KNF

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Key requirements and procedure for authorization of investment firms

Assessing notification of proposed acquisitions

Investment services requiring authorisation

The authorisation specifies the investment services or activities which the investment firm is authorised to provide.

Investment services and activities (Annex II, Section A, MIFID II)

(1) Reception and transmission of orders in relation to one or more financial instruments;

- (2) Execution of orders on behalf of clients;
- (3) Dealing on own account;
- (4) Portfolio management;
- (5) Investment advice;

(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;

- (7) Placing of financial instruments without a firm commitment basis;
- (8) Operation of an MTF;
- (9) Operation of an OTF.



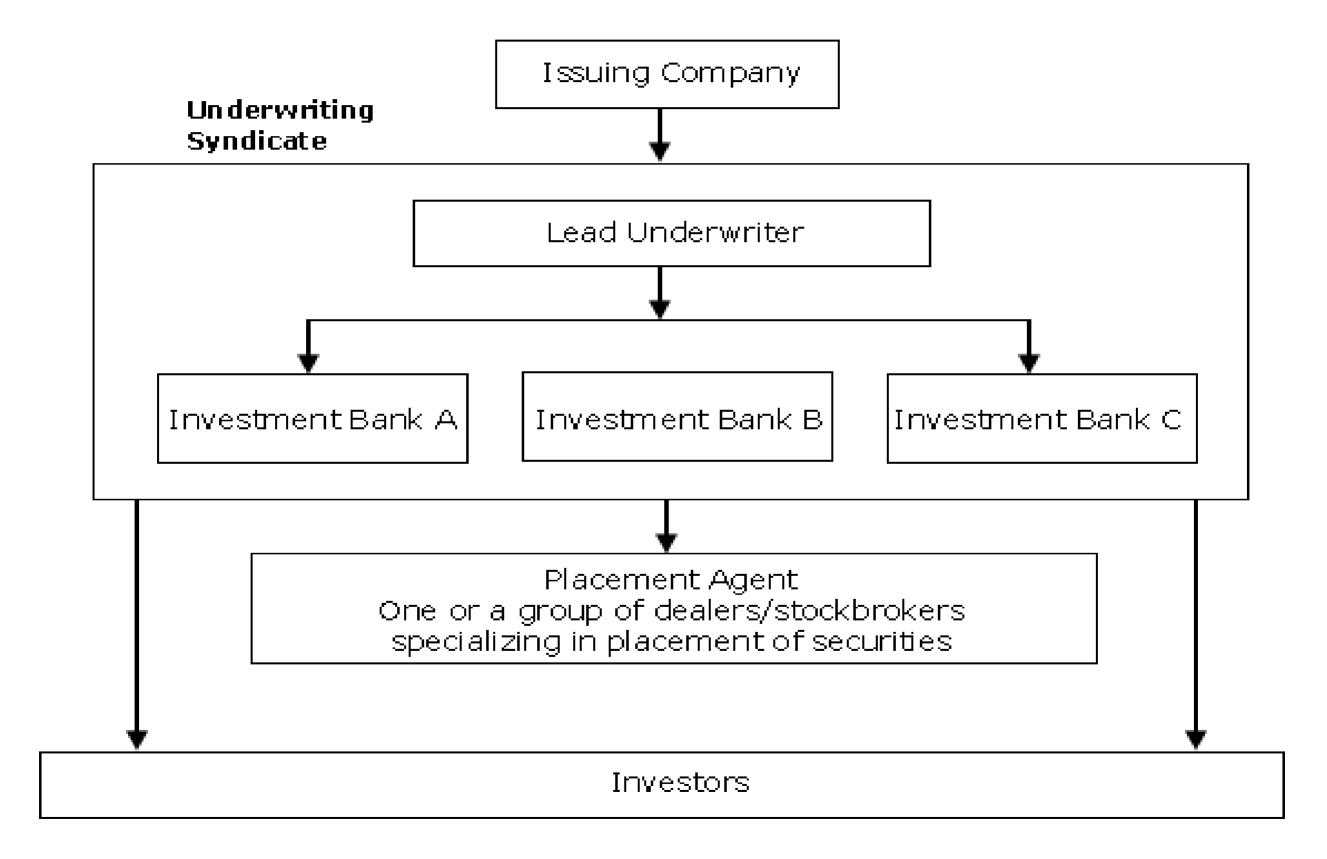


Questions raised

- 1) Could you please clarify what is the difference between underwriting of financial instruments and placing of financial instruments on a firm commitment basis?
- In addition, could you please kindly provide some examples of services 2) related to underwriting?



