

**3 July 2015**  
**JC/CP/2015/003**

# Joint Consultation Paper

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Draft Joint Guidelines on the prudential assessment of acquisitions  
and increases of qualifying holdings in the financial sector

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# 1. Responding to this Consultation

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The European Supervisory Authorities (the ESAs) invite comments on all proposals put forward in this paper.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the ESAs should consider.

## Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 02.10.2015. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

## Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the ESAs' rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the ESAs' Board of Appeal and the European Ombudsman.

## Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the ESAs in their implementing rules adopted by their Management Boards. Further information on data protection can be found under the Legal notice section of the ESAs' website.

## 2. Executive Summary

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Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007<sup>1</sup> (hereafter referred to as the "Directive") established the legal framework for the prudential assessment of acquisitions by natural or legal persons of a qualifying holding in a credit institution, assurance, insurance or re-insurance undertaking or an investment firm. The Directive amended the European Directives applicable to credit institutions<sup>2</sup>, investment firms<sup>3</sup>, and insurance and reinsurance undertakings<sup>4</sup> (hereafter referred to collectively as "financial institutions"). Certain European Directives which were amended by the Directive were thereafter repealed, however the provisions of the Directive were reflected in the relevant new sectoral Directives and Regulations.

The main objective of these Guidelines is to provide the necessary legal certainty, clarity and predictability with regard to the assessment process contemplated in the sectoral Directives and Regulations, as well as to the result thereof, by:

- a. harmonising the conditions under which the proposed acquirer of a holding in a financial institution is required to notify its decision to the competent authority responsible for the prudential supervision of the target undertaking;
- b. defining a clear and transparent procedure for the prudential assessment by the competent authorities of the proposed acquisition or increase of a qualifying holding, including setting the maximum period of time for completing the process;
- c. specifying clear criteria of a strictly prudential nature to be applied by the competent authorities in the assessment process; and
- d. ensuring that the proposed acquirer knows what information it will be required to provide to the competent authorities in order to allow them to assess the proposed acquisition in a complete and timely manner.

Due to the increasing integration of financial markets and the frequent use of group structures that extend across multiple Member States, a single acquisition or increase of a qualifying holding may be subject to scrutiny in several Member States. This has led to the adoption of a Directive

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<sup>1</sup> Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector (OJ L 247, 21.9.2007, p.1).

<sup>2</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177/1 of 30.06.2006.

<sup>3</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145/1 of 30.04.2004.

<sup>4</sup> Directive 2007/44/EC amended the EU (Re-)Insurance Directives 92/49/EEC, 2002/83/EC and 2005/68/EC. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335/1 of 17.12.2009 recasted these three Directives.

based on the principle of maximum harmonisation of the procedural rules and assessment criteria throughout the European Union, without the Member States being able to lay down stricter rules. Moreover, identical provisions now apply in all three financial sectors.

Achieving the goals of the Directive requires that supervisory authorities throughout the European Union and in all three sectors cooperate closely, both in the exchange of information and in the consideration of prudential issues or concerns about the financial institutions they supervise, and that they promote convergence in their supervisory practices, within the new common legal framework for the prudential assessment of acquisitions contemplated by the sectoral Directives and Regulations.

In 2008 the former three Level-3 Committees (CEBS, CESR and CEIOPS) developed non-binding guidelines for the prudential assessment of acquisitions (the "3L3 Guidelines"). The European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Securities and Markets Authority ("ESMA" and, together with EBA and EIOPA, the "ESAs") jointly reviewed and updated the 3L3 Guidelines with the aim of:

- a. reaching a common understanding on the five assessment criteria laid down by the Directive, as a prerequisite for convergent supervisory practices; and
- b. establishing a harmonised list of information that proposed acquirers should include in their notifications to the competent supervisory authorities.

The requirements of these Guidelines build on the sectoral requirements regarding procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings in the financial sector, without prejudice to and without duplication of these requirements.

### 3. Background and rationale

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

1. The present Guidelines should be read with the sectoral Directives and Regulations as background. The sectoral Directives and Regulations set out identical procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector. The two main objectives are:
  - a) to improve the legal certainty, clarity and transparency of the supervisory approval process with regard to acquisitions and increases of qualifying holdings in the banking, insurance and securities sectors; and
  - b) to ensure that all proposed acquisitions or disposals of a qualifying holding are treated in the same way throughout the EU and across sectors.
  
2. In February 2013 the Commission published a report on the application of the Directive (the "EC review report"<sup>5</sup>). The EC review report highlighted a positive assessment of the application of the EU legal framework, as no substantial compliance issues have emerged in the Member States and the data did not reveal any significant differences between the treatment of domestic and cross-border transactions. Whilst the EC review report proved that, overall, the legislative regime created works satisfactorily, the survey reflected that some issues still need to be addressed. The Guidelines provide for an update and further clarifications on these aspects, with the aim of fostering the achievement of the abovementioned goals of the sectoral Directives and Regulations. In order to take into account the specificities of generally applicable national corporate rules, the Guidelines offer, in some cases, common indicators to be considered by the competent authorities, rather than unique definitions.
  
3. The EC review report identified the following main issues:
  - a) the lack, in the sectoral Directives and Regulations as well as in the 3L3 Guidelines, of harmonised definitions of the notions of indirect qualifying holding and persons acting in concert, as different methods are employed by national competent authorities to establish the

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<sup>5</sup> [http://ec.europa.eu/finance/general-policy/docs/committees/130211\\_report\\_en.pdf](http://ec.europa.eu/finance/general-policy/docs/committees/130211_report_en.pdf)

existence of indirect shareholding and whether persons are acting in concert and hence different interpretations exist as to whether, under such circumstances, a proposed acquisition or increase of a holding has to be notified or not;

b) the lack of consensus on whether the notion of a "decision to acquire" should be applicable or not in situations where the acquirer crossed a threshold without taking the conscious decision to do so;

c) the need to enhance the coherent application of the proportionality principle, as it seemed that national supervisory authorities do not sufficiently apply the proportionality principle both in terms of the information required and of the assessment procedure, in particular in the assessment of intra-group transactions (some apply a "light-version" of the procedure in such cases or even do not always require a formal notification for intra-group transactions within cross-border banking groups; in contrast, others assess all intra-group transactions in the same way as the rest of the notifications);

d) the need to clarify that the solvency of the proposed acquirer should be assessed under the criterion related to "the financial soundness of the proposed acquirer", as well as to provide some consistency in the interpretation of the use of own funds versus borrowed funds and on the documents required by the national supervisory authorities for the assessment of this criterion;

e) the need to clarify what constitutes money laundering and terrorist financing when assessing *"whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof"*;

f) the need to address certain inconsistencies that have been observed with regard to the application of the provisions of the Directive on the time limits, related to the different understanding of the acknowledgement of the receipt among Member States, and to clarify whether conditional approvals of the acquisitions are compatible or not with the wording of the Directive; and

g) the need to further improve cooperation between competent authorities.

4. As mentioned in the EC review report, the Action Plan on Corporate Governance and Company law of 12 December 2012 addresses the issue of acting in concert. The Commission recognised "the need for guidance to clarify the conceptual boundaries and to provide more certainty on this issue in order to facilitate shareholder cooperation on corporate governance issues. During 2013 the Commission will work closely with the competent national authorities and ESMA with a view to developing guidance to clarify the rules on acting in concert, notably in the context of the rules applicable to takeover bids."

5. In November 2013 the European Securities and Markets Authority (ESMA) published a statement on practices governed by the Takeover Bid Directive, focusing on shareholder cooperation issues relating to acting in concert and the appointment of board members<sup>6</sup>.
6. The Commission asked the three ESAs to review and further clarify the 3L3 Guidelines in order to provide solutions, where feasible, to the issues outlined above. When reviewing and updating the content of the 3L3 Guidelines, several other concepts outlined in other sectoral Directives, Regulations and draft regulatory standards<sup>7</sup> were taken into consideration in order to avoid inconsistencies and potential overlaps.
7. Regarding the issue of whether competent authorities are permitted to impose limitations or conditions on the approval of a proposed acquisition of a qualifying holding, competent authorities should follow the approach indicated by the European Court of Justice on this matter<sup>8</sup>.

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<sup>6</sup> <http://www.esma.europa.eu/content/ESMA-clarifies-shareholder-cooperation-takeover-situations>

<sup>7</sup> In particular: Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, Directive 2008/22/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as regards the implementing powers conferred on the Commission; Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC and ESMA's Draft technical standards under Article 10a (8) of MiFID on the assessment of acquisitions and increases in qualifying holdings in investment firms.

<sup>8</sup> Judgment of the Court of 25 June 2015 in Case C-18/14, Request for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Netherlands) lodged on 16 January 2014 — CO Sociedad de Gestion y Participación SA and Others v De Nederlandsche Bank NV, De Nederlandsche Bank NV v CO Sociedad de Gestion y Participación SA and Others

# 4. Joint Committee Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector

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## Status of these Joint Guidelines

This document contains Joint Guidelines issued pursuant to Articles 16 and 56 subparagraph 1 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); and Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority)) - ‘the ESAs’ Regulations’. In accordance with Article 16(3) of the ESAs’ Regulations, competent authorities and financial institutions must make every effort to comply with the Guidelines.

Joint Guidelines set out the ESAs’ view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities to whom the Joint Guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where the Joint Guidelines are directed primarily at institutions.

## Reporting Requirements

In accordance with Article 16(3) of the ESAs’ Regulations, competent authorities must notify the respective ESA whether they comply or intend to comply with these Joint Guidelines, or otherwise with reasons for non-compliance, by dd.mm.yyyy (two months after issuance). In the absence of any notification by this deadline, competent authorities will be considered by the respective ESA to be non-compliant. Notifications should be sent to [[compliance@eba.xxx](mailto:compliance@eba.xxx), [compliance@eiopa.xxx](mailto:compliance@eiopa.xxx) and [compliance@esma.xxx](mailto:compliance@esma.xxx)] with the reference ‘JC/GL/xxx’. A template for notifications is available on the ESAs’ websites. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.

Notifications will be published on the ESAs’ websites, in line with Article 16(3).

## Title I - Subject matter, scope and definitions

### 1. Subject matter

These Guidelines are aimed at clarifying the procedural rules and the assessment criteria to be applied by competent authorities for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.

### 2. Scope and level of application

2.1 These Guidelines apply to competent authorities in the prudential assessment of acquisitions or increases of qualifying holdings in target undertakings.

