise the voting rights attached to these shares. The exemption also applies to persons who perform activities as referred to in part a of the definition of performing an investment activity in Section 1:1 Wft who acquire or lose disposal of shares and/or voting rights as a result of which they know, or should know that the share capital interest or voting rights percentage at their disposal reaches, exceeds or falls below the threshold of 3% or 5%, to the extent they do not exert any influence on the management of the relevant issuer and have a licence for the exercise of their business in their home Member State as referred to in part c of Section 5:25a (1) Wft.

The exemption further applies to persons who acquire or lose disposal of shares and the associated voting rights in the context of stabilisation purposes in accordance with Chapter III of Regulation (EC) no. 2273/2003 of the European Commission of 22 December 2003 for implementation of Directive 2003/6/EC of the European Parliament and the Council in connection with the exemption applying to buy-back programmes and for the stabilisation of financial instruments (PbEU 2003, L 336), to the extent that the votes are not cast or otherwise used to exert influence over the management of the issuing institution.

If shares in a public limited company under Dutch law are concerned whereby the shares are admitted to trading on a regulated market or in a legal person incorporated under the law of a state that is not a Member State, a person as referred to in Section 5:46 (2) at (b) Wft will report to the AFM, without delay, for which legal person the Netherlands serves as home Member State and whose shares are admitted to trading to a regulated market in the Netherlands, that it, with respect to the relevant issuer, performs, intends to perform or ceases performing activities as referred to in part a of the definition of performing an investment activity in Section 1:1 Wft.

The person will inform the AFM of the above by means of the designated notification form.

Shares and the attached voting rights that are part of the trading portfolio of one of the financial undertakings as referred to in Section 5:46 (3) at (a) to (f) Wft are not taken into consideration in the determination as to whether the relevant percentages reach, exceed, or fall below the thresholds, as referred to in Sections 5:38 (4) and 5:39 (3) Wft, to the extent these shares or voting rights do not amount to more than 5% of the share capital or the voting rights in an issuer and those votes are not cast or otherwise exercised to exert influence on the management of the

issuer.

11.1 Exemption for foreign legal persons

Sections 5:40, 5:41 and 5:42 Wft do not apply to shares or voting rights in a legal person incorporated under the law of a state that is not an EU Member State, but whose shares are admitted to trading on a regulated market in the Netherlands, and in respect of which the Netherlands serves as host Member State, as referred to in Section 2 (1) at (j) of the Transparency Directive.

In this context, and in derogation of Section 5:38 (3) Wft, the notification obligations as referred to Section 5:38 (1) and (2) Wft apply to the notification thresholds of 5% and 10%, if the person obliged to notify is an issuer that is obliged to notify as a result of the acquisition or loss of disposal of shares in its own capital. Furthermore, the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% (see also section 1) apply for the notification obligations stated in Sections 5:38 and 5:39 Wft.

12. Assessment of the published share capital interest percentages and voting right percentages

Situations in which one percentage or the sum of the published share capital interest and/or voting right percentage in a single issuer amount to more than 100% must be taken into account when assessing published percentages. The following situations are provided by way of example.

1. It may be the case that a notification obligation arises for several persons with respect to the same shares. This can occur if the shares are held indirectly. For example, if a third party holds the shares for the account of a person obliged to notify, a notification obligation may arise for both parties. A similar situation may arise if a limited or general partnership (with multiple managing partners) acquires or loses disposal of shares.

2. The act provides for a notification obligation for depositary receipt holders in addition to the notification obligation applying to shareholders. If, for example, depositary receipts have been issued for 100% of the shares in an issuer, the trust office will be required to notify a share capital interest of 100% in connection with the shares held by it. A notification obligation may moreover arise for holders of depositary receipts in connection with the share capital interest and (to the extent the depositary receipts can be exchanged for the underlying shares) the voting rights held by them.

3. A notification obligation pursuant to the Wft may arise for not only those persons who actually hold shares or the depositary receipts for those shares, but also for persons who hold rights to acquire shares or depositary receipts for shares. Reference is made to the situation that regularly occurs in which an option to acquire preference shares, up to the amount of the issued capital, is granted to a foundation. Such a foundation will in any case have to notify a (potential) share capital interest of 100%, because the calculation of

the numerator needs to be based on the denominator as at the moment the notification obligation arose (this the moment at which the option is acquired).

