**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?**

Insurance Europe welcomes this opportunity to comment on ESA’s Joint Consultation Paper regarding the “Draft Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector”.

From Insurance Europe’s point of view the guidelines should not duplicate already existing provisions as set out in relevant Directives, Regulations and Delegated Acts nor add another layer of requirements. In addition, it is important that a consistent level playing field within the European Union is ensured and that gold plating by national supervisory authorities is avoided.

**1. Scope of the Guidelines**

It is important that the guidelines, in general, are only used where there are no regulatory measures already in place. Thus, the guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (hereafter referred to as “Guidelines”) should not create new requirements where the relevant legal texts refer to existing rules.

Insurance Europe supports the need for a uniform interpretation of the concept of “acting in concert”, but it should not be done through these guidelines. Achieving the desired level of uniform application and interpretation would be best served by incorporating a clear and consistent definition of this concept in the relevant sectoral Directives and Regulations (eg the Takeover Bids Directive and the Transparency Directive both contain a clear definition ie *“any legal or natural person who decides to acquire or increase a qualifying holding in accordance with an explicit or implicit agreement between them*”). As a consequence, there is no need to redefine the concept of “acting in concert” or “indirect holding of voting rights”. Moreover, any such definitions in the guidelines must not deviate from the relevant provisions in the Transparency Directive (as they do at least with respect to “acting in concert”, see also below). See further comments in our response to question 2.

An additional problem might arise through the application of the guidelines. Due to possible constraints from national law, the impact of the guidelines might vary from Member State to Member State. This may create conflicts with national laws (consistent with EU Directives) and as such represent a potential risk for the envisaged level playing-field in the European Union. Hence, supervisors should not create additional burdens on top of what is required in the legal texts. The following three points are examples of contradictions and additional burdens.

With respect to the acquisition of a cross-border operating group, only one supervisory authority should be competent to consider and permit such acquisition. This authority should be the group supervisor of the target group and other involved supervisory authorities should be bound by its decision.

The supervisory authority should have the option of pre-authorization of an acquisition. On the current legal status, acquisitions are not explicitly permitted by the supervisory authority but rather, this permission is simulated at the end of a period. In straightforward cases the supervisory authority should have the opportunity to permit the acquisition explicitly to speed up the procedure.

 Lastly, references to relevant provisions should also include references to the Solvency II Directive. Sec. 3.1 (iii) and (iv): “Management body” and “management body in its supervisory function” are defined by reference to the CRD IV which is not applicable to insurance and reinsurance undertakings. For sec. 3.1 (vii) “Qualifying holding” is defined in Article 13, No. 21 of the Solvency II Directive. This should be the relevant definition for any transactions with respect to holdings in insurance and reinsurance undertakings.

**2. Principle of proportionality**

While Insurance Europe appreciates a coherent application of the proportionality principles, it is important that these lead to a clear reduction of prudential control where the proposed acquirer is supervised within the EU/EEA, and for intra-group transactions relating to qualifying holdings.

**a) Companies supervised within the EU/EEA**

Insurance and reinsurance undertakings are authorised by the supervisory authorities of their home member state, to carry on business in the entire Community. A condition to the authorization is the prudential control of their good repute (including the integrity and professional competence of the persons effectively running their business). Insurance Europe believes that the qualitative requirements for conducting business are not lower in terms of efficiency and purpose than those for owning a qualifying holding in a regulated entity. Accordingly, the prudential control of the reputation of a proposed acquirer of a qualifying holding is redundant and should not be performed if such acquirer is supervised as financial sector regulated entity within the EU/EEA.

However, Section 10.4 of the guidelines does not provide enough certainty that such redundant supervision will be eliminated. It stipulates in its opening sentence that “both requirements should generally be considered to be met”. Although this appears to call for the exemption from redundant supervision in the cases described therein, the use of the word “generally” cast doubts as to whether the exemption will be applied without restrictions if the provisions set out are met. Therefore, the proposal is to delete “generally” from the opening sentence of section 10.4.

In addition, by virtue of effectively applying the principle of proportionality, the Guidelines should make clear that proposed acquirers that are financial sector regulated entities (i.e. insurers, reinsurers, credit institutions, investment firms, pension funds or asset management companies) in the EU/EEA, do not need to provide any of the information set forth in Annex I, Section 3, Section 4 and Section 5.