### 3. Definitions

3.1 For the purposes of these Guidelines, the following definitions apply:

- (i) "competent authority" means any of the following:
  - (a) the competent authorities identified in point (i) of Article 4(2) of Regulation (EU) No 1093/2010 establishing the European Banking Authority ("EBA");
  - (b) the competent authorities identified in point (i) of Article 4(2) of Regulation (EU) No 1094/2010 establishing the European Insurance and Occupational Pensions Authority ("EIOPA"), namely the supervisory authorities defined in Directive 2009/138/EC on the taking up and pursuit of the business of insurance and reinsurance;
  - (c) the competent authorities identified in point (i) of Article 4(3) of Regulation (EU) No 1095/2010 establishing the European Securities Market Authority ("ESMA"), as defined in point (22) of paragraph 1 of Article 4 of Directive 2004/39/EC on markets in financial instruments and, as of 3 January 2017, in point (26) of paragraph (1) of Article 4 of Directive 2014/65/EU on markets in financial instruments and in Article 22 of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories;
- (ii) "control" means the relationship between a parent undertaking and a subsidiary undertaking, as defined in, and determined in accordance with the criteria set out in, Article 22 of Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings - which criteria, for the purposes of these Guidelines, target supervisors should apply beyond the subjective scope of application of Directive 2013/34/EU - or a similar relationship between any natural or legal person and an undertaking;
- (iii) "management body" has the meaning given to this term in point (7) of Article 3(1) of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms;

- (iv) "management body in its supervisory function" has the meaning given to this term in point (8) of Article 3(1) of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms;
- (v) "proposed acquirer" means 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;
- (vi) "proposed acquirer supervisor" means, if a proposed acquirer is a supervised entity, the competent authority which is responsible for the supervision of such proposed acquirer;
- (vii) "qualifying holding" has the meaning given to this term in point (36) of Article 4(1) of Regulation (EU) No 575/2013, namely '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';
- (viii) "sectoral Directives and Regulations" means collectively :
  - (a) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;
  - (b) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II);
  - (c) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012, on OTC derivatives, central counterparties and trade repositories;
  - (d) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;
  - (e) Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012; and
  - (f) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;
- (ix) "shareholder" or "member" means, unless the context otherwise requires, a holder of voting or other rights in respect of the capital of the target undertaking, whether or not represented by certificates;

- (x) "target supervisor" means the competent authority, as defined in point (i) above, which is responsible for the supervision of the target undertaking;
- (xi) "target undertaking" or "financial institution" means any of the following: a credit institution (as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013), an investment firm (as defined in point (1) of Article 4(1) of Directive 2014/65/EU), an insurance undertakings (as defined in point (1) of Article 13 of Directive 2009/138/EC), a re-insurance undertaking (as defined in point (4) of Article 13 of Directive 2009/138/EC) and a central counterparty (as defined in point (1) of Article 2 of Regulation (EU) No 648/2012); and
- (xii) "third countries considered equivalent" means, for the purposes of the application of the prudential assessment criteria set out in Sections 10, 11, 12 and 13 of these Guidelines, those non-EU countries in which regulated financial institutions are subject to a supervisory regime which is determined to be equivalent under the conditions specified by the sectoral Directives and Regulations.

## Title II- Proposed acquisition of a qualifying holding and cooperation between competent authorities

### Chapter 1 – General concepts

#### 4. Acting in Concert

4.1 For the purposes of the sectoral Directives and Regulations, target supervisors should consider as acting in concert any legal or natural persons who decide to acquire or increase a qualifying holding in accordance with an explicit or implicit agreement between them. 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.

4.2 The target supervisor should take into account all relevant elements in order to establish, on a case by case basis, whether certain parties act in concert, which would trigger the conditions for the notification to the target supervisor and the prudential assessment of such acquisition.

4.3 When certain persons act in concert, target supervisors should aggregate their holdings in order to determine whether such persons acquire a qualifying holding or cross any relevant threshold contemplated in the sectoral Directives and Regulations.

4.4 Each of the persons concerned, or one person on behalf of the rest of the group of persons acting in concert, should notify the target supervisor of the relevant acquisition or increase of a qualifying holding.

4.5 When no notification evidencing that certain persons are acting in concert has been submitted to the target supervisor, the latter should not be precluded from examining whether such persons are in fact acting in concert. For this purpose, the target supervisor should take into account as indicators that persons may be acting in concert the factors set out in paragraph 4.6, which does not constitute an exhaustive list of factors. The fact that any particular factor is present does not necessarily in itself lead to the conclusion that the relevant persons are acting in concert. The target supervisor should carry out a case by case analysis.

4.6 With a view to assessing whether certain persons are acting in concert, the target supervisor should consider any of the following factors:

- (a) shareholder agreements or other evidence of collaboration and agreements on matters of corporate governance (excluding however pure share purchase agreements, tag along and drag along agreements and pure statutory pre-emption rights);
- (b) the existence of family relationships;
- (c) the relationship between a proposed acquirer who holds a senior management position or is a member of a management body or of a management body in its supervisory function, including the person who effectively directs the business of the

- undertaking, and the undertaking in which the proposed acquirer holds such position;
- (d) the relationship between undertakings in the same group (excluding, however, those situations which satisfy the independence criteria set out in paragraph 4 or, as the case may be, 5 of Article 12 of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as subsequently amended);
- (e) the use by different persons of the same source of finance for the acquisition or increase of holdings in the target undertaking; and
- (f) consistent patterns of voting by the relevant shareholders.

4.7 The target supervisor should not apply the regime relating to the notification and prudential assessment of acquisitions of, or increases in, qualifying holdings in such a way as to inhibit cooperation between shareholders aimed at exercising good corporate governance.

4.8 The target supervisor, when determining whether cooperating shareholders are acting in concert, should carry out a case by case analysis. If there are facts, in addition to the shareholders' engagement in any activity set out in paragraph 4.9 on a particular occasion, which indicate that the shareholders should be regarded as persons acting in concert, then the target supervisor should take those facts into account in making its determination. There might, for example, be facts about the relationship between the shareholders, their objectives, their actions or the results of their actions, which suggest that their cooperation in relation to an activity contemplated in paragraph 4.9 is not merely an expression of a common approach on a specific matter, but one element of a broader agreement or understanding between the shareholders.

4.9 When shareholders, consistently with national law and, where relevant, EU law, cooperate or engage in any of the activities below, the target supervisor should not consider such cooperation, in and of itself, as leading to the conclusion that they are acting in concert:

- (a) entering into discussions with each other about possible matters to be raised with the company's management body;
- (b) making representations to the company's management body about company policies, practices or particular actions that the company might consider taking;
- (c) other than in relation to the appointment of members of the management body, exercising shareholders' statutory rights to:
  - (1) add items to the agenda of a general meeting;
  - (2) table draft resolutions for items included or to be included on the agenda of a general meeting; or
  - (3) call a general meeting, other than the annual general meeting;
- (d) other than in relation to a resolution for the appointment of members of the management body and insofar as such a resolution is provided for under national company law, agreeing to vote in the same way on a particular resolution put to a general meeting, in order, for example:
  - (1) to approve or reject:
    - i.a proposal relating to directors' remuneration;
    - ii.an acquisition or disposal of assets;
    - iii.a reduction of capital and/or share buy-back;
    - iv.a capital increase;

- v.a dividend distribution;
- vi.the appointment, removal or remuneration of auditors;
- vii.the appointment of a special investigator;
- viii.the company's financial statements; or
- ix.the company's policy in relation to the environment or any other matter relating to social responsibility or compliance with recognised standards or codes of conduct; or

(2) to reject a related party transaction.

4.10 If shareholders cooperate by engaging in an activity which is not included in paragraph 4.9, the target supervisor should not consider that fact, in and of itself, as meaning that those persons should be regarded as persons acting in concert. The target supervisor should assess each case on its own merits.

4.11 When considering cases of cooperation between shareholders in relation to the appointment of members of the management body, target supervisors should, in addition to examining the facts described in paragraph 4.8 (including the relationship between the relevant shareholders and their actions), also consider other facts such as:

- (a) the nature of the relationship between the shareholders and the proposed member(s) of the management body;
- (b) the number of proposed members of the management body being voted for pursuant to a voting agreement;
- (c) whether the shareholders have cooperated in relation to the appointment of members of the management body on more than one occasion;
- (d) whether the shareholders are not simply voting together but are also jointly proposing a resolution for the appointment of certain members of the management body; and
- (e) whether the appointment of the proposed member(s) of the management body will lead to a shift in the balance of power in such management body.

4.12 For the avoidance of doubt, the interpretation of the notion of acting in concert set out in these Guidelines should apply exclusively to the prudential assessment of acquisitions and increases in qualifying holdings in the financial sector to be carried out in accordance with the sectoral Directives and Regulations and should not affect the interpretation of any similar notion contemplated in other EU legislative acts, such as Directive 2004/25/EU on takeover bids.

## 5. Significant Influence

5.1 Pursuant to the sectoral Directives and Regulations, 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, the target supervisor 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.

5.2 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 a proposed acquirer and the target undertaking;
- (b) the background of each member or shareholder in relation to the target undertaking;
- (c) the enjoyment by the proposed acquirer of 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) the proposed acquirer being a member, or having a representative or being 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.

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

## 6. Indirect acquisitions of qualifying holdings

6.1 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 undertaking. The possibility to exercise significant influence has been examined in Section 5 above.

6.2 In respect of the scenario contemplated under item (i) of paragraph 6.1, several possible criteria have been examined in respect of an acquisition or increase of a holding through cascading holdings. The main options which have emerged are (i) the control criterion and (ii) the use of the control criterion, supplemented by the multiplication criterion.

6.3 Pursuant to the control criterion, target supervisors should consider as proposed indirect acquirers all natural or legal persons (i) who acquire control over an existing holder of a qualifying holding in a target undertaking or (ii) who, directly or indirectly, control the proposed direct acquirer of a qualifying holding in a target undertaking (including the ultimate natural person or persons at the top of the corporate control chain).

### Explanatory box

By way of example, the target supervisor should consider that the person controlling the parent undertaking of the proposed direct acquirer of a qualifying holding constitutes a proposed indirect acquirer pursuant to item (ii) of this paragraph 6.3.

6.4 In the case set out in paragraph 6.3, item (i) above, only the person or persons acquiring control over an existing qualifying holder should submit the prior notification to the target supervisor.

6.5 In the case set out in paragraph 6.3, item (ii) above, according to the sectoral Directives and Regulations, all the proposed indirect acquirers should submit a prior notification to the target supervisor regarding their intention to acquire or increase a qualifying holding through the proposed direct acquirer. According to the proportionality principle, the target supervisor may allow the person or persons at the top of the corporate control chain to submit the prior notification also on behalf of the intermediate holders; however, this is without prejudice to the proposed direct acquirer's obligation to submit to the target supervisor the prior notification in respect of its own acquisition of a qualifying holding.