The composition of the percentages can be an important aid in the interpretation of the notifications in the above-mentioned situations.

And finally, it is noted that every published notification concerns a snapshot of the situation as it was at the moment the notification obligation arose. A notification obligation will, for example, not arise if a person acquires or loses disposal of shares or if a capital increase or reduction takes place without causing the relevant percentages to reach, exceed or fall below another threshold. The share capital interest and/or voting right percentage actually held by a person can therefore change without this resulting in an obligation to publish this change.

13. Powers of the AFM and potential sanctions

It is of first and foremost importance to record that failure to comply with certain provisions of the Wft constitutes a violation and therefore may constitute an economic offence as referred to in the Economic Offences Act (Wet op de economische delicten, or 'Wed'). Intentional commission of an economic offence constitutes a crime.

Incorrect notification or failure to notify

The AFM is authorised to oblige a person, by means of an instruction, who submitted an incorrect notification, or who wrongly failed to submit a notification, to still submit a correct notification within a reasonable term set by the AFM. If a notification is incorrect and the notification has not been corrected or if a person wrongly failed to submit a notification and the correct notification is not made, the AFM is authorised to include the data it considers correct in the public database, after the AFM has informed the relevant issuer and the relevant person obliged to notify thereof.

The AFM may have reasons to doubt the correctness of the notification or may doubt the correctness of a notification not being made. The grounds for this doubt may, for example, be contained in information obtained by the AFM on the basis of the media, a press release, a public offer or the declaring of a public offer to be unconditional.

Obtaining information

The AFM is authorised pursuant to Section 1:74 Wft, and the supervisors of the AFM are authorised pursuant to Sections 1:68 and 1:72 Wft (in conjunction with Section 5:16 of the General Administrative Law Act (Awb)) to obtain or have information obtained from anyone.

Sections 5:13 and 5:20 Awb apply (by analogy) in this respect. The AFM is authorised to enter any place - with the exception of a residence - without obtaining the occupant's permission. The AFM may engage the assistance of the police in doing so. The AFM is authorised to demand access to business data and documents. It is also authorised to make copies thereof.

Suspension of a notification

As stated above, the AFM is entitled to suspend the processing of the notification in the public database for the duration of the process of obtaining information or having information obtained. The AFM will inform the person and the issuer of the suspension by means of an email. In the event of the suspension of processing, the AFM will process the notification within one working day of the working day on which it received the requested information, or, if the requested information was not obtained, as soon as the AFM considers processing in the public database possible. The suspension is intended to prevent contamination of the public database with incorrect notifications. The AFM will therefore not carry out provisional processing of the notification, in the sense that the AFM provisionally includes the possibly incorrect notification in the public database.

Cooperation

Persons who have made a notification are expected to cooperate to fullest extent possible in the publication of the correct notification within the term set by law. This includes matters such as good availability of the person, so the AFM can obtain information, or have it obtained, without delay.

Confidentiality requirement

A duty of confidentiality applies with respect to the application of the Wft, such as applies to the AFM concerning all its supervisory duties. Any party that performs any duty pursuant to the Wft is prohibited from making any further or other use of confidential data or information and from publicising such data and information in any further or other way than is required for the performance of that party's duties or required by the Wft. The AFM may make disclosures by using confidential data or information obtained in the performance of its duties under the Wft, provided that these cannot be traced back to individual persons.

13.1 Orders for incremental penalty payments

The AFM is authorised, pursuant to Section 1:79 Wft, to impose an order for incremental penalty payments in respect of violations of the regulations as referred to in the annex to the aforementioned section. This applies, for example, if someone refuses to comply with the instruction issued on the basis of Section 5:51 (1) Wft.

13.2 Administrative fines

The AFM is authorised to impose an administrative fine if the Sections referred to in the annex to Section 1:80 Wft are violated.

The method for determining the amount of the fine is set out in the Wft and the Decree on administrative penalties in the financial sector. These provide a list of tariff numbers, each representing the amount of the fine for the corresponding violation. If the AFM intends to impose a fine, the person involved will be informed thereof, including the grounds on which the intention is based. The person involved will be afforded the opportunity to present its position. The AFM will impose the fine by way of decision. The decision will always state the violation in respect of which

the fine was imposed, the amount of the fine and the data on the basis of which this amount was determined, and the term within which it must be paid.