Underwriting of financial instruments vs placing of financial instruments on a firm commitment basis







Underwriting of financial instruments vs placing of financial instruments on a firm commitment basis

"standby underwriter" shall mean an entity which is a party to an agreement with an issuer or a selling shareholder whereby such entity has undertaken to acquire, on its own account, all or part of securities offered in primary trading or in an initial public offering, which were not subscribed for during the subscription period;

"firm commitment underwriter" shall mean an entity which is a party to an agreement with an issuer or a selling shareholder whereby such entity has undertaken to acquire, on its own account, all or part of securities of a specific issue, which are offered exclusively to this entity with a view to reselling them in primary trading or in an initial public offering;



Underwriting of financial instruments vs placing of financial instruments on a firm commitment basis

The issuer or the selling shareholder may execute a standby underwriting agreement.

An issuer executing a standby underwriting agreement must obtain appropriate authorisation in the form or a resolution adopted by the appropriate decision making body of the issuer or, in the case of standby underwriting of shares – in the form a resolution of the General Shareholders Meeting of the company.

Only the following entities may act as a standby underwriter: an investment firm, an investment fund, an open-end pension fund, a bank, an insurance institution, a Polish or foreign financial institution having its registered office in an OECD state or in a Member State, or a consortium of such entities. In the case of a consortium, each member of the consortium shall also be regarded as a standby underwriter.



Underwriting of financial instruments vs placing of financia

Prior to commencement of a securities subscription, the issuer or the selling shareholder may execute a firm commitment underwriting agreement. Disposal of securities in performance of such an agreement shall be made through the intermediation of an investment firm.

Under a firm commitment underwriting agreement executed by the issuer, the firm commitment underwriter should be able to dispose of its right to subscribe for securities. Disposal of this right by the firm commitment underwriter shall be regarded as primary trading; where the registry court has entered an increase in the issuer's share capital in the register of entrepreneurs, offering of shares acquired in exercise of such right by the firm commitment underwriter shall also be regarded as primary trading.

Under a firm commitment underwriting agreement executed by the selling shareholder, the firm commitment underwriter should be able to dispose of the securities acquired from the selling shareholder as well as the right to acquire such securities.

Only the following entities may act as a firm commitment underwriter: a bank, an investment firm, a foreign investment firm, or a consortium of such entities. In the case of a consortium, each member of the consortium shall also be regarded as a firm commitment underwriter.



NEW OFFERING RULES, REASONS FOR CHANGING THE OFFERING DEFINITION UNDER POLISH LAW AND ITS IMPACT ON INVESTMENT FIRMS

New definition of offering (placement)

Offering financial instruments is understood as undertaking on behalf of the issuer of securities, an issuer of a financial instrument or a seller of a financial instrument, activities leading to acquisition of financial instruments by other entities, by:

- 1) presenting, in any form and manner, issuer's information, available on financial instruments and the terms and conditions of their acquisition, which constitute a sufficient basis for making a decision to purchase such instruments or
- 2) intermediation in the sale of financial instruments purchased by entities as a result of presenting information referred to in point 1, or
- 3) presenting to individually marked addressees information provided by the issuer or seller, in any form and in any way, in order to:
- (a) to promote, directly or indirectly, the acquisition of financial instruments; or

(b) encourage, directly or indirectly, the acquisition of financial instruments.



Ancillary services requiring authorisation

The authorisation may cover one or more of the ancillary services set out in Section B of Annex I to MIFID II.

Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier level;

Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction; Advice to undertakings on capital structure, industrial strategy and related matters and advice

and services relating to mergers and the purchase of undertakings;

Foreign exchange services where these are connected to the provision of investment services; Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;

Services related to underwriting.

Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 to MIFiD II related to the underlying of the derivatives

Authorisation shall in no case be granted solely for the provision of ancillary services.



AUTHORISATION OF INVESTMENT FIRM



What are the criteria?

