CAA COMMISSARIAT AUX ASSURANCES

Luxembourg, October 9th 2024

Circular Letter 24/9 on changes in shareholding structures of captive insurance undertakings and reinsurance undertakings

In light of the multiple exchanges with the undertakings in the scope of this Circular Letter relating to the definition of a change in shareholding and in view of the significant number of such transactions regarding groups holding a captive insurance undertaking or a reinsurance undertaking, this circular letter aims to:

- provide additional clarifications on the identification of a qualifying holding as defined in Article 43 paragraph 27 of the amended law of December 7, 2015, on the insurance sector;
- clarify certain practical aspects of the notification procedure for changes in shareholding;
- define the content of the notification to be submitted to the CAA in accordance with Articles 87 paragraph 2 and 89 paragraph 3 of the amended law of December 7th, 2015, on the insurance sector;
- introduce notification forms and templates allowing for digital submission of these files to the CAA.

The introduction of these notification forms and templates, which include the information to be submitted and the clarifications provided by this Circular Letter, should facilitate the submission of change in shareholding files to the CAA by the concerned parties and thereby improve processing times for these files through better quality submissions.

Legal Bases:

This circular letter is based on the following texts:

- Articles 43, 87 to 93 of the amended law of December 7th, 2015, on the insurance sector (hereinafter "LSA");
- Article 92 of the amended law of December 8th, 1994, on the annual accounts and consolidated accounts of Luxembourg insurance and reinsurance undertakings (hereinafter "LCA");
- The "Joint Guidelines on the Prudential Assessment of Acquisitions and Increases of Qualifying Holdings in the Financial Sector" issued by the three ESAs (EIOPA, EBA, and ESMA) (hereinafter "Joint Guidelines").

Definitions:

"Shareholder" or "Member": means a person who owns shares in the target undertaking or, depending on the legal form of an institution, other owners or members of the target undertaking.

"Beneficial Owner": any natural person identified according to the terms of Article 1 paragraph 1 point 7 of the amended law of November 12th, 2004, on the fight against money laundering and terrorist financing.

"Proposed acquirer": a natural or legal person who, whether individually or acting in concert with another person or persons, intends to acquire or to increase, directly or indirectly, a qualifying holding in a target undertaking.

"File": Notification file within the meaning of Article 87, paragraph 1 of the LSA.

"Target undertaking": a Luxembourg captive insurance undertaking within the meaning of Article 43, paragraph 8 of the LSA or a Luxembourg reinsurance undertaking authorised within the meaning of Article 45, paragraph 5 of the LSA.

"Control relationship": the relationship between a parent undertaking and a subsidiary, as provided in Article 92 of the LCA, or a similar relationship between any natural or legal person and an undertaking.

"Qualifying holding": means a direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking.

I. Notification obligation for shareholders crossing the thresholds defined in Article 87 of the LSA

Under Article 87 of the LSA, the notification obligation lies with the proposed acquirer and with any natural or legal person, once the decision has been taken to acquire or cease to hold, directly or indirectly, a qualifying holding in the capital or in the voting rights in a target undertaking, or to increase or decrease their holding so that the latter crosses the thresholds of 20%, 30%, or 50%, or the target undertaking becomes or ceases to be their subsidiary.

A qualifying holding is acquired when the participation rate in the capital or in the voting rights reaches or exceeds 10% or which makes it possible to exercise a significant influence over the management of that undertaking.

Furthermore, a single transaction may result in both, the acquirer and the seller crossing one of the aforementioned thresholds. In this case, each of the two parties will have to make a notification. However, the CAA will accept joint notifications.

It is important to note that the obligation of notification applies to legal persons in the same way as to natural persons, once they have taken the decision to acquire or dispose of a qualifying holding, or to increase or decrease their holding in a target undertaking so as to exceed one of the thresholds referred to in Article 87 of the LSA. The LSA specifies that the notification must take place prior to the execution of the transaction. A notification after the acquisition is not in compliance with the legislation.

