Nederlandse Vereniging van Banken

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Dear Sir/Madam

The Dutch Banking Association (Nederlandse Vereniging van Banken, NVB) appreciates the opportunity to comment on the draft joint guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.

We understand that the main objective of these guidelines is to provide legal certainty, clarity and predictability with regard to the assessment process of qualified holdings in the sectoral Directives and regulations. You hereby find our answers to the questions.

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?**

The goal of the current guidelines is to provide a solution for the lack of harmonised definitions of certain notions of Directive 2007/44/EC on prudential assessments of acquisitions (the Qualifying Holdings Directive). We consider this goal is not achieved as the draft do not provide clear-cut definitions in addition to already existing notions.

Furthermore, a position paper was submitted by the Netherlands which argues for amending the underlying Directive by introducing two new criteria for the assessment of proposed acquisitions and further increases of qualifying holdings in the financial sector. The position paper states that the current evaluation criteria are all micro-prudential in nature. Therefore two criteria which take into account wider systemic implications and the resolvability of an institution resulting from a merger or acquisition should be added to the existing list of criteria. With this in mind, it might be wise to postpone amending the Guidelines until a decision has been made concerning this position paper.

Paragraph 4: Acting in concert
As the draft guidelines rightly state there is no clear legal definition of *acting in concert* . However some European Directives (e.g. the Takeover Bids Directive[1], Transparency Directive[2]) do contain a clear definition i.e. '*any legal or natural person who decides to acquire or increase a qualifying holding in accordance with an explicit or implicit agreement between them'*.

The draft guidelines extend the already existing definition without explaining why the existing definition cannot be used. We believe that the different legal definitions of *acting in concert* lead to uncertainties in practice due to the different interpretations that are adopted by Member States (and supervisory authorities). We believe that the concept of *acting in concert* should be used in a uniform way.

[1] Art. 2.1(d) of the Takeover Bids Directive states that: *'persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid.*

[2] Art. 10 of the Transparency Directive states: *The notification requirements defined in paragraphs 1 and 2 of Article 99 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*
(a) 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.

It is unclear to us why the joint consultation states that '*the interpretation of the notion of acting in concert set out in these Guidelines should apply exclusively to the prudential assessment of qualifying holdings (…) and should not affect the interpretation of any similar notion contemplated in other EU legislative acts*'. The list of activities in which shareholders may cooperate without being presumed to have acted in concert (par. 4.9 of the draft Guidelines) is exactly the same as the 'White list of activities' established by ESMA within the meaning of the Takeover Bids Directive.[3] The same is applicable to the 'other factors' that should be taken into account when determining whether or not shareholders who cooperate in relation to board appointments are persons acting in concert (par. 4.11 of the draft Guidelines) i.e. these factors are exactly the same as the criteria established by ESMA that should be taken into account under the Takeover Bids Directive.[4] Based on the foregoing, we conclude that *acting in concert* within the meaning of the Qualifying Holdings Directive should be interpreted in the same way as *acting in concert* within the meaning of the Takeover bids Directive. We fully support a uniform interpretation of the concept of *acting in concert*, but doubt whether this is achieved by adding to an existing definition at his level of legislation. Achieving the desired level of uniform application and interpretation would be best served by incorporating a clear definition in the relevant sectoral Directives and Regulations.

Paragraph 5: Significant influence

Par. 5.1 of the draft Guidelines state that 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.

The Qualifying Holdings Directive does not include this requirement but only includes a national option that allows Member States to require that the competent authorities are to be *informed* of acquisitions of holdings below the thresholds laid down in the Directive, provided that Member States impose no more than one additional threshold below 10 % for this purpose. The Directive does not prescribe a procedure under which an assessment is necessary for acquisitions below the threshold of 10%.

We believe that the draft Guidelines are not the level of legislation to introduce new requirements with significant impact and ask you to reconsider this new rule or initiate an amendment of Qualifying Holdings Directive.