In all cases, we will review:

- 1. General information
- 2. Information on capital
- 3. Information on shareholders
- 4. Information on the management body and persons who direct the business
- 5. Financial information
- 6. Information on the organisation of the firm

Additional information in special cases:

- a) Requirements applicable to the management of investment firms that are natural persons or investment firms that are legal persons managed by a single natural person
- b) Requirements applicable to shareholders and members with qualifying holdings



General information

An applicant seeking authorization as an investment firm shall submit to the competent authority an application that includes the following general information:

- its name (including its legal name and any other trading name to be used); a) legal structure (including information on whether it will be a legal person or, where allowed by national legislation, a natural person), address of the head office and, for existing companies, registered office; contact details; its national identification number, where available; as well as: (i) for domestic branches: information on where the branches will operate; (ii) for domestic tied agents: details on its intention to use tied agents;
- the list of investment services and activities, ancillary services and financial b) instruments to be provided, and whether clients' financial instruments and funds will be held (even on a temporary basis);
- copies of corporate documents and evidence of registration with the **C**) national register of companies, where applicable.

Information on capital

An applicant seeking authorisation as an investment firm shall provide to the competent authority information and, where available, evidence on the sources of capital available to it.

The information shall include:

- a) details on the use of private financial resources including the origin and availability of those funds;
- b) details on access to capital sources and financial markets including details of financial instruments issued or to be issued;
- c) any relevant agreements and contracts regarding the capital raised;
- d) information on the use or expected use of borrowed funds including the name of relevant lenders and details of the facilities granted or expected to be granted, including maturities, terms, pledges and guarantees, along with information on the origin of the borrowed funds (or funds expected to be borrowed) where the lender is not a supervised financial institution;
- e) details on the means of transferring financial resources to the firm including the network used to transfer such funds.



Information on shareholders

An applicant seeking authorisation as an investment firm shall provide to the competent authority the following information on its shareholders:

- (a) the list of persons with a direct or indirect qualifying holding in the investment firm, and the amount of these holdings and, for indirect holdings, the name of the person through which the stake is held and the name of the final holder;
- (b) for persons with a qualifying holding (direct or indirect) in the investment firm the documentation required from proposed acquirers for the acquisition and increases in qualifying holdings in investment firms in accordance with Articles 3, 4 and 5 of Commission Delegated Regulation 2017/1946 of 11 July 2017 supplementing Directives 2004/39/EC and 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for an exhaustive list of information to be included by proposed acquirers in the notification of a proposed acquisition of a qualifying holding in an investment firm;
- (c) for corporate shareholders that are members of a group, an organisational chart of the group indicating the main activities of each firm within the group, identification of any regulated entities within the group and the names of the relevant supervisory authorities as well as the relationship between the financial entities of the group and other non-financial group entities.
- (d) For the purposes of point (b), where the holder of a qualifying holding is not a natural person, the documentation shall also relate to all members of the management body and the general manager, or any other person performing equivalent duties.

The organisation chart should show who has control of the company to which the licence application relates. It is important that the organisation chart shows exactly who are the directors of legal entities and the percentages held by both direct and indirect shareholders in the company.

Information on the management body and persons who direct the business

In respect of members of the management body and persons effectively directing the business and their related powers and any proxies:

- (i) personal details comprising the person's name, date and place of birth, personal national identification number, where available, address and contact details;
- (ii) the position for which the person is/will be appointed;
- (iii) a curriculum vitae stating relevant education and professional training, professional experience, including the names of all organizations for which the person has worked and nature and duration of the functions performed, in particular for any activities within the scope of the position sought; for positions held in the previous 10 years, when describing those activities, details shall be included on all delegated powers and internal decisionmaking powers held and the areas of operations under control;
- (iv) documentation relating to person's reputation and experience, in particular a list of reference persons including contact information, letters of recommendation;
- (v) criminal records and information on criminal investigations and proceedings relevant civil and administrative cases, and disciplinary actions opened against them;
- (vi) information on refusal of registration, authorization, membership or license to carry out a trade, business or profession; or the withdrawal, revocation or termination of such a registration, authorization, membership or license; or expulsion by a regulatory or government body or by a professional body or association;

Information on the management body and persons who direct the business

(vii) information on dismissal from employment or a position of trust, fiduciary relationship, or similar situation;

(viii) information on whether an assessment of reputation and experience as an acquirer or as a person who directs the business has already been conducted (including the date of the assessment, the identity of that authority and evidence of the outcome of this assessment);
(ix) description of any financial and non-financial interests or relationships of the person and his/her close relatives to members of the management body and key function holders in the same institution, the parent institution and subsidiaries and shareholders;
(x) details of the result of any assessment of the suitability of the members of the management body, performed by the applicant itself;

(xi) information on the minimum time that will be devoted to the performance of the person's functions within the firm (annual and monthly indications);

(xii) information on human and financial resources devoted to the induction and training of the members (annual indications);

(xiii) the list of executive and non-executive directorships currently held by the person.