However, and in addition to the principle set out in Article 87 of the LSA according to which it lies within the responsibility of the proposed acquirer to notify the CAA of acquisitions and disposals of holdings in a target undertaking that exceed predefined thresholds, Article 91 of the LSA provides that insurance or reinsurance undertakings must notify the CAA, as soon as they become aware, of acquisitions or disposals that cause one of the thresholds referred to in Article 87 of the LSA to be crossed upwards or downwards.

Although Article 91 of the LSA does not impose an obligation on insurance or reinsurance undertakings to notify the CAA in advance in case of exceeding or reaching a threshold by one or more shareholders, they are nonetheless required to inform the CAA as soon as they become aware of such transactions.

As in practice it is difficult, if not impossible, to demonstrate when an insurance or reinsurance undertaking becomes aware of a change in its shareholding within the meaning of Article 87 of the LSA, the CAA presumes that the undertaking under its supervision reasonably becomes aware of a direct or indirect acquisition or disposal of shares as soon as this information is publicly available, for example based on press releases, annual reports, declarations of threshold crossings made to financial market authorities, or any other source of information to which it may have had access. This approach applies even more to shareholding changes within the same group to which the undertaking under CAA supervision belongs, as the group's governance should ensure that this information is communicated to the concerned entities. The CAA considers that when the target undertaking provides an organizational chart, as part of the annual reporting, setting out a change in its shareholding structure, it cannot claim ignorance of the change and must immediately take all necessary steps to ensure that a proper notification is submitted to the CAA.

Regarding changes in shareholdings involving several legal entities or individuals, acting in concert, such transactions may be jointly notified by the person who can validly represent the rest of the group of persons acting in concert, instead of multiple individual notifications to be submitted to the CAA by each member of the group acting in concert.

II. Cases Requiring Notification:

1. Acquisitions of Qualifying shareholdings:

While the determination of a direct qualifying holding should not give rise to interpretation discrepancies, this is not the case for indirect holdings where the shareholding structure has multiple levels.

In addition to the explanations provided in the “Information Note of the CAA regarding changes in the shareholding of direct insurance and reinsurance undertakings dated September 27th, 2017,” it has been deemed necessary to provide certain clarifications regarding the methods for determining an indirect qualifying holding.

To determine the size of the indirect qualifying holding, the CAA relies on the methods set out in section 6 of chapter 1 of title II of the Joint Guidelines, in the following order of application:

1.1 Step 1: Control Criterion

The first step consists in applying the "control" criterion to determine whether a proposed acquirer has acquired or intends to increase his direct or indirect qualifying holding in a target undertaking or in an existing shareholder holding a qualifying holding.

This method involves replacing the participation rate with 100% at each level of the shareholder chain when the proposed acquirer directly or indirectly holds the majority of the voting rights or exercises control by other means over the target undertaking or an existing shareholder holding a qualifying holding.

To determine whether a proposed acquirer has directly or indirectly acquired control over a target undertaking, reference should be made to the relationships set out in Article 92 of the LCA.

Without prejudice to any other control relationship, the CAA considers that there is an acquisition of control by a person, whether natural or legal, over another legal person from the moment when that person, whether natural or legal, holds the majority of voting rights (50% + 1 voting right).

According to the principle of the "control" method, any person, whether natural or legal, who exercises control over another legal person holding a qualifying holding in a third legal person is deemed to hold a qualifying holding of the same percentage in this third legal person, without this holding being diluted by multiplying the holding percentages at each level of the shareholding chain (multiplication criterion).

In order to make the "control" method easier to understand, Annex I of this circular letter aims to illustrate it with some practical cases.

1.2 Step 2: Multiplication Criterion

When the application of the control criterion does not lead to the conclusion that an indirect control is exercised by a proposed acquirer over a target undertaking, the multiplication criterion should be applied. This method involves multiplying the participation rates at each level of the shareholding chain up to the direct level of the target undertaking.

