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EUROPEAN SUPERVISORY AUTHORITIES' CONSULTATION

ACTING IN CONCERT

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1 - On 3 July 2015, the European Supervisory Authorities[1] (the "ESAs") initiated a joint consultation on guidelines for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector[2] ("Draft Joint Guidelines"). In this consultation paper, the ESAs discuss the notion of acting in concert and invite comments on three policy options, further described below.

Under the sectoral Directives and Regulations, persons who act in concert are considered to also have disposal of the holdings of the other persons with whom they act in concert. When certain persons act in concert, target supervisory authorities should aggregate their holdings in order to determine whether such persons acquire a qualifying holding.

2 - In the absence of a precise definition of acting in concert, this notion creates uncertainty for the potential acquirers. The joint paper of the ESAs recommends establishing a clearer definition and, for this purpose, submits three potential options for the clarification of the notion of acting in concert:

- Option 1: setting up an exhaustive list of circumstances in which persons are deemed or presumed to act in concert,
- Option 2: setting up a non-exhaustive, indicative list of factors which the supervisors could examine to determine whether certain persons act in concert, and
- Option 3: the identification of activities which, by themselves, will not lead to the finding that persons act in concert.

After a cost-benefit analysis, the ESAs come to the conclusion that a combination of policy options 2 and 3 would be preferable.

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Question 1 raised by the ESAs seeks general comments on the consultation paper. In this connection, we find it important to discuss the notion of acting in concert.

[1] The European Securities and Markets Authority, the European Banking Authority, the European Insurance and Occupational Pensions Authority, through the Joint Committee of the European Supervisory Authorities.

[2] Joint Consultation Paper – Draft Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, 3 July 2015, ref. JC/CP/2015/003.

3 – Supervisory authorities in the EU apply different criteria to establish whether persons act in concert. In several member states guidelines have been developed, while in others there is little further guidance as to what would constitute acting in concert.

A brief summary of the available guidance in a number of member states is set out below:

France: according to the French commercial code, parties act in concert when they have entered into an agreement with a view to buying or selling or exercising voting rights, to implement a common policy in relation to the company or to obtain control of this company. The essential criterion to determine whether parties act in concert is whether they pursue a sustained joint voting policy. The code also lists several situations in which such agreement is presumed to exist. There is no further national guidance on the notion of acting in concert.

Germany: in Germany for the purpose of calculating the proportion of voting rights in relation to qualifying holdings the aggregation rules of the Transparency Directive apply. The aggregation rules define acting in concert as the coordination of behaviour in relation to the issuer on the basis of an agreement or otherwise, except for agreements in individual cases. The coordination of behaviour requires a common understanding in relation to the exercise of voting rights or with a view to effect a long lasting and material change of the issuer's entrepreneurial activities. The *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) has published further guidance on the notion of acting in concert by listing criteria that speak for or against acting in concert.

Italy: in Italy acting in concert consists of the purchasing of shareholdings by persons who intend to exercise their rights linked to the shares jointly under specific agreements entered into in whatever form. Italian national guidelines give further guidance on when parties should be seen as acting in concert and how the voting rights must be aggregated.

The Netherlands: in the Netherlands the notion of acting in concert is only relevant in the context of attributing voting rights. Where there is a "sustained joint voting policy" between two or more parties, these voting rights are attributed to both (or all) parties. The Dutch Central Bank (*De Nederlandsche Bank N.V.*, "DNB") has not published any guidance on its interpretation of these terms. The Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*) has published a guide relating to the Transparency Directive in which it sets out a list of facts and circumstances that may cause it to suspect the existence of an agreement for a sustained joint voting policy if a number, but not necessarily all, of these facts or circumstances occur. We believe DNB takes the same approach, also based on the currently applicable guidelines from CESR, CEBS and CEIOPS (the "Current Guidelines") that state that persons act in concert when each of them decides to exercise his rights linked to the shares he acquires

in accordance with an explicit or implicit agreement between them and that persons who act in concert should notify the voting rights they hold collectively to the competent authorities.[3]

Portugal: in Portugal a party acts in concert if it has entered into any agreement aimed at acquiring the control of, or preventing the change of control of, a financial undertaking, or which are deemed to be, by any other means, an instrument exercising concerted influence over the financial undertaking. In that case the voting rights of both parties should be aggregated. Further guidance is given on "instruments exercising concerted influence". If parties agree on a sustained joint voting policy, these parties are generally deemed to act in concert. However, this situation differs from the situation where parties in fact consistently vote in the same manner, which does not necessarily constitute acting in concert, because of the absence of an agreement.

Spain: in Spain parties act in concert if they have entered into an agreement with other parties that oblige these parties to adopt (by means of a joint voting policy) a long term cooperation with respect to the management of the financial undertaking or with the purpose to materially affect such management. There are no additional national guidelines in Spain on the notion of acting in concert.

United Kingdom: in the UK there is no definition of the notion acting in concert relevant in the context of acquisitions and increases of qualifying holdings. However, the Financial Conduct Authority ("FCA") and the Prudential Regulation Authority ("PRA") have given further guidance with respect to this notion. The guidance of both authorities is substantively identical. They expressly reference the Current Guidelines and state that: "persons are acting in concert when each of them decides to exercise his rights linked to the shares he acquires in accordance with an explicit or implicit agreement made between them". The guidelines furthermore state that the agreement need not require them always to exercise the rights attached to their respective share in the same way and provides clarification of various scenarios in which the FCA and PRA would not generally regard persons to act in concert. A joint voting policy or understanding can be viewed as a key element of any finding that parties in fact act in concert.