6.6 Having regard to the principle of proportionality, the target supervisor may deem it sufficient, taking into account the particular circumstances of the case (for instance, the fact that supervised entities are concerned or that the target supervisor has already received and assessed up to date information), to assess only the person or persons at the top of the corporate control chain, in addition to the proposed direct acquirer.

6.7 Pursuant to the multiplication criterion, target supervisors should multiply the percentages of the holdings across the corporate chain and, if the result in respect of a proposed acquirer is 10% or more, a qualifying holding will be deemed to be acquired indirectly by such person.

**Explanatory box**

To provide an example, if entity A acquires 40% of entity B, which in turn holds 30% of the target undertaking, pursuant to the multiplication criterion entity A will be deemed to have acquired a holding of 12% in the target undertaking, which would constitute a qualifying holding. A similar approach would be used to assess whether a relevant threshold was crossed in the event of an increase in the qualifying holding.

**Option A**

Target supervisors should apply solely the control criterion, as described above.

**Option B**

Target supervisors should apply the control criterion together with the multiplication criterion, so that a qualifying holding is deemed to have been acquired indirectly if either test is satisfied. Should the control test and the multiplication test yield different results, the higher resulting percentage shall apply.

Question 3	Which approach identified above do you consider to be the most appropriate, Option A or Option B? Please explain your answer.
Question 4	Would you propose a different test for assessing whether a qualifying holding is being acquired indirectly? Please explain your answer.

## 7. Decision to acquire

7.1 Target supervisors should take the following non exhaustive list of elements into account in order to assess whether a decision to acquire has been made:

- (a) whether the proposed acquirer was aware or should have been aware of the acquisition/increase of a qualifying holding and the transaction giving rise to it; and
- (b) whether the proposed acquirer had the ability to influence, to object to or to prevent the proposed acquisition or increase of a qualifying holding.

7.2 Target supervisors should adopt a narrow interpretation of the exceptional circumstances when it would be deemed that there is no decision to acquire, as almost always the acquirer will have taken or omitted to take certain action which will have contributed to the circumstances leading to a threshold being crossed or a holding being acquired.

7.3 Should shareholders cross a threshold involuntarily within the meaning of paragraph 7.2, they must notify the competent authorities immediately upon becoming aware of such event, even if they intend to reduce their level of shareholding so that it once again falls below the threshold level.

## **8. Proportionality principle**

8.1 Pursuant to the sectoral Directives and Regulations, the target supervisor should carry out the prudential assessment of proposed acquirers in accordance with the principle of proportionality. This is envisaged in respect of (i) the intensity of the assessment, which should take into account the likely influence the proposed acquirer may exercise on the target undertaking and (ii) the composition of the required information, which should be proportionate to the nature of the proposed acquirer and of the proposed acquisition. Without prejudice to the considerations set out in items (i) and (ii), the proportionality principle could also impact the assessment procedures that the target supervisors carry out following the notification of a proposed acquisition and lead to some procedural simplifications, especially in cases of two or more proposed acquirers acting in concert or of indirect proposed acquisitions. The application of the principle of proportionality should always comply with the aim of ensuring that the assessment of the proposed acquirers is consistent with the nature of the proposed acquirers, the objective of the acquisition or increase of a qualifying holding and the possibility of exercising influence over the target undertaking.

8.2 The target supervisor should calibrate the type and breadth of information required from the proposed acquirer taking into account, amongst other matters, the nature of the proposed acquirer (legal or natural person, supervised financial institution or other entity, whether or not the financial institution is supervised in the EU or in a third country considered equivalent, etc.), the specifics of the proposed transaction (intra-group or transaction between persons which are not part of the same group etc.), the degree of involvement of the proposed acquirer in the management of the target undertaking and the size of the holding to be acquired.

8.3 Concerning the reputation of the proposed acquirer (as contemplated in Title II, Chapter 3, Section 10), while the target supervisor should always assess the integrity of the proposed acquirers against the same requirements regardless of the influence over the target undertaking, the assessment of the professional competence should be reduced for proposed acquirers who are not in a position to exercise any influence over the target undertaking or who intend to acquire holdings purely for passive investment purposes.

8.4 When calibrating the assessment of the financial soundness of a proposed acquirer (as contemplated in Title II, Chapter 3, Section 10), the target supervisor should take into account the nature of the proposed acquirer, as well as the degree of influence the proposed acquirer would have over the target undertaking following the proposed acquisition. In this regard, in accordance with the proportionality principle, the target supervisor should distinguish between cases where control over the target undertaking is acquired and cases where the proposed acquirer would likely exercise little or no influence. If a proposed acquirer gains control over the target undertaking, the assessment of the financial soundness of the proposed acquirer should also cover the capacity of the proposed acquirer to provide further capital to the target undertaking in the mid-term, if necessary.

8.5 For intra-group transactions, the target supervisor should apply the proportionality principle as follows:

- a notification should be submitted by the proposed acquirer, identifying the upcoming changes in the group (for instance, the revised group structure chart) and providing the

required information, as laid down in the sectoral Directives and Regulations, concerning the new persons and/or entities in the group. This refers to the direct or indirect owners of the qualifying holding, as well as to the persons who effectively direct the business of the proposed acquirer;

- the full assessment procedure is only necessary for the new persons and/or entities in the group and the new group structure; and
- if there is a change in the nature of a qualifying holding so that an indirect qualifying holding becomes a directly held qualifying holding and the relevant holder has already been assessed, the target supervisor should consider limiting its assessment to the changes having occurred since the date of the last assessment.

8.6 Under certain circumstances, such as in the case of acquisitions by means of a public offer, the proposed acquirer may encounter difficulties in obtaining information which is needed to establish a full business plan. In these cases, the proposed acquirer should bring such difficulties to the attention of the target supervisor and point out the aspects of its business plan that might be modified in the near future. On the other hand, in such circumstances, in accordance with the proportionality principle, the target supervisor should not oppose the proposed acquisition on the sole basis of the lack of some required information the absence of which can be justified by the nature of the transaction, if the information provided appears sufficient to understand the likely outcome of the acquisition for the target undertaking and to carry out the prudential assessment and provided that the proposed acquirer undertakes to provide the missing information as soon as possible after the closing of the acquisition.

## Chapter 2 – Notification and assessment of proposed acquisition

### 9. Assessment period and information to be provided

9.1 According to the sectoral Directives and Regulations, the notification has to be acknowledged in writing by the target supervisor to the proposed acquirer promptly and in any event within two working days from receipt of the notification. The notification should be considered to be complete when it includes all the required information set out in the list to be published in accordance with the relevant legislation for the purposes of the prudential assessment by the target supervisor. Such acknowledgment should exclusively constitute a procedural step relating to the formal completeness of the notification, having the effect of starting the 60 working days period for the prudential assessment, and does not entail a substantive review by the target supervisor of the documentation provided. The acknowledgement does not prejudice the target supervisor's entitlement, consistently with the sectoral Directives and Regulations, to request further information and to oppose the proposed acquisition on grounds arising from the prudential assessment or if the information provided by the proposed acquirer is subsequently assessed to be incomplete. In such acknowledgement of receipt, the target supervisor informs the proposed acquirer of the date of expiry of the assessment period.

9.2 Where the notification is incomplete, the target supervisor should acknowledge receipt of the notification within 2 working days; such notification would not, however, have the contents and effects specified in paragraph 9.1. The proposed acquirer should subsequently submit the missing information. Upon receipt of all required documents set out in the list published by the relevant

Member State, the target supervisor should acknowledge receipt of the notification in writing pursuant to, and with the effects and contents specified in, paragraph 9.1.

9.3 To avoid undue delays in the notification and assessment process, the proposed acquirer is encouraged to engage in pre-notification contacts with the target supervisor, in particular when the proposed transaction presents some complexity for both the proposed acquirer and the target supervisor (linked, for instance, to the transaction itself, to the complex group structure of the proposed acquirer or to the structure of the target undertaking). An early pre-notification contact is expected to reduce the risk of submitting incomplete notifications.

9.4 Pursuant to the sectoral Directives and Regulations, the Member States are required to publish a list specifying the information that is necessary to carry out the assessment of acquisitions and increases of qualifying holdings. Annex I sets out the minimum list of information which should be required by the competent authorities. As of the date of application of the regulatory technical standards developed by ESMA pursuant to Article 10a(8) of Directive 2004/39/EC on markets in financial instruments and Article 12(8) of Directive 2014/65/EU on markets in financial instruments and relating to an exhaustive list of information to be provided by proposed acquirers, the recommendations set out in Annex I should continue to apply only in respect of acquisitions and increases which fall outside the scope of that regulatory technical standard, but are contemplated in these Guidelines.

## Chapter 3 – Prudential requirements for a proposed acquisition – the five assessment criteria

### 10. Reputation of the proposed acquirer - First assessment criterion

10.1 The assessment of the reputation of the proposed acquirer should cover two elements:

- his integrity; and
- his professional competence.

10.2 The integrity requirements should be applied regardless of the level of the qualifying holding that a proposed acquirer intends to acquire and of its involvement in the management or the influence that it is planning to exercise on the target undertaking. On the contrary, the assessment of professional competence should take into account the influence that the proposed acquirer will exercise over the target undertaking. This means that, according to the proportionality principle, the competence requirements are reduced for the proposed acquirers who are not in a position to exercise, or undertake not to exercise, significant influence over the target undertaking. In such circumstances, evidence of adequate management competence should be sufficient.

10.3 If the proposed acquirer is a legal person, the requirements must be satisfied by the legal person as well as by all of the persons who effectively direct its business, subject to national legislation.

10.4 Both requirements should generally be considered to be met if:

- the proposed acquirer is a natural or legal person already considered to be ‘of good repute’ in its capacity as a holder of a qualifying holding in another financial institution which is supervised by the same competent supervisor or by another competent supervisor in the same country or in another Member State;

- the proposed acquirer is a natural person who already directs the business of the same or another financial institution which is supervised by the same competent supervisor or by another competent supervisor in the same country or in another Member State; or
- the proposed acquirer is a legal person regulated and supervised as a financial institution by the same competent supervisor or by another competent supervisor in the same country or in another Member State,

and there is no new or revised evidence that could cast doubt on the proposed acquirer's professional competence or integrity.

10.5 If any of the situations contemplated in paragraph 10.4 apply, the target supervisor should not, however, rely on the relevant assessment if there are reasons to do so. For instance, just because a proposed acquirer has been judged competent to control (for example) a small firm providing financial advice, it does not necessarily mean that it is competent to control a more significant firm such as a large bank. Moreover, the target supervisor should always carry out an integrity check in respect of the proposed acquirer as there might have been further developments since the date of the previous assessment or the authority having carried out such assessment might not have been aware of certain information.