The fine must be paid within six weeks after the decision imposing the fine becomes effective. If the fine is not paid, the AFM is authorised, following demand for payment, to collect the fine by means of a writ of execution. If an objection or appeal is filed against the decision imposing the fine, this will suspend the obligation to pay the fine until the period for lodging an appeal has expired or, if appeal has been filed, until the appeal has been ruled on.

The power to impose an administrative fine lapses if criminal proceedings have been brought against the offender in respect of the violation concerned and the court hearing has commenced, or if the right to prosecute has lapsed under Section 74 of the Criminal Code. The right to commence criminal proceedings therefore lapses if the AFM has already imposed a fine. If an administrative fine of more than € 340 can be imposed for a violation, the power to impose an administrative fine lapses five years after the violation occurred. In other cases, the power to impose an administrative fine lapses three years after the violation occurred. The activities relating to the imposition of an administrative fine are carried out by persons not involved in establishing the violation and the preceding investigation.

Objections and appeals

Any interested party may object to a decision by submitting notice of objection to the AFM[7] within six weeks of notification of the decision.

Any interested party can appeal against the decision on the objection by lodging an appeal with District Court of Rotterdam[8] within six weeks of notification of the decision.

13.3 Other sanctions

13.3.1 Criminal-law sanctions

If a person or an issuer fails to comply with certain provisions of the Wft, this will constitute a punishable act. This follows from the Economic Offences Act. The sanction imposed for a violation of the Wft, at the time of publication of this guideline, is a prison sentence of up to six months, a community service order, or a fine of € 20,250 (€ 81,000 for legal persons).

[7] Sections 6:3 and 6:7 Awb
[8] Section 8:7 Awb

13.3.2 Civil-law sanctions

If a notification is not made in accordance with the Wft, the civil courts can impose measures. One or more holders of shares in the capital of an issuer that hold, alone or jointly, a substantial holding or a special right under the articles of association, and the issuer are authorised to institute a claim. TheCourt in the district where the relevant issuer has its registered office is the competent court. The District Court of The Hague is the competent court if the case involves a legal person under foreign law. The claim must be brought within three months of the day on which the violation was detected or could have been detected.

The district court may impose the following measures:

1. an order to the person obliged to notify to submit a notification in accordance with the Wft;

2. suspension of the right to exercise voting rights held in the relevant issuer at the disposal of the person obliged to notify, during a term to be determined by the district court of up to three years;

3. suspension of a resolution of the general meeting of shareholders of the relevant issuer until a decision on a measure as referred to at 4 becomes final;

4. a declaration that a resolution of the general meeting of shareholders of the relevant issuer is void, to the extent that it is likely that this resolution would not have been adopted if the voting rights at the disposal of the person obliged to notify had not been exercised; and

5. an order to the relevant person obliged to notify, to refrain from acquiring the disposal of shares or voting rights in the relevant issuer during a period to be determined by the district court of at most five years.

A measure as referred at 2 and 5 does not apply to shares that are held for management purposes by someone other than the relevant person obliged to notify, unless this person is authorised to acquire these shares or to specify how the attached voting rights are to be exercised.

In the event of preliminary relief, the measures can also be imposed by the president of the court in interlocutory proceedings, with the exception of the measures referred at 4.

14. Publication of violations

The AFM publishes its decisions to impose administrative fines, orders for incremental penalty payments or instructions in connection with violations relating to notification obligations as soon as the imposition becomes irrevocable.

Decisions to impose an administrative fine for a serious violation or an order for incremental penalty payments if the order is incurred must be published earlier. In these cases, publication is made as soon as possible after the sanction is imposed. The AFM must then observe a term of five working days before effecting publication. Information relating to any objection and/or appeal will also be published.

If the protection of interests that the Wft is designed to protect do not permit delay, the AFM may publish all administrative sanctions immediately.

In certain circumstances the AFM may delay publication or publish in anonymous form. This may be the case if:

(i) the information to be published could lead to identification of a natural person and the publication of his/her personal information would be disproportionate;

(ii) (ii) this would cause disproportionate harm to the parties involved;

(iii) (iii) a current criminal investigation or current investigation by the supervisor into potential violations would be undermined; or

(iv) (iv) this would endanger the stability of the financial system.

Publication may be withheld in exceptional situations. This applies if even delayed or anonymous publication would endanger the stability of the financial system or publication would be disproportionate given the limited seriousness of the offence.

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