When the result of the applied multiplication is greater than or equal to 10%, a notification to the CAA must be made. It should be noted that any shareholder directly or indirectly controlling another shareholder identified by the application of the multiplication method is also deemed to hold a qualifying holding in the target undertaking.

2. Special cases:

2.1 Parties acting in concert:

Under section 4 of the Joint Guidelines, the CAA considers as "parties acting in concert" all natural or legal persons who, by virtue of an explicit or implicit agreement, decide to acquire or increase a qualifying holding in a target undertaking.

Conversely, inaction that could create favourable conditions for an acquisition or an increase in a qualifying holding in a target undertaking may be seen by the CAA as a concerted action among multiple proposed acquirers.

Where multiple proposed acquirers act in concert in relation to a target undertaking, the shareholdings of each proposed acquirer are to be summed up in order to determine if a qualifying holding in a target undertaking is acquired. If the sum of the shareholdings exceeds one of the thresholds defined in Article 87 of the LSA, each proposed acquirer should submit a file to the CAA, even if none individually holds a qualifying holding. However, the CAA will accept joint notifications.

To determine if the above-mentioned persons are acting in concert, the CAA considers the criteria listed in section 4 of the Joint Guidelines.

2.2. Shareholders exercising significant influence

In order to qualify as a qualifying holding, the proposed acquirer must hold or intend to acquire, directly or indirectly, a holding representing at least 10% of the capital or of the voting rights, or exercise significant influence over the management of the target undertaking.

Under the definition of a qualifying holding, a proposed acquisition or increase of an existing holding that does not represent 10% of the capital or of the voting rights must still be notified to the CAA if the holding would enable the proposed acquirer to exercise significant influence over the management of the target undertaking, regardless of whether this significant influence is exercised or not.

The existence of significant influence exercised by a shareholder or a proposed acquirer over the management of a target undertaking will be examined by the CAA in light of the criteria set out in section 5 of chapter 1 of title II of the Joint Guidelines.

Where it is established that significant influence, whether direct or indirect, is exercised over the target undertaking, the same notification obligations apply to the acquiring candidate as if they had acquired a holding of 10% or more in the capital or voting rights of the target undertaking.

2.3. Division of share ownership

A widespread technique for wealth transmission and estate planning is the division of the full ownership of shares into "usufruct" and "bare ownership".

According to Article 1852bis of the Civil Code and unless otherwise stipulated by the undertaking's bylaws, voting rights belong to the bare owner, except for decisions regarding the allocation of profits which belong to the usufructuary, and the usufructuary has the right to the profits that the undertaking decides to distribute.

As the shareholding of insurance and reinsurance undertakings under the supervision of the CAA mostly consists of foreign companies, it goes without saying that the provisions of the Luxembourg Civil Code do not apply to them. As a consequence, the legislation of the country of establishment of the undertaking must be considered to determine the rights assigned to usufructuaries and bare owners.

In practice, the usufructuary can exercise the prerogatives granted to shareholders, including in particular the right to take part in decisions at general meetings of shareholders to the extent that these

decisions contribute to the realisation of profits, while decisions related to the substance of the shares belong to the bare owner.

To enable the CAA to assess whether the acquisition or disposal of a qualifying holding exceeds one of the thresholds set out in Article 87 of the LSA, the proposed acquirer and any natural or legal person who has decided to dispose of all or part of their holding, or if applicable, the insurance or reinsurance undertaking, has to demonstrate to the CAA what prerogatives are attached to the usufruct and the bare ownership of the shares, taking into account the law applicable to the said shareholders as well as any potential statutory provisions.

Where, based on the bylaws or the local legislation of the shareholder's country of establishment, the voting rights are shared between the usufructuary and the bare owner, they are deemed to equally control, directly or indirectly, the target undertaking.

