



BANKING AND FINANCE

ASF Regulation 3/2021-R: An analysis of the main changes

ASF Regulation 3/2021-R (“ASF Regulation”), issued by the Insurance and Pension Funds Supervisory Authority (“ASF”), was approved on 13 April 2021 and revokes ASF Regulation 3/2016-R of 12 May¹. The aim of this ASF Regulation is to establish the documents and information that must be filed with (i) the prior communication of projects to acquire, increase and decrease qualifying shareholdings in insurance or reinsurance companies and pension fund management companies, (ii) the communication of the constitution of encumbrances or charges on qualifying shareholdings in insurance or reinsurance companies and pension fund management companies. The ASF Regulation also defines (i) the criteria to confirm the existence of qualifying shareholdings by concerted action or through indirect shareholdings, as well as the terms of their prior notification, and (ii) the rules applicable to the acquisition of holdings that make it possible to exercise significant influence over the management of the company.

The Regulator has legislated² to establish more transparent rules in line with the main trends in European legal and corporate control, mainly at the level of qualifying shareholdings by concerted action or through indirect shareholdings. The ASF Regulation has been issued precisely to implement the rules set out in the Joint Guidelines of the European Supervisory Authorities on the prudential assessment of acquisitions and increases of qualifying shareholdings in financial sector entities (“Joint Guidelines”)³.

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1 The ASF Regulation was published in the official gazette *Diário da República* on 3 May 2021, available at www.dre.pt.

2 Under Article 174-A(1) of the Legal Framework for Access to and Exercise of Insurance and Reinsurance Business (“RJASR”), approved by Law 147/2015 of 9 September, and Article 89(1) of the Legal Framework for the Constitution and Operation of Pension Funds and Pension Fund Management Entities (“RJFP”), approved by Law no. 27/2020, of 23 July, which grant the ASF the power to legislate on qualified shareholdings.

3 Available at https://esas-joint-committee.europa.eu/Publications/Guidelines/JC_OH_GLs_EN.pdf.

This ASF Regulation is also intended to adapt the ASF's procedures with regard to processing personal data in accordance with the General Data Protection Regulation ("GDPR")⁴.

In general terms, the biggest changes introduced by the ASF Regulation as to the prior notification of facts regarding the ownership of qualifying shareholdings are the following:

- i) The definition of criteria to confirm the existence of qualified shareholdings (a) by acting in concert or (b) through indirect shareholdings, as well as the terms to fulfil the obligation of prior notification in such cases⁵
- ii) The establishment of a substantial approach of the acquisition of shareholdings, in cases where the percentage limits provided for in the RJASR and RJFP for the purposes of prior notification are not reached or exceeded (10%, 20%, 33% or 50%) but where, nevertheless, the shareholder exercises significant influence within the insurance or reinsurance company or pension fund management company⁶; and
- iii) The provision of rules for the involuntary acquisition or increase of qualifying shareholdings⁷.

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1. Qualifying shareholdings by acting in concert

In line with the Joint Guidelines, the ASF Regulation defines the concept of "acting in concert" as "any legal or natural persons who decide to acquire or increase a qualifying shareholding in accordance with an explicit or implicit agreement between them of a lasting nature"⁸.

Among others, the following are identified as indications of concerted action: (i) express agreement between shareholders or agreements relating to corporate governance⁹, (ii) other indications of collaboration (personal, functional, composition of the corporate structure, financing, etc.), or (iii) indications of cooperation between shareholders in relation to the appointment of members of management bodies.¹⁰

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) available at: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

5 See Articles 2(2), 8 and 9.

6 See Articles 2(3) and 10.

7 See Article 5.

8 See Article 8(2). See also Joint Guidelines, p. 6.

9 Except mere share purchase agreements, voluntary or forced joint sale rights agreements and statutory pre-emption rights.

10 See Article 8(3) to (5).

"In an acquisition or increase of qualifying shareholding through concerted action, the the ASF Regulation also requires prior notification to the ASF."

In an acquisition or increase of qualifying shareholding through concerted action¹¹, the ASF Regulation also requires prior notification to the ASF. For this purpose, the quantitative limits of the shareholdings of all those acting in concert should be taken into account, instead of considering the individual shareholdings of each of them.

In these situations, prior notification to the ASF may be given by each of the persons acting in concert or through a representative of the same group of persons.¹²

2. Indirect qualifying shareholdings

With regard to indirect qualifying shareholdings, the ASF went further than in Regulatory Rule 13/2020-R of 30 December ("Regulation of the Legal Framework for Insurance and Reinsurance Distribution"). Now, the legislature not only expressly subjects the acquisition or increase and decrease of indirect qualifying shareholdings to the obligation of prior notification, but also, in a change to the previous rules, specifies the criteria to assess whether or not there is an indirect qualifying shareholding¹³.