Moreover, the draft Guidelines do not make unequivocally clear under which circumstances a proposed acquirer exercises *significant influence* over the management of the target undertaking. The draft Guidelines provide for a non-exhaustive list of factors (par 5.2) that should be taken into account when assessing significant influence. We believe this will lead to different approaches in Member States (and supervisory authorities) towards determining whether proposed acquirers have significant influence. We suggest the ESAs in reconsideration of implementing this new rule here or in the QHD to have the definition of 'significant influence' to tie into the well-known and widely used definition under international financial reporting standards (IFRS) i.e. the power to participate in the operating and financial policy decisions of an entity as evidenced by board of directors

[3] ESMA/2013/1642 Public Statement '*Information on shareholder cooperation and acting in concert under the Takeover Bids Directive*', par. 4.1.
[4] ESMA/2013/1642 Public Statement '*Information on shareholder cooperation and acting in concert under the Takeover Bids Directive*', par. 5.3.

representation, management personnel swapping or sharing, material transactions with the investee, policy-making participation and technical information exchanges. Following the IFRS definition would be efficient in practice and lead to the desired harmonisation.

Paragraph 6: Indirect acquisitions of qualifying holdings

This paragraph needs to be more detailed on the relevant criteria to determine whether the proposed transaction constitutes an *acquisition* or *increase* in a target undertaking.

- A qualifying holding can be "***acquired***" by means of coming into possession of any percentage (from 10% or more) of the voting rights or of capital of a target undertaking.
- A qualifying holding can be "***increased***" by means of coming into possession of any additional percentage of voting rights or of capital of a target undertaking, in which already at least 10% but less than 100% of the voting rights or of capital has been acquired.
  An increase cannot take place anymore, once the target undertaking is in 100% possession through voting rights and capital. Therefore, e.g. newly created voting rights, shares and/or capital contributions of any legal form in already 100% held (target) undertakings, do not constitute an "***increase***" of a qualifying holding and therefore these transactions do not require prudential assessment by the competent authorities on the basis of these Guidelines on EU/2007/44 and EU/575/2013 and subsequent national legislation.

Paragraph 8: Proportionality principle - Intra-group transactions

Par. 8.5 of the draft Guidelines deals with intra-group transactions. We experience in practice that intra-group transactions are dealt with in very different manners by different supervisory authorities. In the Netherlands a very practical solution to intra-group transactions exists which is the group-declaration of no objection and results in undertakings only having to notify intra-group structural changes once a year. No additional assessments as a result of intra-group changes are necessary as such an assessment does not seem to have added value. We suggest to follow the Dutch practice which is efficient and has –as far as we know- not had any negative consequences from a prudential perspective.

Paragraph 9: Assessment period and information to be provided

We experience in practice that the supervisory authorities do not acknowledge the receipt of a notification within two working days. This leads to great uncertainty on whether or not the notification is considered to be complete. Although we fully support the concept of engaging in (proportional) pre-notification contacts with the target supervisor, we experience that it sometimes becomes unclear when the notification is considered to be complete and the assessment period has commenced.

We therefore suggest that supervisory authorities must always inform the proposed acquirers within two working days on whether the notification is considered to be complete or not in order to avoid (undue) delays. We also suggest to design a uniform notification form that proposed acquirers can use when filing a request so it can easily be assessed whether a notification is complete. We believe that this would lead to greater harmonisation and certainty for the proposed acquirer and target undertaking regarding the notification and assessment procedure, timing and/or information that is required from them.

Paragraph 10: Reputation of the proposed acquirer – first assessment criterion

Reputation of the proposed acquirer - integrity

Par. 10.5 of the draft Guidelines requires target supervisors to always carry out an integrity check in respect of the proposed acquirer. We believe that this is not in line with the principle of proportionality. We suggest to make a distinction between:

i. A proposed acquirer supervised by the same competent authority; or
ii. A proposed acquirer supervised by another competent authority in the same country; or
iii. A proposed acquirer supervised by a competent authority in another Member State.

