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The AFM on Substantial Shareholdings and Gross Short Positions

On 11 January 2024, the Netherlands market regulator, Autoriteit Financiële Markten (AFM) issued another edition of their Market Watch publication where they provide background and insight to a specific market topic. This edition was devoted to “[Substantial Holdings and Gross Short Positions](#).”

The AFM cites that the Exor-Philips case, and the ownership structure of SPACs has sparked public discourse about the notification obligation. In this edition the AFM provides background on the notification requirement and explains in more detail how the AMF has organized its supervision.

Common Knowledge:

The notification obligation requires anyone who acquires or disposes of a short position, a position in shares and/or voting rights in issuers that reaches, exceeds, or falls below a threshold should make a notification to the AFM without delay.

Did you know?

If a person’s capital position reaches the 3% threshold, both the total capital holding and the holding in voting rights must be reported to the AFM, even if the latter has not reached or crossed a threshold.

Breaking down it down: Exor-Philips Case

Goldman Sachs (GS) used the securities lending market to acquire a substantial shareholding in Philips on behalf of its client Exor. Because the securities lending agreements and the sale to Exor happened on the same day, no notification obligation arose for GS for this part of the transaction as no thresholds were crossed. This was aided by the market maker exemption (Art.5:46a Wft), in which case GS would not have a notification obligation for its gross short positions.

As the exemption is only applicable to the gross short position of a position holder, a notification would need to be filed if the position holder disposes of a position in capital and/or voting rights. GS made a notification but in the view of the AFM, this notification did not reflect the actual capital position and therefore GS also reported its short position.

The AFM also highlights that the total position of voting rights or capital holding can be greater than 100% of issued capital. Such can be the case when a securities lending transaction has the right to recall and agreements that concern sustained joint voting policy where every participant is required to notify the total amount of shares held by all the participants.

The AFM recognizes that some obscure practices remain possible, e.g. acquiring stakes off-market or positions over 100% and therefore perfect market transparency where all transactions are public is unattainable. As such the AFM tries to balance transparency with the administrative burden.

Going Forward

The European Single Access Point (ESAP) will centralize substantial shareholding disclosures EU-wide similar to what is currently being done for net short positions. The AFM is upgrading the register and web portal for filing notifications to improve the process and data quality.

Actions

1. Position holders need to ensure they have proper systems and controls for actively monitoring holdings and understanding regulatory requirements. This is crucial for compliance.
2. Regulators need to continue upgrading public reporting systems to simplify filing processes and improve data quality.
3. Regulators need to enhance their use of data analysis tools and automation to better detect unreported positions.
4. Continued dialogue between regulators and stakeholders to refine requirements and guidance to continually move to a more transparent market.

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