Specifically, it defines two criteria to establish an indirect qualifying shareholding: (i) the control criterion¹⁴ and, in the alternative, (ii) the multiplication criterion¹⁵.

As the name suggests, the multiplication criterion involves multiplying the percentages of the shareholdings in the corporate chain. This starts with the shareholding held directly in the target company, which has to be multiplied by the shareholding held at the next highest level. The result of this multiplication corresponds to the amount of the last person's indirect shareholding. The process continues along the corporate chain as long as the result of the multiplication remains at 10% or more¹⁶.

Regardless of the criterion used, the direct and indirect acquirers may individually communicate to the ASF the change in the shareholding structure of the insurance or reinsurance undertaking and of the pension fund management company. Alternatively, the persons at the top of the holding chain may do so. Even so, the ASF has the prerogative to request additional information about the intermediate participants¹⁷.

¹¹ See Article 8(1).

¹² See Article 8(6).

¹³ See Article 9(1) and (2) and (6) to (8).

¹⁴ See Article 9(1) and (2).

¹⁵ See Article 9(6) to (8).

¹⁶ See Article 9(7). See also Joint Guidelines, pp. 12 and 43-44.

¹⁷ See Article 9(3)(a), 4(a), 9, 10 and 11.

3. The significant influence

Moreover, regardless of the quantitative limits provided for by law, the ASF Regulation provides that acquirers will be subject to the obligation of prior notification¹⁸ whenever they have the possibility to exercise significant influence (article 10).

This means that if the shareholding enables the acquirer to exercise a significant influence over the management of the target company, whether or not this influence is exercised, the acquisition must be disclosed¹⁹.

The ASF specifies the circumstances that make it possible to interpret a particular influence as “significant”, in a purely illustrative list consisting of 8 paragraphs²⁰.

"The ASF specifies the circumstances that make it possible to interpret a particular influence as “significant”."

4. Involuntary acquisition or increase

Under Article 5(1) and (2), if a shareholder reaches the limits of 10%, 20%, 33% or 50% through an involuntary acquisition or increase, the shareholder must inform the ASF of this fact as soon as he or she becomes aware of it. This is pursuant to Articles 2 or 5, depending on the shareholder’s choice of reaction to the increase or acquisition of the qualifying shareholding.

However, in these cases, the shareholder is not fully exempt from the application of sanctions under the general terms²¹. Therefore, it is ensured that careless and imprudent shareholders are not safeguarded by their inertia in complying with the duties of care that bind them.

5. Personal data processing

As regards the processing of personal data, contrary to its predecessor, the ASF Regulation²² determines that in cases of acquisition, increase or decrease of qualifying shareholdings, a declaration must be signed by the data subject and submitted to the ASF containing information on the processing of personal data (under the terms of Annex V), proving the data subject is aware of the processing. With this regulation, the ASF has simultaneously equated the rules with those of the Legal Framework for Insurance and Reinsurance Distribution, which already provides for an identical declaration to the one in Annex V of this ASF Regulation to be made available²³.

18 Provided in Article 2.

19 See Joint Guidelines, p. 10.

20 See Article 10.

21 See Article 53).

22 See Articles 2(4) and 6(e).

23 See point 8 of Annex I, and point 5 of Annex IV, of the Regulation of the Legal Framework for Insurance and Reinsurance Distribution.

"we can see that the provision under analysis complies, at least in theory, with the need to strengthen and adapt the rules in force to the legislative changes at European and national level."

Accordingly, the processing of personal data transmitted in the information relating to the prior communication referred to above is finally adapted to the obligations set out in the GDPR²⁴.

6. Final Notes

Finally, the ASF Regulation also defines transitional arrangements, under which:

- i) Cases that are awaiting a decision by the ASF will continue to be subject to ASF Regulation 3/2016-R²⁵.
- ii) Within 60 days of publication of the ASF Regulation, all entities covered by its scope of application must communicate to ASF the identity of the holders of qualifying shareholdings who should be considered as such for the purposes of the new rules, in accordance with the provisions of Article 11(2); and
- iii) If, following the previous point, other holders of qualifying shareholdings not yet reported to the ASF are identified, the ASF must be provided with information on the previously "unknown" qualifying shareholders²⁶.

Looking at the summary of the measures introduced by the ASF Regulation, we can see that the provision under analysis complies, at least in theory, with the need to strengthen and adapt the rules in force to the legislative changes at European and national level that have occurred in the area of supervision and transparency in the financial sector since 2016. ■

24 The ASF even goes beyond what the GDPR provides. In addition to the possibility of informing the data subject of his or her right to complain (Article 13(2)(d) of the GDPR), information has also been added on the identification of the Portuguese supervisory authority, the National Data Protection Commission, and its website. The addition of this information follows the suggestion made by the Portuguese Insurers Association ("APS") in response to ASF Public Consultation 01/2021, available at www.asf.pt.

25 See Article 11(1).

26 See Article 11(3).