10.6 If any of the situations contemplated in paragraph 10.4 apply in respect of a proposed acquirer supervised by a competent supervisor in a third country considered equivalent, the assessment of integrity and professional competence may be facilitated by cooperating with the competent supervisory authority in such third country.

## **A) INTEGRITY**

10.7 A proposed acquirer should be considered to be of good repute if there is no evidence to suggest otherwise and no reason to have reasonable doubt about his or her good repute. All relevant information available for the assessment should be taken into account, without prejudice to any limitations imposed by national law and regardless of the country where any relevant events occurred.

10.8 Integrity requirements imply the absence of 'negative records'. This notion is further specified in national laws or regulations, although these laws differ on the meaning of negative records, recognising that the target supervisor retains discretionary power to determine which other situations cast doubt on the trustworthiness of the proposed acquirer.

10.9 Any criminal or relevant administrative records should be taken into account, considering the type of conviction or indictment, the level of appeal, the sanction received, the phase of the judicial process reached and the effect of any rehabilitation measures. Other matters which should be considered include the surrounding (including mitigating) circumstances and the seriousness of any relevant offence or administrative or supervisory action, the time period lapsed and the proposed acquirer's conduct since the offence, as well as the relevance of the offence or administrative or supervisory action to the proposed role.

10.10 The cumulative effects of more minor incidents, which individually do not impinge on the reputation of a proposed acquirer but might collectively have a material impact, should also be considered.

10.11 Particular account should be taken of the following factors, which may cast doubt on a member's good repute:

- (a) any conviction or prosecution of a criminal offence, in particular:
  - i. any offences under the laws governing banking, financial, securities, insurance activity, or concerning securities markets or securities or payment instruments, including laws on money laundering, market manipulation or insider dealing and usury;
  - ii. any offences of dishonesty, fraud or financial crime;
  - iii. any tax offences;
  - iv. any other offences under legislation relating to companies, bankruptcy, insolvency or consumer protection;
- (b) any relevant current or past investigations and/or enforcement actions relating to the member, or the imposition of administrative sanctions for non-compliance with provisions governing banking, financial, securities or insurance activities or those concerning securities markets, securities or payment instruments, or any financial services legislation or other matters contemplated in sub-paragraph (a) above;
- (c) any relevant current or past investigations and/or enforcement actions by any other regulatory or professional bodies for non-compliance with any relevant provisions.

10.12 Attention should be paid to the following factors regarding the propriety of the proposed acquirer in past business dealings:

- (a) any evidence that the proposed acquirer has not been transparent, open and cooperative in its dealings with supervisory or regulatory authorities;
- (b) any refusal of any registration, authorisation, membership or license to carry out a trade, business or profession, any revocation, withdrawal or termination of such registration, authorisation, membership or license and any expulsion from a professional body or association;
- (c) the reasons for any dismissal from employment or any position of trust, fiduciary relationship or other similar situation, as well as any request to resign from such a position; and
- (d) any disqualification by any competent authority from acting as a person who directs the business.

10.13 The following situations regarding past and present business performance and financial soundness of a proposed acquirer with regard to their potential impact on his or her reputation should be considered:

- (a) any inclusion on any list of unreliable debtors or any similar negative records with a credit bureau, if available;
- (b) the financial and business performance of the entities owned or directed by the proposed acquirer or in which the proposed acquirer had or has significant share with special consideration to any rehabilitation, bankruptcy and winding-up proceedings and whether and how the proposed acquirer has contributed to the situation that led to the proceedings;
- (c) any declaration of personal bankruptcy; and
- (d) any civil lawsuits, administrative or criminal proceedings, large investments or exposures and loans taken out, in so far as they can have a significant impact on the financial soundness.

10.14 Target supervisors should assess the relevance of such situations on a case-by-case basis, recognising that the characteristics of each situation may be more or less severe and that some situations may be significant when considered together, even though each of them in isolation may not be significant.

10.15 Target supervisors may judge the relevance of criminal records differently according to the type of conviction, whether it is still possible to appeal against the sanction (definitive vs. non-definitive convictions), the type of punishment (imprisonment vs. less severe sanctions), the length of the sentence (more vs. less than a specified period), the phase of the judicial process reached (conviction, trial, indictment) and the effect of rehabilitation.

10.16 In cases involving the acquisition of a new qualifying holding, the information requirements on which the assessment of integrity is based may vary according to the nature of the acquirer (natural vs. legal person, regulated or supervised entity vs. unregulated entity).

10.17 However, in all cases, the proposed acquirer should attest in a written statement whether, to the best of his knowledge, any of the situations described in points 10.11 to 10.12 is outstanding or has occurred in the past.

10.18 In all cases, the target supervisor should be able to verify the statement submitted by the proposed acquirer by asking it to provide documents evidencing that the statement is true (for instance, recent extracts from the criminal register) and, if needed, by requesting confirmation from other authorities (judicial authorities or other regulators), whether such authorities are domestic or foreign.

10.19 Failure by the proposed acquirer to provide the declaration contemplated in paragraph 10.17 or the extracts contemplated in paragraph 10.18, the delayed submission thereof or the submission of an incomplete declaration will call into question the approval of the acquisition.

10.20 In the case of an increase in an existing qualifying holding which crosses the relevant thresholds contemplated in the sectoral Directives and Regulations, and to the extent that the integrity of the proposed acquirer has previously been assessed by the target supervisor, the relevant information should be updated as appropriate.

10.21 When assessing the integrity of the proposed acquirer, the target supervisor may take into consideration any person linked to the proposed acquirer, meaning any person who has, or appears to have, a relevant family or business relationship with the proposed acquirer.

## ***B) PROFESSIONAL COMPETENCE***

10.22 The professional competence of the proposed acquirer covers competence in management (the "**management competence**") and in the area of the financial activities carried out by the target undertaking (the "**technical competence**").

10.23 The management competence may be based on the proposed acquirer's previous experience in acquiring and managing holdings in companies, and should demonstrate due skill, care, diligence and compliance with the relevant standards.

10.24 The technical competence may be based on the proposed acquirer's previous experience in operating and managing financial institutions as a controlling shareholder or as a person who

effectively directs the business of a financial firm. In this case also, the experience should demonstrate due skill, care, diligence and compliance with the relevant standards.

10.25 In the case of an increase in an existing qualifying holding, and to the extent that the professional competence of the proposed acquirer has been assessed previously by the target supervisor, the relevant information should be updated as appropriate. Under the proportionality principle, this updated assessment of the professional competence of the proposed acquirer should take into account the increased influence and responsibility associated with the increased holding.

10.26 If the proposed acquirer is a legal person, the assessment of professional competence should cover the persons who effectively direct the business of the proposed acquirer. The assessment of technical competence should relate primarily to the financial activities currently performed by the proposed acquirer and/or by companies in the group to which it belongs.

10.27 Natural or legal persons may acquire significant holdings in financial companies with the aim of diversifying their portfolio and/or obtaining dividends or capital gains, rather than with the aim of becoming involved in the management of the financial institution concerned. According to the proportionality principle, having regard in any event to the likely influence of the proposed acquirer over the target institution, the professional competence requirements for this type of acquirer could be significantly reduced.

10.28 Similarly, when the acquisition of control or of a shareholding allows the acquirer to exercise a strong influence (e.g., a holding which confers a veto power), the need for technical competence will be greater, considering that the controlling shareholders will be able to define and/or approve the business plan and strategies of the financial institution concerned. In the same way, the degree of technical competence needed will depend on the nature and complexity of the activities envisaged.

## **11.Reputation and experience of those who will direct the business of the target undertaking - Second assessment criterion**

11.1 This criterion comes into play when the proposed acquirer is in a position to appoint and has already identified new persons to direct the business of the target undertaking as a result of the proposed acquisition.

11.2 This criterion is without prejudice to the on-going fit and proper requirements that apply to persons who currently direct the business under the sectoral Directives and Regulations.

11.3 If the proposed acquirer intends to appoint a person who is not fit and proper, then the target supervisor should oppose the proposed acquisition.

11.4 This criterion should be assessed in a similar manner to the relevant provisions of the sectoral Directives and Regulations which set out as a condition for granting authorisation that the persons who will direct the business must be 'fit and proper'.

## 12. Financial soundness of the proposed acquirer - Third assessment criterion

12.1 The financial soundness of the proposed acquirer should be understood as the capacity of the proposed acquirer to finance the proposed acquisition and to maintain, for the foreseeable future, a sound financial structure in respect of the proposed acquirer and of the target undertaking. This capacity should be reflected in the overall aim of the acquisition and the policy of the proposed acquirer regarding the acquisition, but also – if the proposed acquisition would result in a qualifying holding of 50% or more or in the target undertaking becoming a subsidiary of the proposed acquirer – in the forecast financial objectives, consistent with the strategy identified in the business plan.

12.2 Thus, this assessment criterion allows supervisory authorities to determine whether the proposed acquirer is sufficiently sound from a financial point of view to ensure the sound and prudent management of the target undertaking for the foreseeable future (usually three years) in accordance with the principle of proportionality (having regard to the nature of the proposed acquirer and of the acquisition).

12.3 The target supervisor should oppose the acquisition if it concludes, based on its analysis of the information received, that the proposed acquirer is likely to face financial difficulties during the acquisition process or in the foreseeable future.

12.4 The target supervisor should also analyse whether the financial mechanisms put in place by the proposed acquirer to finance the acquisition, or existing financial relationships between the proposed acquirer and the target undertaking, could give rise to conflicts of interest that could destabilise the financial structure of the target undertaking.

12.5 In accordance with the principle of proportionality, the depth of the assessment of the financial soundness of the proposed acquirer should be linked to the likely influence of the proposed acquirer, the nature of the proposed acquirer and the nature of the acquisition. The characteristics of the acquisition may also justify differences in the depth and methods of the analysis by the competent supervisor. In this regard, one should distinguish situations where the acquisition leads to a change in the control of the target undertaking from situations where it does not.

12.6 The information required for the assessment of the financial soundness of the proposed acquirer will depend on the legal status of the proposed acquirer, for example, whether it is:

- a financial institution subject to prudential supervision,
- a legal entity other than a financial institution, or
- a natural person.

12.7 If the proposed acquirer is a financial institution subject to prudential supervision by another (EU or equivalent) competent supervisor, the target supervisor should take into account the assessment of the proposed acquirer's financial situation by the proposed acquirer supervisor, together with the documents gathered and transmitted directly by the proposed acquirer supervisor to the target supervisor.

12.8 The cooperation process between competent supervisors may be influenced by the nature and the location of the proposed acquirer, as follows:

- if the proposed acquirer is a supervised entity in another Member State, the assessment of its financial soundness should rely heavily on the assessment made by the proposed acquirer

supervisor, which has all the information on the profitability, liquidity and solvency of the proposed acquirer, as well as on the availability of the resources for the acquisition (without prejudice, however, to the possibility of the target supervisor disagreeing with the assessment of the proposed acquirer supervisor); and

- if the proposed acquirer is a financial entity supervised by a competent supervisor in a third country considered equivalent, the assessment may be facilitated by cooperation with that competent supervisor.