When a proposed acquirer is already considered to be of 'good repute' by the target supervisor (either in his capacity as a holder of a qualifying holding or as a board member/ supervisory board member), we believe it would be unnecessary to carry out an integrity check in respect of the proposed acquirer. We may expect from the target supervisor to be aware of all developments since carrying out its previous assessment. In order to avoid unnecessary duplication of work and unnecessary delay in the assessment procedure, we believe that the proposed acquirer is not obliged to submit a written statement on his integrity in these cases (as proposed in par. 10.17).

Reputation of the proposed acquirer - professional competence

Par. 10.1 of the draft Guidelines requires target supervisors to assess the professional competence of the proposed acquirer. We believe this is a new requirement which was not incorporated in the Qualifying Holdings Directive and we are not sure what the purpose of this requirement is. We consider this level of legislation not the proper level to introduce new requirements. Moreover, it is unclear how this requirement relates to the suitability (or fit) requirement for policy makers of financial institutions as already incorporated in existing law. We suggest to include that if the proposed acquirer is a regulated undertaking, that the professional competence of its policy makers is already deemed to have been assessed.

Paragraph 11: Reputation and experience of those who will direct the business of the target undertaking - Second assessment criterion

Par. 11 states that if the proposed acquirer intends to appoint a person who is not fit and proper, then the target supervisor should oppose the proposed acquisition. According to the draft Guidelines this requirement 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. We do not understand the purpose of this requirement.

The Qualifying Holding Directive only applies in cases of qualifying holdings in regulated financial undertakings. All policy makers of these undertakings are subject to a fit and proper test. Therefore, if a proposed acquirer intends to appoint a person who is not fit and proper, the target supervisor already has the power to prevent nomination of that person by declaring that person not fit or proper. We fail to understand why the target supervisor should in this case oppose the entire acquisition if a less intrusive measure like not approving the fit and proper assessment is possible. We ask you to reconsider this requirement.

Paragraph 13: Compliance with prudential requirements of the target undertaking- fourth assessment criterion

The draft Guidelines state that 'the group of which the target undertaking will become a part should be adequately capitalized.' This term is vague and does not specify what is meant exactly. This could lead to uncertainty and different national approaches towards determining if a proposed acquirer is 'adequately capitalised.' We believe that a distinction should be made between proposed acquirers that are legal persons that are regulated and supervised by a competent supervisor in an EU Member State or a third country and proposed acquirers that are legal persons that are not regulated nor supervised by a competent authority. Legal persons that are regulated and supervised

by a competent authority must be deemed to be 'adequately capitalised' when the legal person complies with the relevant EU prudential capital or solvency requirements.

Paragraph 14: Suspicion of money laundering or terrorist financing – fifth assessment criterion

The draft Guidelines state that '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'. The draft Guidelines do not make clear under which circumstances supervisory authorities can oppose a proposed acquisition. We believe that the Guidelines should describe how the supervisory authorities should make such assessment, because a uniform application of this assessment criterion is essential due to the sensitive information involved.

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

We do not always consider the level of detail of the draft Guidelines appropriate. See in our answer to question 1 for some examples where we consider the draft Guidelines to go beyond the scope of the Qualifying Holding Directive. On the other hand more details could be provided e.g. on the specifics of the notification procedure in order to achieve a uniform process.

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

We prefer neither A nor B as we find that the application of these options is complicated because of the lack of clear definition of the control criterion and as to at which level in the corporate chain the criterion is to be applied. We would prefer to solely apply the multiplication criterion. The criterion is clear and and easily applied. Pursuant to criterion, target supervisors should multiply the percentages of the holdings across the corporate chain and, if the result leads to a holding of 10% or more, a qualifying holding will be deemed to be acquired indirectly.

Question 4: Would you propose a different test for assessing whether a qualifying holding is being acquired indirectly? Please explain your answer.

Please see the answer to question 3.