For the purposes of point (ix) of point (a), financial interests include interests such as credit operations, guarantees and pledge, whereas non-financial interests may include interests such as family or close relationships.

The staff of the internal management and control bodies.

Financial information

An applicant seeking authorisation as an investment firm shall provide to the competent authority the following information on its financial situation:

(a) forecast information at an individual and, where applicable, at consolidated group and sub**consolidated levels, including:** (i) forecast accounting plans for the first **three business years** including: - forecast balance sheets; - forecast profit and loss accounts or income statements; (ii) planning assumptions for the above forecasts as well as explanations of the figures, including expected number and type of customers, expected volume of transactions/orders, expected assets under management; (iii) where applicable, forecast calculations of the firm's capital requirements and liquidity requirements under Regulation (EU) No 575/2013 of the European Parliament and of the Council and forecast solvency ratio for the first year;

(b) for companies that are already active, statutory financial statements, at an individual and, where applicable, at consolidated group and sub-consolidated levels for the last three financial periods, approved, where the financial statements are audited, by the external auditor, including: (i) the balance sheet; (ii) the profit and loss accounts or income statements; (iii) the annual reports and financial annexes and any other documents registered with the relevant registry or authority in the particular territory relevant to the company financial statements and, where applicable, a report by the company's auditor of the last three years or since the beginning of the activity;

(c) an analysis of the scope of consolidated supervision under Regulation (EU) No 575/2013, including details on which group entities will be included in the scope of consolidated supervision requirements post-authorisation and at which level within the group these requirements will apply on a full or subconsolidated basis.

Information on the organization of the firm

An applicant seeking authorization as an investment firm shall provide to the competent authority the following information on its organization:

- (a) a program of initial operations for the following three years, including information on planned regulated and unregulated activities detailed information on the geographical distribution and activities to be carried out by the investment firm. Relevant information in the program of operations shall include: (i) the domicile of prospective customers and targeted investors; (ii) the marketing and promotional activity and arrangements, including languages of the offering and promotional documents; identification of the Member States where advertisements are most visible and frequent; type of promotional documents (in order to assess where effective marketing will be mostly developed); (iii) the identity of direct marketers, financial investment advisers and distributors, geographical localization of their activity;
- (b) details of the firm's auditors, when available at time of application for authorization;
- (c) the organizational structure and internal control systems of the company, comprising: (i) the personal details of the heads of internal functions (management and supervisory), including a detailed curriculum vitae, stating relevant education and professional training, professional experience; (ii) the description of the resources (in particular human and technical) allocated to the various planned activities; in relation to holding client financial instruments and funds, information, specifying any client asset safeguarding arrangements (in particular, where financial instruments and funds are held in a custodian, the name of the custodian, and related contracts); (iv) an explanation of how the firm will satisfy its prudential and conduct requirements.

Information on the organization of the firm

(d) information on the status of the application undertaken by the investment firm to become a member of the investor compensation scheme or evidence of membership to the investor compensation scheme, where available;

(e) a list of the outsourced functions, services or activities (or those intended to be outsourced) and a list of the contracts concluded or foreseen with external providers and resources (in particular, human and technical, and the internal control system) allocated to the control of the outsourced functions, services or activities; (f) measures to identify and to prevent or manage conflicts of interest that arise in the course of providing investment and ancillary services and a description of product governance arrangements;

(g) a description of systems for monitoring the activities of the firm, including backup systems, where available, and systems and risk controls where the firm wishes to engage in algorithmic trading and/or provide direct electronic access; (h) information on the compliance, internal control, and, risk management systems (a monitoring system, internal audits and the advice and assistance functions).

(i) details on the systems for assessing and managing the risks of money laundering and terrorist financing;

(j) business continuity plans, including systems and human resources (key personnel); (k) record management, record-keeping and record retention policies; (I) a description of the firm's manual of procedures.

Notification of proposed acquisitions

Article 11 MIFiD II

Member States shall require any natural or legal person or such persons acting in concert (the 'proposed acquirer'), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a **<u>qualifying holding</u>** in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (the 'proposed acquisition'), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information.

In determining whether the criteria for a qualifying holding referred to in Article 10 and in this Article are fulfilled, Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

Shareholders and members with holdings

The competent authorities <u>shall not authorize</u> the provision of investment services or performance of investment activities by an investment firm until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

The competent authorities if, taking into account the need to ensure the sound and prudent **shall refuse authorization** management of an investment firm, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings. Where close links exist between the investment firm and other natural or legal persons, the competent authority shall grant authorization only if those links do not prevent the effective exercise of the supervisory functions of the competent authority.