### **13. Compliance with prudential requirements of the target undertaking - Fourth assessment criterion**

13.1 Whilst criterion 3 is aimed primarily at clarifying whether the financial situation of the proposed acquirer is sufficiently sound to support the acquisition of the target undertaking, criterion 4 requires that the proposed acquisition does not adversely affect the target undertaking's compliance with prudential requirements.

13.2 This specific assessment of the proposed acquirer's plan at the time of the acquisition is complementary to the responsibilities of the target supervisor for the on-going supervision of the target undertaking.

13.3 The target supervisor should take into consideration not only the objective facts, such as the intended holding in the target undertaking, the reputation of the proposed acquirer, its financial soundness and its group structure, but also the proposed acquirer's declared intentions towards the target undertaking expressed in its strategy (including as reflected in the business plan). This could be backed by appropriate commitments of the proposed acquirer to meet prudential requirements under the assessment criteria laid down in the sectoral Directives and Regulations, provided that the rights of the proposed acquirers are not affected. These commitments could concern, for example, financial support in case of liquidity or solvency problems, corporate governance issues, the proposed acquirer's future target share in the target undertaking and directions and goals for development.

13.4 The target supervisor should consider the ability of the target undertaking to comply at the time of the proposed acquisition, and to continue to comply after the acquisition, with all prudential requirements, including capital requirements, liquidity requirements, large exposures limits, requirements related to governance arrangements, internal control, risk management and compliance.

13.5 If the target undertaking will be part of a group as a result of the proposed acquisition, the sectoral Directives and Regulations require that the structure of the group make it possible to exercise effective supervision, to effectively exchange information with the competent authorities and to determine the allocation of responsibilities among the competent authorities.

13.6 The target supervisor should not be prevented from exercising effective supervision by the close links of the new group of the target undertaking to other natural or legal persons. The target supervisor should not be prevented from fulfilling its monitoring duties by the laws, regulations or administrative provisions of another country governing a natural or legal person with close links to the target undertaking, or by difficulties in the enforcement of those laws, regulations or administrative provisions.

13.7 The prudential assessment of the proposed acquirer should also cover its capacity to support adequate organisation of the target undertaking within its new group. Both the target undertaking and the group should have clear and transparent corporate governance arrangements and adequate organisation.

13.8 The group of which the target undertaking will become a part should be adequately capitalised.

13.9 The target supervisor should also consider whether the proposed acquirer will be able to provide the target undertaking with the financial support it may need for the type of business pursued by and/or envisaged for it, to provide any new capital that the target undertaking may require for future growth in its activities and to implement any other appropriate solution to accommodate the target undertaking's needs for additional own funds.

13.10 If the proposed acquisition would result in a qualifying holding of 50% or more or in the target undertaking becoming a subsidiary of the proposed acquirer, Criterion 4 should be assessed at the time of acquisition and on a continuous basis for the foreseeable future (usually 3 years). The business plan provided by the proposed acquirer to the target supervisor should cover at least this period. On the other hand, in cases of qualifying holdings of less than 20%, the information requirements should be reduced, as contemplated in the Annex.

13.11 The business plan should clarify the plans of the proposed acquirer concerning the future activities and organisation of the target undertaking. This should include a description of its proposed group structure. The plan should also evaluate the financial consequences of the proposed acquisition and include a medium-term forecast.

## **14. Suspicion of money laundering or terrorist financing by the proposed acquirer - Fifth assessment criterion**

14.1 If the proposed acquirer is suspected or known to be or to have been involved in money laundering operations or attempts, whether or not this is directly or indirectly linked to the proposed acquisition, or if the proposed acquirer is 'listed' as being a terrorist or is suspected or known to finance terrorism, or if the proposed acquisition increases the risk of money laundering or terrorist financing, the target supervisor should oppose the proposed acquisition.

14.2 In addition to information about the proposed acquirer gathered during the assessment process, competent authorities should collect information from (for example) court decisions, public prosecutor's files, relevant evaluations, assessments or reports drawn up by international organisations and standard setters with competencies in the field of preventing money laundering and combating the financing of terrorism. The competent authorities should also collect information regarding the origin of the funds that will be used to acquire the proposed holding.

14.3 For such purpose, the target supervisor should, to the extent possible, require information on:

- a) the criminal records and ongoing investigations in relation to money laundering or other relevant criminal offences of the proposed acquirer and any other person with close links to the proposed acquirer; and

b) any relevant information in suspicious transaction reports held by the financial intelligence unit regarding the involvement of the proposed acquirer and any other person with close links to the proposed acquirer.

14.4 The target supervisor should also oppose the acquisition even when there are no criminal records, or where there are no reasonable grounds to suspect that money laundering is being committed or attempted, if the context of the acquisition would give reasonable grounds to suspect there will be an increased risk of money laundering or terrorist financing.

This could be the case, for example, if the proposed acquirer is established in or has relevant personal or business links itself (or through any family member or persons known to be close associates) with a country or territory the Financial Action Task Force identified as having strategic deficiencies that pose a risk to the international financial system or with a country or territory identified by the European Commission as having strategic deficiencies in its national anti-money laundering or counter-terrorist financing regime that pose significant threats to the financial system. In any event, particular attention should be paid where the legislation of the third country does not permit the application of anti-money laundering and terrorist financing combating measures consistent with those applicable in the European Union.

14.5 The anti-money laundering and terrorist financing assessment complements the integrity assessment and should be carried out regardless of the value and other characteristics of the proposed acquisition.

14.6 Regarding the funds, target supervisors should also verify that:

- (a) the funds used for the acquisition are channelled through chains of financial institutions, all of which are subject to supervision by competent authorities (i) in the EU or (ii) in non-EU countries which, on the basis of credible sources such as mutual evaluations, detailed assessment reports or published follow-up reports, have requirements to combat money laundering and terrorist financing consistent with the revised FATF Recommendations and effectively implement those requirements;
- (b) the information on the history of the business activities of the proposed acquirer and on the financing scheme is consistent with the value of the deal; and
- (c) the funds have an uninterrupted paper trail back to their origins, or other information that allows the supervisory authorities to resolve all doubts as to their legal origin.

14.7 Missing information or information regarded as incomplete, insufficient or liable to give rise to suspicion – for example, capital movements not accounted for, cross-border relocations of headquarters, reshuffles in management or legal person owners, earlier associations of the owners, or the management of the company by criminals – should trigger increased supervisory diligence and requests by the target supervisor for further information and, should reasonable suspicion subsist, the target supervisor should oppose the acquisition.

## Chapter 4 – Requirements for the cooperation and exchange of information between competent supervisory authorities

15.1 Competent authorities should continue to apply, to the extent relevant, the guidance to facilitate coordination and exchange of information between supervisory authorities set out in the Joint CEBS, CESR and CEIOPS Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC (CEBS/2008/14; CEIOPS-3L3-19/08; CESR/08-543b). Notwithstanding the foregoing, on and from the date of application of the implementing technical standards regarding the consultation process between competent authorities to be developed by EBA pursuant to Article 22(9) of Directive 2013/36/EU or, as the case may be, by ESMA pursuant to Article 10a(8) of Directive 2004/39/EC or Article 12(9) of Directive 2014/65/EU, the relevant provisions of the Guidelines referred to above shall cease to apply in respect of such acquisitions and increases of holdings as are subject to the relevant implementing technical standards.

### **Title III - Final provisions and implementation**

These Guidelines apply as of dd.Mm.201x. On and from such date, and without prejudice to paragraph 15.1, the Joint CEBS, CESR and CEIOPS Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC (CEBS/2008/14; CEIOPS – 3L3 – 19/08; CESR/08-543b) are repealed.

## Annex I: Recommended list of information required for the assessment of an acquisition of a qualifying holding

### **Section 1** **Subject matter**

This Annex sets out the minimum list of information to be required by target supervisors to be included by a proposed acquirer in the notification of a proposed acquisition of, or increase in, a qualifying holding for the assessment of the proposed acquisition.

### **Section 2** **Information to be provided by the proposed acquirer**

The information to be provided by the proposed acquirer to the competent authority of the target undertaking should be that referred to in Sections 3 to 13 of this Annex, depending on whether the information relates to a natural person or a legal person or a trust.

### **Section 3** **General information relating to the identity of the proposed acquirer**

1. Where the proposed acquirer is a natural person, the proposed acquirer should provide the target supervisor with the following information relating to his identity:
  - (a) personal details including the person's name, date and place of birth, personal national identification number (where available), address, and contact details;
  - (b) a detailed curriculum vitae (or equivalent document), stating relevant education and training, previous professional experience, and any professional activities or other relevant functions currently performed.
2. Where the proposed acquirer is a legal person, the proposed acquirer should provide the target supervisor with the following information:
  - (a) documents certifying the business name and registered address of its head office, and postal address if different, contact details and its national identification number (where available);
  - (b) registration of legal form in accordance with relevant national legislation;
  - (c) an up-to-date overview of entrepreneurial activities;
  - (d) a complete list of persons who effectively direct the business, their name, date and place of birth, address, contact details, their national identification number, where available, detailed curriculum vitae (stating relevant education and training, previous professional experience, any professional activities or other relevant functions currently performed);
  - (e) the identity of all persons who may be considered to be beneficial owners of the legal person, their name, date and place of birth, address, contact details, and their national identification number, where available.
3. For trusts that already exist or would result from the proposed acquisition, the proposed acquirer should provide the target supervisor with the following information:

- (a) the identity of all trustees who will manage assets under the terms of the trust document and, where applicable, their respective shares in the distribution of income;
- (b) the identity of all persons who are beneficial owners or settlors of the trust property and, where applicable, their respective shares in the distribution of income.

