



Consultation paper of EBA, ESMA and EIOPA on Draft Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector

Eumedion's draft online response

Q 1: Do you have any general comments on the draft Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector?

General remarks

Eumedion welcomes the opportunity to submit comments on the consultation paper of EBA, ESMA and EIOPA on Draft Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector. By way of background, Eumedion is the Dutch based corporate governance and sustainability forum for institutional investors. Our 70 Dutch and non-Dutch participants have together more than EUR 1 trillion assets under management. They invest for their clients and their beneficiaries in listed companies worldwide, and also in listed banks. Our response is confined to those topics which are most relevant for Eumedion and its participants.

Interpretation of acting in concert

From the perspective of an investor it is important to have a common interpretation of what forms of cooperation between shareholders may qualify as acting in concert. Therefore Eumedion welcomes that the guidelines give a clear and uniform regime in this respect. We agree with EBA, ESMA and EIOPA that the regime relating to the notification and prudential assessment of acquisitions of, or increases in, qualifying holdings should not be applied in such way as to inhibit cooperation between shareholders aimed at excising good corporate governance. Therefore we welcome that the draft guidelines – in addition to a list of indicators that persons may be acting in concert (4.6) - make clear what kind of cooperation between shareholders should (in principle) not be considered as acting in concert (4.9). For example the draft guidelines make clear that there is no acting in concert - other than in relation to the appointment of members of the management body - when the cooperation relates to adding items to the agenda of a general meeting or the calling of a general meeting. Eumedion would like to make a minor remark regarding the wording of draft guideline 4.1. That guideline states “*Target supervisors should not be precluded from concluding that certain persons are acting in concert merely due to the fact that one or several such persons are passive, as inaction may be one of the elements that contribute to creating the*

conditions for an acquisition or increase of a qualifying holding.” The meaning of this sentence is not clear to Eumedion. We therefore advise to clarify this in the definitive version of the guidelines.

Interpretation of significant influence

A qualifying holding is a direct or indirect holding in an undertaking which i) represents 10% or more of the capital or of the voting rights or ii) which makes it possible to exercise significant influence over the management of that undertaking¹. Eumedion welcomes that the draft guidelines provide clarity on the interpretation of significant influence. Eumedion agrees with the proposed approach in chapter 5 of the consultation paper. However, Eumedion is not sure whether 5.2 (c) will give sufficient legal certainty about the situations in which it should be applied. Several Dutch financial institutions have established a so called continuity foundation as an anti-takeover measure. Those financial institutions have granted such a foundation a call-option to acquire so called anti-takeover preference shares. By exercising the call-option, the continuity foundation can protect the financial institution against any undesirable – hostile – bids and against unwanted shareholders' activism. The financial institution has entered into a call-option agreement with the continuity foundation. The specific right for the continuity foundation of attaining preferred dividend is incorporated in the articles of association of the financial institution. The exact objects and rights of the foundation are laid down in the articles of association of the foundation. Therefore, Eumedion believes that the granting of a call-option to a continuity foundation is also covered by 5.2 (c). To avoid legal uncertainty Eumedion suggests to reflect this position in the definitive version of the guidelines. For sake of clarity, we would also advise to make crystal-clear that in case of significant influence an initial – small – holding of capital or voting rights in the target company is not presumed by the definition of “qualifying holding”.

Q 2: Do you consider the level of detail used in the draft Guidelines to be appropriate?

Yes, Eumedion believes that the level of detail of the draft guidelines is appropriate, with the exceptions mentioned in our answer to Q1.

Q 3: Which approach identified above do you consider to be the most appropriate, Option A or Option B? Please explain your answer.

Eumedion believes that Option B is most appropriate. According to the Draft Guidelines ‘control’ means the relationship between a parent undertaking and a subsidiary, as defined in, and determined in accordance with the criteria set out in article 22 of Directive 2013/34/EU or a similar relationship between any natural or legal person and an undertaking. According to Directive 2013/34/EU control is not only based on holding a majority of voting rights. Control also exists if the proposed indirect acquirer is able to appoint the majority of the members of the administrative, management or supervisory body of the direct

¹ Article 4 (1) point (36) Regulation (EU) No 575/2013.

acquirer. In this respect we would like to note that the influence of a shareholder on (for example) a credit institution in practice is relative. The reasons are i) the strategy of the company is the board's responsibility and not that of the shareholder, ii) due to the fit and proper test not all people can be appointed as administrative, management or supervisory director and iii) the credit institution must comply with the applicable directives and regulation (e.g. sound and prudent management). Against this background we are of the opinion that the combination of the multiplication criterion and the control criterion is most suitable to determine the actual size of the holding of a proposed indirect acquirer in the target company and hence its influence on that company.