The competent authority shall refuse authorization if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

Member States shall require that, where the influence exercised by the persons is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation. Such measures may include applications for judicial orders or the imposition of sanctions against directors and those responsible for management, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

qualifying

Notification of proposed acquisitions

Regulation (EU) 2017/1946 sets out rules on the information to be included by a proposed acquirer in the notification of a proposed acquisition to the competent authorities of the investment firm in which the acquirer is seeking to acquire or increase a qualifying holding ('target entity') for the assessment of the proposed acquisition.

Information to be provided by the proposed acquirer:

- 1) General information relating to the identity of the proposed acquirer;
- 2) Additional information relating to the proposed acquirer that is a natural person;
- 3) Additional information relating to the proposed acquirer that is a legal person;
- 4) Information on the persons that will effectively direct the business of the target entity;
- 5) Information relating to the proposed acquisition;
- 6) Information on the new proposed group structure and its impact on supervision;
- 7) Information relating to the financing of the proposed acquisition;
- 8) Additional information for qualifying holdings of up to 20 %;
- 9) Additional requirements for qualifying holdings between 20 % and 50 %;
- 10)Additional requirements for qualifying holdings of 50 % or more;



Questions raised

- 1) It would be of great benefit if you could share your experience on the issue of defining "significant influence on the proposed acquirer" with regard to Article 5 of the Regulation (EU) №2017/1946.
- 2) We also kindly ask you to provide a detailed explanation of the methodology KNF uses to calculate indirect qualifying holding, since Article 11 of MiFID II provides for: "Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an investment firm first to notify in writing the competent authorities, indicating the size of the intended holding".
- 3) Lastly, any explanations on how comprehensive assessment of the shareholding's structure of the target entity should be conducted would be greatly appreciated.



Significant influence

A proposed acquisition or increase in a holding which does not amount to 10% of the capital or voting rights of the target undertaking should be subject to prior notification and prudential assessment if such holding would enable the proposed acquirer to exercise a significant influence over the management of the target undertaking, whether such influence is actually exercised or not.

In order to assess whether significant influence may be exercised you should take several factors into account, including the ownership structure of the target undertaking and the actual level of involvement of the proposed acquirer in the management of the target undertaking.

With a view to determining whether significant influence could be exercised, you should take into account all the relevant facts and circumstances.



Significant influence

The target supervisor should take into account the following non-exhaustive list of factors for the purpose of assessing whether a proposed acquisition of a holding would make it possible for the proposed acquirer to exercise significant influence over the management of the target undertaking:

(a) the existence of material and regular transactions between the proposed acquirer and the target undertaking;

(b) the relationship of each member or shareholder with the target undertaking;
(c) whether the proposed acquirer enjoys additional rights in the target undertaking, by virtue of a contract entered into or of a provision contained in the target undertaking's articles of association or other constitutional documents;

(d) whether the proposed acquirer is a member of, has a representative in or is able to appoint a representative in the management body, the management body in its supervisory function or any similar body of the target undertaking;

(e) the overall ownership structure of the target undertaking or of a parent undertaking of the target undertaking, having regard, in particular, as to whether shares or participating interests and voting rights are distributed across a large number of shareholders or members;
(f) the existence of relationships between the proposed acquirer and the existing shareholders and any shareholders agreement that would enable the proposed acquirer to exercise significant influence;

(g) the proposed acquirer's position within the group structure of the target undertaking; and (h) the proposed acquirer's ability to participate in the operating and financial strategy decisions of the target undertaking.

Question raised

We would appreciate your assistance in the interpretation of the Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (hereinafter referred to as CRD IV).

Article 76 (3) of CRD IV envisages that the risk committee shall review whether prices of liabilities and assets offered to clients take fully into account the institution's business model and risk strategy. Where prices do not properly reflect risks in accordance with the business model and risk strategy, the risk committee shall present a remedy plan to the management body. Could you possibly offer your advice on the way the aforementioned phrase "prices of liabilities and assets" should be construed? Is it the value of the liability transferred under assignment agreement between the investment firm and its client? Alternatively, should it be considered as the price of investment products that are being sold to the investment firm's clients? It would be a great assistance if you could kindly provide any examples of the chargeable transfer of the liabilities by an investment firm to its clients.