Where the usufructuary or the bare owner holds the voting rights, the percentage of voting rights held is considered to determine the existence of a control relationship.

Where the rights of the bare owner are limited to the capital, the latter cannot exercise direct or indirect control over the target undertaking, and the existence of a qualifying holding must be examined using the multiplication criterion.

2.4. Successive crossings of notification thresholds

Another phenomenon the CAA has had to deal with recently, particularly in relation to shareholders listed on a stock exchange, is when one or more shareholders successively cross one or more notification thresholds.

By way of illustration, an investment fund considers to acquire a 10% stake in a listed undertaking that wholly owns a subsidiary under the supervision of the CAA. A file is submitted to the CAA. The CAA in turn does not object to the acquisition of a qualifying holding in the target undertaking.

Given the good financial performance of the listed undertaking, the investment fund intends to increase its stake in the listed undertaking from 10% to 21%, thus crossing the 20% notification threshold.

In principle, the investment fund should submit a second file.

However, since the investment fund has already been assessed by the CAA in light of the criteria set out in Article 89 of the LSA, a simplified notification procedure is introduced in this case, provided that the following cumulative conditions are met:

- the date of the CAA's non-objection letter following the introduction of the first file is not more than 5 years old;
- no changes to the business plan or governance are envisaged at the level of the target undertaking supervised by the CAA as a result of the increase in a qualifying holding by the shareholder(s) who have already submitted a file;
- the scope of the shareholders in the second file is identical to that of the first.

The content of the simplified notification file is defined in Annex V of this circular letter.

III. Content of the file

Article 87 of the LSA lays down the obligation to provide the CAA with a file only in the case described in paragraph 1, i.e., an acquisition or an increase of an existing qualifying holding. For the cases mentioned in paragraph 2, a simple notification is sufficient.

For the assessment of the file, the CAA must evaluate whether the proposed acquisition is likely to compromise the sound and prudent management of the undertaking under its supervision, considering all the criteria outlined in Article 89 of the LSA.

The content of the file and the intensity of the review by the CAA are proportionate to the likely influence the proposed acquirer could exert on the target undertaking.

Without prejudice to the CAA's right to request any information it deems necessary for the assessment of the proposed acquisition or disposal of a qualifying holding in light of the criteria outlined in Article 89 and paragraph 2 of Article 87 of the LSA, this section aims to define the minimum content of the file to be submitted to the CAA.

Regarding the content of the notification file, a distinction should be made between three different types of files :

- Acquisitions/increases in qualifying holdings without causing a change of the business plan;
- Acquisitions/increases in qualifying holdings causing a change of the business plan;
- Disposals/decreases of qualifying holdings.

It should be noted that for change in shareholdings causing a change of the business plan, the instructions of “Circular Letter 23/8 regarding the procedures and content of changes in business plan application files for reinsurance undertakings” do not apply.

The content of each type of file and notification is defined in the following annexes:

- Annex II for acquisitions/increases of qualifying holdings without causing a change of the business plan;
- Annex III for acquisitions/increases of qualifying holdings followed by a change of the business plan;
- Annex IV for disposals of qualifying holdings;
- Annex V for simplified files in case of successive crossings of notification thresholds.

Regarding the documents and information referred to in Annexes II to V of this circular letter, the names of the documents should indicate the reference number at the beginning of the electronic document name (e.g., 5_Organigramme before acquisition of a qualifying holding, I.3_Description of the group to which the proposed acquirer belongs). The references to be used are indicated in the column "Reference" of Annexes II to V.

IV. Final Provisions

From November 1st, 2024, the following circular letters will no longer be applicable to the undertakings in the scope of this circular letter:

- for captive insurance companies within the meaning of Article 43 paragraph 8 of the LSA, CAA circular letter 06/1 regarding changes in shareholding of direct insurance undertakings;
- CAA circular letter 02/7 regarding changes in shareholding of reinsurance undertakings.

The Executive Committe