#### **Section 4**

##### ***Additional information relating to the proposed acquirer that is a natural person***

1. The proposed acquirer that is a natural person should provide the target supervisor with the following additional information:
  - (a) the following information concerning the proposed acquirer, any undertaking directed or controlled by the proposed acquirer, over the last 10 years:
    - (1) criminal records, or criminal investigations or proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director or bankruptcy, insolvency or similar procedures), notably through an official certificate (if and in so far as it is available from the relevant Member State or third country), or through another equivalent document. For ongoing investigations information could be provided through a declaration of honour;
    - (2) open investigations, enforcement proceedings, sanctions, or other enforcement decisions against the proposed acquirer;
    - (3) refusal of registration, authorisation, membership or licence to carry out trade, business or a profession; or the withdrawal, revocation or termination of such a registration, authorisation, membership or licence; or expulsion by a regulatory or government body or a professional body or association;
    - (4) dismissal from employment or a position of trust, fiduciary relationship, or similar situation;
  - (b) information as to whether an assessment of reputation of the proposed acquirer has already been conducted by another supervisory authority, the identity of that authority, and evidence of the outcome of the assessment.
  - (c) information regarding the current financial position of the proposed acquirer, including details concerning sources of revenues, assets and liabilities, pledges and guarantees, granted or received.
  - (d) a description of the business activities of the proposed acquirer.
  - (e) financial information including credit ratings and publicly available reports on the undertakings controlled or directed by the proposed acquirer and, if applicable, on the proposed acquirer.
  - (f) a description of the financial and non-financial interests or relationships of the proposed acquirer with the persons listed in the following points:
    - (1) any other current shareholder of the target undertaking;
    - (2) any person entitled to exercise voting rights of the target undertaking in any of the following cases or a combination of them:
      - voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted

- exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;
  - voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question;
  - voting rights attaching to shares which are lodged as collateral with that person or entity, provided the person or entity controls the voting rights and declares its intention of exercising them;
  - voting rights attaching to shares in which that person or entity has the life interest;
  - voting rights which are held, or may be exercised within the meaning of the first four items of this (2), by an undertaking controlled by that person or entity;
  - voting rights attaching to shares deposited with that person or entity which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders;
  - voting rights held by a third party in its own name on behalf of that person or entity;
  - voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders;
- (3) any member of the administrative, management or supervisory body, in accordance with relevant national legislation, or of the senior management of the target undertaking;
- (4) the target undertaking itself and its group.
- (g) Information on any other interests or activities of the proposed acquirer that may be in conflict with those of the target undertaking and possible solutions for managing those conflicts of interest.
2. With regard to point (f) of paragraph 1, financial interests may include interests such as credit operations, guarantees and pledges. Non-financial interests may include interests such as family or close relationships.

### **Section 5**

#### ***Additional information relating to the proposed acquirer that is a legal person***

1. The proposed acquirer that is a legal person should provide the target supervisor with the following additional information:
- (a) Information regarding the proposed acquirer, any person who effectively directs the business of the proposed acquirer, any undertaking under the proposed acquirer's control, and any shareholder exerting significant influence on the proposed acquirer as identified in point (e). That information shall include the following:
- (1) criminal records, criminal investigations or proceedings, relevant civil and administrative cases, or disciplinary actions (including disqualification as company director or bankruptcy, insolvency or similar procedures), through an official certificate (if and in so far as it is available within the relevant Member

- State or third country), or through another equivalent document. For ongoing investigations information could be provided through a declaration of honour;
- (2) open investigations, enforcement proceedings, sanctions, or other enforcement decisions against the proposed acquirer;
  - (3) refusal of registration, authorisation, membership, or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of such a registration, authorisation, membership or licence; or expulsion by a regulatory or government body or by a professional body or association;
  - (4) dismissal from employment or a position of trust, fiduciary relationship, or similar situation (in relation to any person who effectively directs the business of the proposed acquirer and any shareholder exerting significant influence on the proposed acquirer).
- (b) Information as to whether an assessment of reputation of the proposed acquirer or of the person who directs the business of the proposed acquirer has already been conducted by another supervisory authority, the identity of that authority and evidence of the outcome of the assessment.
- (c) A description of financial interests, and non-financial interests or relationships of the proposed acquirer, or, where applicable, the group to which the proposed acquirer belongs, as well as the persons who effectively direct its business with:
- (1) any other current shareholders of the target undertaking;
  - (2) any person entitled to exercise voting rights of the target undertaking in any of the following cases or a combination of them:
    - voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;
    - voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question;
    - voting rights attaching to shares which are lodged as collateral with that person or entity, provided the person or entity controls the voting rights and declares its intention of exercising them;
    - voting rights attaching to shares in which that person or entity has the life interest;
    - voting rights which are held, or may be exercised within the meaning of the first four items of this (2), by an undertaking controlled by that person or entity;
    - voting rights attaching to shares deposited with that person or entity which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders;
    - voting rights held by a third party in its own name on behalf of that person or entity;

- voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders;
  - (3) any member of the administrative, management or supervisory body in accordance with relevant national legislation, or of the senior management of the target undertaking;
  - (4) the target undertaking itself and the group to which it belongs;
  - (d) Information on any other interests or activities of the proposed acquirer that may be in conflict with those of the target undertaking and possible solutions for managing those conflicts of interest;
  - (e) The shareholding structure of the proposed acquirer, with the identity of all shareholders exerting significant influence and their respective share of capital and voting rights including information on any shareholders agreements;
  - (f) If the proposed acquirer is part of a group, as a subsidiary or as the parent undertaking, a detailed organisational chart of the entire corporate structure and information on the share of capital and voting rights of shareholders with significant influence of the entities of the group and on the activities currently performed by the entities of the group;
  - (g) If the proposed acquirer is part of a group as a subsidiary or as the parent company, information on the relationships between the financial entities of the group and other non-financial group entities;
  - (h) Identification of any credit institution; assurance, insurance or re-insurance undertaking; or investment firm within the group, and the names of the relevant supervisory authorities;
  - (i) Statutory financial statements, at an individual and, where applicable, at consolidated and sub-consolidated group levels, regardless of the size of the proposed acquirer, for the last three financial periods, approved, where the financial statements are audited, by the external auditor, including:
    - (1) the balance sheet;
    - (2) the profit and loss accounts or income statement;
    - (3) the annual reports and financial annexes and any other documents registered with the relevant registry or authority in the particular territory relevant to the proposed acquirer.

Where the proposed acquirer is a newly established entity, instead of the information specified in the first sub-paragraph, the proposed acquirer shall provide to the target supervisor the forecast balance sheets and forecast profit and loss accounts or income statements for the first three business years, including planning assumptions used;
  - (j) Where available, information about the credit rating of the proposed acquirer and the overall rating of its group.
2. With regard to point (c) of paragraph 1, financial interests may include interests such as credit operations, guarantees and pledges. Non-financial interests may include interests such as family or close relationships.

3. Where the proposed acquirer is a legal person which has its head office registered in a third country, the proposed acquirer should provide to the target supervisor the following additional information:
  - (a) a certificate of good-standing, or equivalent where not available, from foreign financial sector authorities in relation to the proposed acquirer;
  - (b) where available, a declaration by foreign financial sector authorities that there are no obstacles or limitations to the provision of information necessary for the supervision of the target undertaking;
  - (c) general information on the regulatory regime of that third country as applicable to the proposed acquirer.
4. Where the proposed acquirer is a sovereign wealth fund, the proposed acquirer should provide to the target supervisor the following additional information:
  - (a) the name of the ministry or government department in charge of defining the investment policy of the fund;
  - (b) details of the investment policy and any restrictions on investment;
  - (c) the name and position of the individuals responsible for making the investment decisions for the fund; details of any influence exerted by the identified ministry or government department on the day-to-day operations of the fund and the target undertaking.

#### **Section 6**

##### ***Information on the persons that will effectively direct the business of the target undertaking***

1. The proposed acquirer should provide the competent authority with the following information relating to the reputation and experience of any person who will effectively direct the business of the target undertaking as a result of the proposed acquisition:
  - (a) personal details including the person's name, date and place of birth, personal national identification number (where available), address and contact details;
  - (b) the position for which the person is/will be appointed;
  - (c) a detailed curriculum vitae stating relevant education and professional training, professional experience, including the names of all organisations 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, and documentation relating to person's experience such as a list of reference persons including contact information and letters of recommendation. For positions held in the last 10 years, when describing these activities, the person shall specify his or her delegated powers, internal decision-making powers and the areas of operations under his or her control. If the curriculum vitae includes other relevant experiences, including management body representation, this shall be stated;
  - (d) criminal records, criminal investigations or proceedings, relevant civil and administrative cases, or disciplinary actions (including disqualification as a company director, bankruptcy, insolvency and similar procedures), through an official certificate (if and in so far as it is available within the relevant Member State or third country), or through another equivalent document. For ongoing investigations information could be provided through a declaration of honour;

- (e) information on:
    - (1) open investigations, enforcement proceedings, sanctions or other enforcement decision against the person;
    - (2) refusal of registration, authorisation, membership or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of such a registration, authorisation, membership or licence; or expulsion by a regulatory or government body or by a professional body or association; and
    - (3) dismissal from employment or a position of trust, fiduciary relationship, or similar situation;
  - (f) information as to whether an assessment of reputation as a person who directs the business has already been conducted by another supervisory authority, the identity of that authority and evidence of the outcome of this assessment;
  - (g) a description of financial interests, 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;
  - (h) the minimum time that will be devoted to the performance of the person's functions within the firm (annual and monthly indications);
  - (i) the list of executive and non-executive directorships currently held by the person.
- (2) With regard to point (g) of paragraph 1, financial interests may include interests such as credit operations, shareholdings, guarantees and pledges. Non-financial interests may include interests such as family or close relationships.

**Section 7**  
**Information relating to the proposed acquisition**

The following information relating to the proposed acquisition should be provided by the proposed acquirer to the target supervisor:

- (a) identification of the target undertaking;
- (b) details of the proposed acquirer's intentions with respect to the proposed acquisition, such as strategic investment or portfolio investment;
- (c) information on the shares of the target undertaking owned, or contemplated to be owned, by the proposed acquirer before and after the proposed acquisition, including:
  - (1) the number and type of shares, whether ordinary shares, or other, of the target undertaking owned, or intended to be acquired, by the proposed acquirer before and after the proposed acquisition, along with the nominal value of such shares;
  - (2) the share of the overall capital of the target undertaking that the shares owned, or intended to be acquired, by the proposed acquirer represent before and after the proposed acquisition;
  - (3) the share of the overall voting rights of the target undertaking that the shares owned, or contemplated to be owned, by the proposed acquirer represent before

and after the proposed acquisition, if different from the share of capital of the target undertaking;

- (4) the market value, in euro and in local currency, of the shares of the target undertaking owned, or intended to be acquired, by the proposed acquirer before and after the proposed acquisition.
- (d) Any action in concert with other parties which shall include, amongst other things, the following considerations: the contribution of other parties to the financing, the means of participation in the financial arrangements and future organisational arrangements;
- (e) Content of intended shareholder's agreements with other shareholders in relation to the target undertaking;
- (f) The proposed acquisition price and the criteria used when determining such price and, if there is a difference between the market value and the proposed acquisition price, an explanation as to why that is the case.