**b) Intra-group transactions**

Section 8.5 of the Guidelines addresses the application of the proportionality principle in the case of intra-group transactions.

It is stated that in case of intra-group transactions, the full assessment procedure should only be necessary for the new persons/entities in the group and the new group structure. Such an assessment of the new entities in the group is inconsistent with the requirements set out in article 57(1) of the Solvency II Directive (provision stemming from Acquisitions directive (2007/44/EC)), where notification of new persons/entities is only required if the acquisition/disposal thresholds of 20 %, 30 % or 50 % are reached or exceeded. Hence, not all changes need to be notified according to the directive and an additional assessments is not needed

Also, the last bullet point in this section suggest that, with a change in the nature of the holding, the assessment should be limited to the changes having occurred since the last assessment. Insurance Europe disagrees that such an assessment is required in all circumstances; for example, an assessment should not be required where a holder of a qualifying interest is authorised to hold participations between certain ranges in accordance with the Acquisitions Directive, or where a holder of a qualifying holding has previously obtained an authorisation on behalf of itself and of any of its subsidiaries (existing or newly incorporated).

**c) Information requested**

The information request relating to integrity should not look back beyond a reasonably limited time period, and should comprise a limited scope that considers only personal sanctions and sanctions imposed on undertakings that a relevant natural person is or was managing; Simple control functions (i.e. membership in supervisory boards or non-executive memberships in boards of directors) should be out of the scope.

For example, paragraph 10.5 of the draft guidelines requires target supervisors to always carry out an integrity check in respect of the proposed acquirer. Insurance Europe believes that this is not in line with the principle of proportionality. It is therefore suggested to make a distinction between:

* A proposed acquirer supervised by the same competent authority; or
* A proposed acquirer supervised by another competent authority in the same country; or
* 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), it would be unnecessary to carry out an integrity check with respect to the proposed acquirer. It is also expected 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, insurance Europe believes that the proposed acquirer should not obliged to submit a written statement on his integrity in these cases (as proposed in paragraph 10.17)

**d) Passive threshold crossings**

Article 57 of the Solvency II Directive imposes the obligation of prior notification to the competent supervisory authorities for any person (natural or legal) who has taken a decision to acquire a qualifying holding in an insurance or reinsurance undertaking, or to further increase its qualifying holding thereby exceeding the 20, 30 or 50% threshold in respect of capital or voting rights. In case of passive threshold crossings, it is uncertain whether a notification needs to be made pursuant to Article 57 of the Solvency II Directive because there may not be any such decision of the holder of the qualifying holding. The guideline should limit such uncertainty by giving concrete examples of cases where there are no decision triggering a notification by the holder of the qualifying holding. For example, a notification duty triggered by the knowledge of the increase or decrease of shares by the relevant shareholder could be stipulated.

Examples should include the following scenarios: 1) a reduction of holdings below any relevant threshold occurs if the target company increases its capital and the relevant holder is either excluded, or decides not to participate in the increase. In the first case, there is no decision to be taken by the relevant holder. 2) an increase of holdings reaching or exceeding any relevant threshold occurs if the target company repurchases and redeems its own shares (note that there is no increase if the company repurchases its own shares without redeeming them, since Article 9 (1) second subparagraph stipulates that treasury shares for which voting rights are suspended, need to be included in the denominator when calculating the ownership ratio). Furthermore, documents that have been submitted to the target supervisor within the past 12 months should not have to be resubmitted, unless there has been a material change.

Finally, the relevance of Annex I, Section 3, (2)(e) is questioned for non EU/EEA listed companies. The information to be provided pursuant to Annex I, Section 5 (1) (e) and (f) should be sufficient.