4 – Although it is clear that most supervisory authorities agree that each situation should be assessed on the basis of its own merits, it would be helpful to be able to use the new guidelines as a clear starting point to assess when parties should be considered as acting in concert.

In our view, a combination of policy options 2 and 3 including two non-exhaustive lists could provide the necessary further guidance. Although an exhaustive list of situations in which persons are considered to act in concert would ensure further convergence between the policies of the different supervisory authorities, this would also remove

[3] Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC of CESR (CESR/08-543b), CEBS (CEBS/2008/214) and CEIOPS (CEIOPS-3L3-19/08).

the flexibility for supervisory authorities to assess each case on the basis of its own merits. Extensive lists of factors that point in either direction will provide the best of both worlds.

However, we feel that the Chapter on acting in concert in the Draft Joint Guidelines[4] gives an undesirably broad interpretation of the notion acting in concert. We elaborate on this in paragraph 5.

In paragraph 6 we touch upon a more technical issue; in our opinion the aggregation of holdings should be limited to voting rights and not include shareholdings.

Definition of acting in concert

5 – Firstly, we note that the requirement for a declaration of no-objection under the sectoral Directives and Regulations is linked to the acquirer obtaining significant *influence* over the policy of the target. Therefore, in our view, the focus of the notion acting in concert should be the intention to act in unison *after* obtaining the target by having agreed to a sustained joint voting policy with a view to determining the policy of the financial undertaking. We feel that the current description in the Draft Joint Guidelines raises doubt as to the scope of the notion acting in concert (contrary to the glossary in the Current Guidelines). This should be clarified.

The first paragraph on acting in concert in the Draft Joint Guidelines currently reads: "target supervisors should consider as acting in concert any legal or natural persons that decide to acquire or increase a qualifying holding in accordance with an explicit or implicit agreement between them". In our view, using this criterion as a starting point would in practice drag all potential acquirers that decide to acquire a financial undertaking together into the definition of acting in concert, while they may not wish to act jointly after having obtained the target at all.

Although the starting point is mitigated by the non-exhaustive lists provided in the Draft Joint Guidelines, we are of the view that the guidelines should start with clearly defining what *is* acting in concert: having a sustained joint voting policy with a view to determining the policy of the financial undertaking after the acquisition. Parties should be able to cooperate when entering into a share purchase agreement and when setting up a financing structure to support this. For efficiency purposes they should also be allowed to have the same legal representation. These facts alone should not lead to the conclusion that they act in concert.

The relevant question should be whether the (in)direct shareholders will have a joint influence on the target after the acquisition. For parties to have such joint influence they must take joint decisions after they have acquired the target. This can be based on explicit or implicit agreements made between them before or after the acquisition.

[4] Pages 13-15 Draft Joint Guidelines.

Furthermore, not all circumstances in which persons decide to vote together (formalised in a shareholders agreement or not) should be regarded as acting in concert. The draft guidelines already mention that pure tag along and drag along agreements and pure statutory pre-emption rights should not lead to the conclusion that the parties act in concert. We feel that added to this list should in any case be:

- an agreement to vote with other shareholders on a specific issue, rather than on an ongoing or sustained basis;
- an agreement to require particular management actions to be put to a vote of shareholders, such as the issue of new shares, or major acquisitions;
- an agreement to require the company to provide certain information to its shareholders;
- an agreement pursuant to which the shareholders agree that the company will act "stand alone" and therefore no shareholder will at any time be obliged to provide additional financing to the company;
- an agreement to vote with other shareholders in favour of the appointment of representatives of certain shareholders on the (management or supervisory) board of the financial undertaking.

The ultimate test should be whether the shareholders have agreed to exercise their voting rights jointly (in a sustained manner) and with a view to determining the policy of the financial undertaking.

Aggregation of holdings

6 – A more technical point is that the Current Guidelines state that each party that acts in concert with others should notify the voting rights the relevant parties hold collectively to the competent authorities (or one of these parties should notify on behalf of the group). These guidelines clearly show that acting in concert is mostly linked to a joined *voting* policy. In paragraph 4.3, the Draft Joint Guidelines speak of aggregation of "holdings". It is unclear whether "holdings" still refers to voting interests only or whether parties should also aggregate their shareholdings.

As stated above, only if parties vote in the same manner (or agree to arrange certain issues in a predetermined way) after completing the transaction, they can jointly determine the policy of the financial undertaking. For this reason we are of the view that it would be more accurate to only add the voting rights of parties that act in concert instead of also aggregating the shareholdings. This should be clarified in the guidelines.

Conclusion

7 – For the reasons set out above, the chapter on acting in concert in the Draft Joint Guidelines requires further clarification to avoid an undesirably wide scope of acting in concert that does not take into account that only if parties agree on a sustained joint voting policy they have joint influence over the policy of the financial undertaking. In line with this, it should be made explicit that if parties act in concert, only their voting rights should be aggregated and not also their shareholdings.