### **Section 8**

#### ***Information on the new proposed group structure and its impact on supervision***

1. Where the proposed acquirer is a legal person, the proposed acquirer should provide the target supervisor with an analysis of the perimeter of consolidated supervision of the target undertaking and the group that it would belong to after the proposed acquisition. This should include information about which group entities would be included in the scope of consolidated supervision requirements after the proposed acquisition and at which levels within the group these requirements would apply on a full or sub-consolidated basis.
2. The proposed acquirer should also provide, to the target supervisor, an analysis as to whether the proposed acquisition will impact in any way, including as a result of close links of the proposed acquirer with the target undertaking, on the ability of the target undertaking to continue to provide timely and accurate information to its supervisor.

### **Section 9**

#### ***Information relating to the financing of the proposed acquisition***

1. The proposed acquirer should provide a detailed explanation, as provided in paragraph 2, on the specific sources of funding for the proposed acquisition.
2. The explanation referred to in paragraph 1 shall include:
  - (a) details on the use of private financial resources and the origin and availability of the funds, including any relevant documentary support to provide evidence to the financial supervisor that no money laundering is attempted through the proposed acquisition;
  - (b) details on the means of payment of the intended acquisition and the network used to transfer funds;
  - (c) details on access to capital sources and financial markets including details of financial instruments to be issued;
  - (d) information on the use of borrowed funds including the name of relevant lenders and details of the facilities granted, including maturities, terms, pledges and guarantees, along with information on the source of revenue to be used to repay such borrowings and the origin of the borrowed funds where the lender is not a supervised financial institution;

- (e) information on any financial arrangement with other shareholders of the target undertaking;
- (f) information on assets of the proposed acquirer or the target undertaking which are to be sold in order to help finance the proposed acquisition, such as conditions of sale, price, appraisal, and details regarding their characteristics, including information on when and how the assets were acquired.

#### **Section 10**

#### ***Additional information requirements where the proposed acquisition would result in a qualifying holding of up to 20%***

Where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of up to 20%, the proposed acquirer should provide a document on strategy to the target supervisor containing, where relevant, the following information:

- (a) the strategy of the proposed acquirer regarding the proposed acquisition, including the period for which the proposed acquirer intends to hold its shareholding after the proposed acquisition and any intention of the proposed acquirer to increase, reduce or maintain the level of his shareholding in the foreseeable future;
- (b) an indication of the intentions of the proposed acquirer towards the target undertaking, and in particular whether or not it intends to act as an active minority shareholder, and the rationale for that action;
- (c) Information on the financial position of the proposed acquirer and its willingness to support the target undertaking with additional own funds if needed for the development of its activities or in case of financial difficulties.

#### **Section 11**

#### ***Additional information requirements where the proposed acquisition would result in a qualifying holding of 20% and up to 50%***

1. Where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of 20% and up to 50%, the proposed acquirer should provide a document on strategy to the target supervisor containing, where relevant, the following information:
  - (a) all the information requested pursuant to Section 10 of this Annex;
  - (b) details on the influence that the proposed acquirer intends to exercise on the financial position including dividend policy, the strategic development, and the allocation of resources of the target undertaking;
  - (c) a description of the proposed acquirer's intentions and expectations towards the target undertaking in the medium-term, covering all the elements referred to in Section 12(2) of this Annex.
2. Where, depending on the global structure of the shareholding of the target undertaking, the influence exercised by the shareholding of the proposed acquirer is considered to be equivalent to the influence exercised by shareholdings of 20% and up to 50%, the proposed acquirer should provide the information set out in paragraph 1.

### **Section 12**

#### ***Additional information requirements where the proposed acquisition would result in a qualifying holding of 50% or more, or where the target undertaking becomes a subsidiary of the proposed acquirer***

1. Where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of 50% or more, or in the target undertaking becoming its subsidiary, the proposed acquirer should provide a business plan to the target supervisor which shall comprise a strategic development plan, estimated financial statements of the target undertaking, and the impact of the acquisition on the corporate governance and general organisational structure of the target undertaking.
2. The strategic development plan referred to in paragraph 1 should indicate, in general terms, the main goals of the proposed acquisition and the main ways for achieving them, including:
  - (a) the overall aim of the proposed acquisition;
  - (b) medium-term financial goals which may be stated in terms of return on equity, cost-benefit ratio, earnings per share, or in other terms as appropriate;
  - (c) the possible redirection of activities, products, targeted customers and the possible reallocation of funds or resources expected to impact on the target undertaking;
  - (d) general processes for including and integrating the target undertaking in the group structure of the proposed acquirer, including a description of the main interactions to be pursued with other companies in the group, as well as a description of the policies governing intra-group relations.

With regard to point (d), for institutions authorised and supervised in the Union, information about the particular departments within the group structure which are affected by the transaction shall be sufficient.

3. The estimated financial statements of the target undertaking referred to in paragraph 1 should, on both an individual and, where applicable, a consolidated basis, for a period of three years, include the following:
  - (a) a forecast balance sheet and income statement;
  - (b) forecast prudential capital requirements and solvency ratio;
  - (c) information on the level of risk exposures including credit, market and operational risks as well as other relevant risks;
  - (d) a forecast of provisional intra-group transactions.
4. The impact of the acquisition on the corporate governance and general organisational structure of the target undertaking referred to in paragraph 1 should include the impact on:
  - (a) the composition and duties of the administrative, management or supervisory body, and the main committees created by such decision-taking body including the management committee, risk committee, audit committee, remuneration committee and any other committees, including information concerning the persons who will be appointed to direct the business;
  - (b) administrative and accounting procedures and internal controls, including changes in procedures and systems relating to accounting, internal audit, compliance including anti-money laundering and risk management, and including the appointment of key functions of internal auditor, compliance officer and risk manager;

- (c) the overall IT architecture including any changes concerning the outsourcing policy, the data flowchart, the in-house and external software used and the essential data and systems security procedures and tools including back-up, continuity plans and audit trails;
- (d) the policies governing outsourcing, including information on the areas concerned, on the selection of service providers, and on the respective rights and obligations of the principal parties as set out in contracts such as audit arrangements and the quality of service expected from the provider;
- (e) any other relevant information pertaining to the impact of the acquisition on the corporate governance and general organisational structure of the target undertaking, including any modification regarding the voting rights of the shareholders.

### **Section 13**

#### ***Reduced information requirements***

1. Notwithstanding the requirements in Sections 2 to 12 of this Annex, where the proposed acquirer is an entity authorised and supervised within the European Union and the target undertaking meets the criteria provided in paragraph 2 of this Section, the proposed acquirer should submit the following information to the target supervisor:
  - (a) Where the proposed acquirer is a natural person:
    - (1) the information set out in Section 3(1) of this Annex;
    - (2) the information set out in points (c) to (g) of paragraph 1 of Section 4 of this Annex;
    - (3) the information set out in Sections 6, 7 and 9 of this Annex;
    - (4) the information set out in Section 8(1) of this Annex;
    - (5) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of up to 20%, a document on strategy as set out in Section 10 of this Annex;
    - (6) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of 20% or more, a document on strategy as set out in Section 11 of this Annex.
  - (b) Where the proposed acquirer is a legal person:
    - (1) the information set out in Section 3(2) and, where relevant, Section 3(3) of this Annex;
    - (2) the information set out in points (c) to (j) of Section 5(1) of this Annex and, where relevant, the information set out in Section 5(4) of this Annex;
    - (3) the information set out in Sections 6, 7 and 9 of this Annex;
    - (4) the information set out in Section 8(1) of this Annex;
    - (5) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of up to 20%, a document on strategy as set out in Section 10 of this Annex;
    - (6) where the proposed acquisition would result in the proposed acquirer holding a qualifying holding in the target undertaking of 20% or more, a document on strategy as set out in Section 11 of this Annex.

2. The requirements provided in paragraph 1 should apply to acquisitions in target entities that meet all of the following criteria:
  - (a) they do not hold client assets;
  - (b) they are not authorised for the investment services and activities ‘Dealing on own account’ or ‘Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis’ referred to in points (3) and (6) of Section A of Annex I of Directive 2004/39/EC;
  - (c) in case they are authorised for the investment service of ‘Portfolio management’ as referred to in point (4) of Section A of Annex 1 of Directive 2004/39/EC, the assets under management by the firm are below EUR 500 million.
3. If the proposed acquirer has been assessed by the target supervisor within the previous two years, regarding the information referred to in Sections 4 and 5 of this Annex, that proposed acquirer should only provide those pieces of information that have changed since the previous assessment.

Where there have been no changes, the proposed acquirer should sign a declaration informing the target supervisor that there is no need to update such information, since it remains unchanged from the previous assessment.

## 6. Accompanying documents

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### Draft Cost- Benefit Analysis / Impact Assessment

#### Introduction

1. The Impact Assessment section evaluates the impact of the proposals of draft guidelines, which were developed by the Joint Committee of the ESAs in accordance with Articles 16 and 56 subparagraph 1 of the ESAs' Regulations. The draft guidelines aim to achieve convergence of supervisory practices relating to the prudential assessment of acquisitions and increase of holdings in the financial sector (see paragraph 2).

#### Scope and objectives

2. The REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS regarding the application of Directive 2007/44/EC amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector showed that there are several issues to be revised and/or clarified in the new version of these guidelines. The issues identified in the report are summarised in the background and rationale section.
3. The guidelines, developed by the ESAs, aim to harmonise the provisions applicable to all EU Member States as to the process of approving a qualifying holding and the notion of "acting in concert". Likewise, the guidelines would assist the Member States meeting the objectives of Directive 2007/44/EC of enhancing the level playing field in the financial market, reducing administrative burdens for credit and financial institutions and supervisory authorities, strengthening the cooperation amongst supervisors as well as ensuring the convergence of supervisory practices.
4. A preliminary **screening** impact assessment has shown that the impact from the implementation of any of the proposed options on indirect qualifying holdings and the identification of circumstances when parties are acting in concert would not have any material impact on the credit and financial institutions and/or the competent authorities. Therefore, respecting the principle of proportionality when conducting impact assessments, the scope of the current impact assessment is not to extensively assess the impact of individual operational decisions that simply clarify the procedures but rather to provide a high-level qualitative assessment of the strategic options considered for the drafting of the current guidelines.

5. Accordingly, the impact assessment has not conducted an in-depth quantitative evaluation of the costs and benefits from the implementation of the proposed guidelines (i.e. only the impact from implementing the preferred option has been assessed), since any positive or negative net impact (benefits minus costs) is not expected to be significant.
6. The IA has assessed, in qualitative terms, the magnitude of the impact assuming **full implementation of the guidelines by all MS**. Thus, the impact from the actual implementation of the guidelines could be lower than the estimated in the analysis below. Therefore, the estimated net impact of the preferred option should be interpreted as the “maximum impact from the implementation of the existing guidelines”.
7. The set of strategic options examined are split in three different sets according to the strategic decision that has been taken, i.e. indirect acquisitions of qualifying holdings and the clarification of the notion of “acting in concert”.