**3. Guidelines and EIOPA empowerments to develop RTS**

Annex I sets out the minimum list of information which should be required by the competent authorities which is necessary to carry out the assessment of acquisitions and disposals of qualifying holdings. However, article 58 (8) of the Solvency II Directive empowers EIOPA (“shall” empowerment) to develop draft regulatory technical standards (RTS) to (i) establish an exhaustive list of information that is necessary to carry out the assessment and that must be provided to the supervisory authorities, and (ii) specify the adjustments of the criteria for the prudential assessment. Therefore, there is no need to have the currently consulted joint guidelines on top of any such foreseen RTS as these guidelines should not pre-empt ongoing EU legislative procedures, substitute EU legislation, or be issued in areas where the European Commission has the power to issue technical standards (cf recital 25 EIOPA Regulation). While it may make sense to develop joint guidelines to further harmonisation between the different financial sectors, the ESAs should not anticipate such RTS with descriptive guidelines.

To reduce the burden on undertakings subject to notification requirements, it should be clarified that information contained in other documents like annual reports, regular supervisory reports (RSR), quantitative reporting templates (QRT) or solvency and financial condition reports (SFCR), do not have to be submitted again to the supervisory authorities. It should also be clarified that all relevant documents can be submitted in English language.

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

The level of detail in the Guidelines could be materially reduced, by avoiding redundancy and conflicting requirements. Furthermore, the Guidelines should take into account Article 59 (4) Solvency II Directive which states that member states, when making publicly available a list of necessary information, shall not require information that is not relevant for a prudential assessment. The list of information to be provided should therefore also be materially reduced.

For example, with respect to the determination of direct or indirect holding of voting rights in an insurance or reinsurance undertaking, Article 63 Solvency II Directive 2009/138/EC (Solvency II Directive) refers to Article 9 and 10 of the Transparency Directive (2004/109/EC). Through this reference the aggregation of voting rights is determined with respect to:

* Voting rights held by third parties with whom a person is acting in concert (Article 63 Solvency II Directive in connection with Article 10 (a) of the Transparency Directive)
* Voting rights held or aggregated by controlled undertakings (indirect holdings) (Article 10 (e) of the Transparency Directive).

Hence, the definition of acting in concert should be consistent with other relevant Directives and regulations. Section 4.1 of the Guidelines foresees a definition of “acting in concert” that requires to aggregate the voting rights of “*persons who decide to acquire or increase a qualifying holding in accordance with an explicit or implicit agreement between them*”. This definition deviates materially from the relevant definition in Article 10 (a) of the Transparency Directive to which Article 63 Solvency II Directive refers, and which requires to aggregate “*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“.*

The deviation concerns two elements: Firstly, Article 10 (a) of the Transparency Directive requires concerted exercise of voting rights, whereas Section 4.1 looks at a concerted acquisition (which may or may not involve subsequent concerted influence on the undertaking). Secondly, Article. 10 (a) of the Transparency Directive requires a lasting common policy towards the management of the target company whereas there is no such requirement in the Guidelines. It should also be noted that the definition contained in Section 4.1 of the guidelines, would not capture transactions by which two parties agree to exercise the voting rights already held by each of them in a concerted way, i.e. without the occurrence of any acquisition.

For all these reasons, the guidelines should not contain an autonomous definition of “acting in concert”, but should refer to the Transparency Directive as stipulated in Article 63 of the Solvency II Directive.

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

The approach in Option A (control concept) is the most appropriate for the following reasons:

* Option B deviates from Article 10 (e) of the Transparency Directive which is referred to in article 63 of the Solvency II Directive with respect to the determination of the voting rights held. This article corresponds to Option A. as it requires to take account of “*voting rights which are held, or may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity.*”
* For practical reasons, the control concept stipulated in article 10 (e) of the Transparency Directive should apply. Large investors can monitor threshold crossings of their holdings only on the basis of elaborated monitoring systems. Applying different concepts of indirect holding of voting rights increases monitoring cost and the risk that such system-based monitoring fails.
* The Guidelines should not contain any definition of “indirect acquisition of qualifying holding” as such definition is not necessary and carries the risk of being in contradiction with the applicable Transparency Directive provisions.
* As few as possible participations in a shareholding chain should be qualified as “indirect acquisitions”, especially only those participations which are controlled (regularly more than 50% of shares required).
* The Transparency Directive requires maximum harmonization with respect to the aggregation of voting rights as from November 2016. Thus, the possibility of different interpretations of the aggregation rules are considerably reduced. A review could be used to follow this direction further - not a new autonomous set of requirements.

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

See answer to Question 3 above.