## Part 1: clarification of the notion of indirect acquisitions of qualifying holdings

### Baseline of the current practices

8. The sectoral Directives and Regulations do not define what constitutes an indirect acquisition of 10% or more of the capital or of the voting rights in a target undertaking. Although the 3L3 Guidelines provide some clarification on what constitutes an indirect holding, according to the EC review report, the Member States largely rely on the concepts in their respective national laws to assess acquisitions carried out through cascading holdings, i.e. corporate chains in which each member of the chain holds a stake in, or otherwise controls, another member of the chain (for example, entity A acquires a stake in entity B, which holds a stake in financial institution C). The survey showed that competent authorities use different methods to form an opinion as to whether an indirect acquisition of a qualifying holding is taking place and consequently whether the proposed acquisition has to be notified or not. This leads to inconsistent treatments of similar situations rendering the framework for indirect acquisition in EU quite diverse amongst Member States.

### Options considered

**Policy option 1:** use of the control criterion.

9. This policy option would entail considering as proposed indirect acquirers all natural or legal persons (i) acquiring control over an existing holder of a qualifying holding in a target undertaking or (ii) who, directly or indirectly, control the proposed direct acquirer of a qualifying holding in a target undertaking (including the ultimate natural person or persons at the top of the corporate control chain).

**Policy option 2:** use of both the control criterion and the multiplication criterion.

10. Pursuant to the multiplication criterion, target supervisors should multiply the percentages of the holdings across the corporate chain and, if the result is 10% or more, a qualifying holding will be deemed to be acquired indirectly. The multiplication criterion is deemed to be unsuitable for use on standalone basis as it would focus mechanically on the size of the holdings and would disregard the control of voting rights and the ability to influence the management of the supervised entity. This would be problematic for assessing the indirect acquisition of voting rights. However, it could be useful when used in conjunction with the control criterion. As such, policy option 2 is to apply the control test and the multiplication test in parallel and, if either test is satisfied, an indirect acquisition of a qualifying holding would be deemed to take place.

## Cost-benefit analysis

### a. Policy option 1

#### Benefits

11. The control criterion has been adopted by the 3L3 Guidelines, albeit not expressly. The criterion takes into account multiple references in sectoral Directives and Regulations to the articles 9 and 10 of Directive 2004/109/EC and is particularly effective in assessing the actual control of voting rights, as the person holding control over an intermediary holder could exercise the entirety of the voting rights held by such intermediary holder.

#### Costs

12. **Costs for the national supervisory authorities** – The main direct cost for supervisory authorities consists of establishing processes for compliance with these Guidelines and is expected to be LOW in relation to their current operational cost as various supervisory authorities already have incurred the majority of such costs to implement the Directive. There may be an additional cost arising from the adjustment of the processes for coordination, communication and information exchange with other competent authorities. Further costs might arise from adapting the national legislation, in whichever jurisdiction is needed.

13. **Costs for institutions** – No significant costs for institutions are expected. There may be some additional costs in certain jurisdictions should certain situations not have been previously considered.

### b. Policy option 2

#### Benefits

14. The second policy option would have the advantage of enlarging the scope of assessment, in particular in respect of indirect acquisitions of capital. Whilst the acquirer of a significant participation in the holding company may be unable to exercise control over the holding company and hence over the target undertaking, it could be argued that the economic reality is that the proposed acquirer has, in fact, acquired indirectly a stake in the capital of the target undertaking<sup>9</sup>.

#### Costs

15. **Costs for the national supervisory authorities** – The main direct cost for supervisory authorities would be that this policy option would increase the number of assessments of notifications and would include potential acquirers who might not be able to exercise any influence over the management of the target undertaking. There may be an additional cost arising from the adjustment of the processes for coordination, communication and information exchange with other competent authorities. Further costs might arise from adapting the national legislation, in whichever jurisdiction is needed.

<sup>9</sup> By way of example, the acquisition of 10% of the capital of the parent company holding 100% of the capital of the target undertaking constitutes commercially the indirect acquisition of 10% of the capital of the target undertaking.

16. **Costs for institutions** – There may be additional costs for institutions in certain jurisdictions, should certain situations not have been previously considered.

### Preferred policy option

17. On the basis of cost-benefit analysis, there are no grounds that would render one policy option more preferable over another, on a standalone basis.

## Part 2: establishing a more precise definition of “acting in concert”

### Baseline of the current practices

18. The definitions of persons acting in concert, accompanied by examples provided by Member States, may be similar in wording across sectoral legislations<sup>10</sup> but in practice there is no generally accepted definition of the notion of “acting in concert”.
19. Based on the information collected by the European Commission and the ESAs, it is possible to identify a variety of approaches. Certain authorities apply the guidance in the current Guidelines directly by way of interpretation or pursuant to provisions of national law.
20. Other jurisdictions set out definitions in national law based on either exhaustive lists or presumptions of circumstances where persons are deemed to be acting in concert, such as in respect of family members or persons holding specific occupational positions of relevance (e.g. being a member of the financial institution’s board of directors).
21. Furthermore, other jurisdictions provide examples of persons in specific situations (e.g. holders of voting rights, parties to an agreement or parties in control of the target undertaking), while others focus on the intentions of the potential acquirer and look at each situation on its own merits.
22. Finally, only few jurisdictions have published additional guidance to assist in clarifying what they perceive to be covered by this concept. However, practices show that, while most supervisory authorities agree that each situation is unique and should be assessed on the basis of its own merits in order to ascertain the actual link between the proposed acquirers, it is possible to identify commonalities which could be transposed to the existing guidelines and could potentially reduce the cost as compared to proposing a test which is not based on existing practices.

### Options considered

- a. **Policy option 1: setting up exhaustive lists of circumstances**
- establishing (i) an exhaustive list of circumstances in which persons are deemed to act in concert and (ii) a list of circumstances in which persons are presumed to act in concert.
- b. **Policy option 2: setting up a non-exhaustive, indicative, list of factors**
- setting out a non-exhaustive list of factors which the supervisors could examine to determine whether certain persons are acting in concert.
23. This policy option would entail setting out an indicative list of factors which may indicate reasons for further investigation by a competent authority. This is particularly relevant when no notification has been provided to the target supervisor. However, it is important to note that the

<sup>10</sup> Such as Takeover Bids Directive article 2.1(d), the Transparency Directive e.g. article 10(1)(a) and the Glossary in the current Guidelines..

presence of such factors would not, in and of itself, lead to a conclusion that the parties are acting in concert.

c. **Policy option 3: identification of activities which, by themselves, will not lead to a finding of persons acting in concert**

- identifying activities where cooperation among shareholders will not, by itself, lead to a conclusion that such persons are acting in concert.

24. This policy option sets out activities in which shareholders may wish to engage without seeking to acquire control or exercise significant influence over the target undertaking, provided such activity is available to the shareholders under national law. When shareholders cooperate to engage in any of the activities in question, such cooperation will not, by itself, lead to a conclusion that such persons are acting in concert. Moreover, the fact that an activity is not included in the list does not mean that such activities or facts lead to a conclusion that the parties are acting in concert. Each case will be determined on its own merits.

## Cost-benefit analysis

a. **Policy option 1**

### Benefits

25. An exhaustive list of situations where persons act in concert would ensure that similar cases are treated in a uniform manner, would enhance supervisory convergence and consistency of supervisory practices and would help expedite the supervision of acquisitions and increases of qualifying holdings. Moreover, a list of such situations would provide competent authorities with the ability to take into account the specific circumstances of cases where the potential acquirer could rebut a presumption that it is acting in concert with another person.

### Costs

26. **Costs for the national supervisory authorities** – The main direct cost for competent authorities would be the lack of flexibility, which could result in various acquisitions not being subject to prudential assessment. The wide range of possible actions or behavior patterns would render an exhaustive list obsolete.

27. The additional direct cost for supervisory authorities, which arises from the need to establish processes for complying with a pre-set list of circumstances in which persons are deemed or presumed to act in concert, is expected to be LOW as the proposals would be based on existing practices and little or no adjustments would be expected. Additional costs would be driven mainly by the need to communicate and exchange information with other competent authorities and to monitor compliance with these Guidelines.

28. **Costs for institutions** – No significant costs for institutions are expected. There may be some additional costs in certain jurisdictions should certain situations not have been previously considered to lead to a determination that persons are acting in concert, as the institutions would

have to set up processes for notifying the competent authorities, and costs resulting from requests for information made by competent authorities. However, in other jurisdictions the number of notifications may be reduced.

#### b. Policy option 2

##### Benefits

29. This policy option would allow competent authorities to assess each situation on its own merits. It would continue to be possible to take into account all relevant circumstances, which would ensure that persons which should be subject to the prudential assessment are not exempted.

30. A non-exhaustive list of indicators will enhance supervisory convergence and consistency of supervisory practices. The additional clarity on common situations likely to be further examined by the relevant competent authorities will help make the supervision of acquisitions and increases of qualifying holdings in the EU more effective.

##### Costs

31. **Costs for the national supervisory authorities** – The main direct cost for supervisory authorities consists of establishing processes for compliance with these Guidelines and is expected to be LOW as the NCAs have already incurred the majority of such costs when implementing the Directive. There may be a need to adjust the existing processes for coordination, communication and information exchange with other competent authorities. Further costs might arise from adapting national legislation, to the extent the Member State sets out such indicators in law.

32. **Costs for institutions** – No significant costs for institutions are expected, as the current practice is also based on an individual assessment of the relevant parties.

#### c. Policy option 3

##### Benefits

33. This policy option will enhance the transparency of the assessment of cooperation between shareholders. Furthermore, using a similar approach as in the area of takeover bids will enhance supervisory cooperation, convergence and practices across sectorial legislation.

##### Costs

34. **Costs for the national supervisory authorities** – The direct cost for supervisory authorities is expected to be very low to negligible, as the proposal is based on existing practices identified in 9 Member States. Such costs will be driven mainly by the need to adapt existing processes, to implement new processes for coordination, communication and information exchange with other competent authorities and to monitor compliance with these Guidelines.

35. **Costs for institutions** – The costs for institutions are expected to be negligible.

## Preferred policy option

36. On the basis of cost-benefit analysis, there are no grounds that would render one policy option more preferable over another, on a standalone basis. However, the qualitative assessment shows that the preferred option to be included in the guidelines would be a combination of policy options 2 and 3. This would consist of:

- (i) providing further guidance regarding the factors which might indicate that persons are acting in concert, enhancing supervisory convergence; and
- (ii) the national supervisory authorities would have the flexibility to deal with specific circumstances, which could have been curtailed by policy option 1. In addition, it would enable the supervisors to judge each case on its own merits.