

## PUBLIC STATEMENT

### Information on shareholder cooperation and acting in concert under the Takeover Bids Directive

#### 1. Introduction

- 1.1 In its report<sup>1</sup> (the “Report”) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2004/25/EC on Takeover Bids (the “TBD”), the European Commission (the “Commission”) suggested that clarification of the concept of “acting in concert” at EU level would help to lessen uncertainty for international investors who wish to cooperate with each other on corporate governance issues but who feel inhibited from doing so for fear that they might risk having to make a mandatory bid.
- 1.2 The Commission emphasised in the Report, however, that the suggested clarification should not limit the ability of national competent authorities<sup>2</sup> to oblige control-seeking concert parties to accept the legal consequences of their concerted action.
- 1.3 The Commission commented further on this matter in its Action Plan on European company law and corporate governance<sup>3</sup>, where it stated that “Effective, sustainable shareholder engagement is one of the cornerstones of listed companies’ corporate governance model”. It continued by saying that if the suggested clarification were not provided, “shareholders may avoid cooperation, which in turn could undermine the potential for long-term engaged share ownership under which shareholders effectively hold the board accountable for its actions”.
- 1.4 This public statement has been prepared for investors in response to the Commission’s suggestion on the basis of information collected by the members of the Takeover Bids Network (the “TBN”) about national practices and application of the TBD. The public statement represents the collective view of the members of the TBN, who stand behind it. The TBN

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<sup>1</sup> COM(2012)347.

<sup>2</sup> National competent authorities appointed under Article 4(1) of the TBD and having responsibility for the regulation of takeover bids.

<sup>3</sup> COM(2012)740/2.

operates under the auspices of ESMA and its members are the national competent authorities appointed under the TBD.

- 1.5 Following consideration of the information collected, a “White List” of activities, in which shareholders may wish to engage in order to exercise good corporate governance over the companies in which they have invested, has been identified. If shareholders cooperate to engage in any activity on the White List, insofar as that activity is available to them under national company law, that cooperation, *in and of itself*, will not lead to those shareholders being regarded as persons acting in concert and thus being at risk of having to make a mandatory bid.
- 1.6 However, individual cases of cooperation between shareholders and the consequences of such cooperation must be determined on their own particular facts. National competent authorities will have regard to the White List when determining whether shareholders are persons acting in concert under national takeover rules but will also take into account all other relevant factors in making their decisions.
- 1.7 The public statement emphasises the importance of early consultation with national competent authorities by parties concerned, in accordance with national procedures, where there is any uncertainty. See Appendix A for contact details.
- 1.8 This public statement does not address disclosure obligations.
- 1.9 ESMA will keep the public statement under review in order, as far as possible, to ensure that it continues to reflect accurately the practices and application of the TBD in the Member States.

## **2. Relevant provisions of the TBD**

- 2.1 Article 2.1(d) of the TBD defines “*persons acting in concert*” as follows:

*“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 of frustrating the successful outcome of a bid”.*

Article 5.1, the “mandatory bid rule”, provides as follows:

*“Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article*

*1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.”*

- 2.2 The information collected about the application of these two provisions has shown that in some Member States, when shareholders come together to act in concert in relation to a particular company in circumstances where, independently, they have already acquired securities in that company which, in total, carry the specified percentage of voting rights that confers “control” under national takeover rules<sup>4</sup>, they will be required to make a bid to all other shareholders (a “mandatory bid”). In other Member States, no mandatory bid obligation will arise initially when shareholders come together to act in concert in such circumstances but such an obligation may be triggered by acquisitions of securities carrying voting rights in the company by any of the shareholders regarded as persons acting in concert. Some Member States, owing to a lack of relevant experience have not yet settled the consequences for shareholders who come together to act in concert in the circumstances described above. Further information is provided in Appendix B2.
- 2.3 Where the securities held by a group of shareholders carry voting rights, which in total are below the national threshold for “control”, there are no immediate bid consequences for those shareholders, even if they are regarded as persons acting in concert. A mandatory bid may be required subsequently if one or more of those shareholders acquires more securities carrying voting rights so that in total the securities held by the group carry the specified percentage of voting rights that confers “control” under national takeover rules.

### **3. Shareholder cooperation and acting in concert**

- 3.1 ESMA recognises that shareholders may wish to cooperate in a variety of ways and in relation to a variety of issues for the purpose of exercising good corporate governance but without seeking to acquire or exercise control<sup>5</sup> over the companies in which they have invested.

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<sup>4</sup> See Appendix B1 for details of “control thresholds” in each Member State.

<sup>5</sup> References in this document to shareholders cooperating to “acquire or exercise control” over a company will, *mutatis mutandis*, include, in certain Member States, shareholders cooperating to acquire and/or exercise voting rights in order to

Cooperation might consist of discussing together issues that could be raised with the board<sup>6</sup>, making representations to the board on those issues, or tabling or voting together on a particular resolution. The issues on which shareholders might cooperate could include: commercial matters (such as particular acquisitions or disposals, dividend policy, or financial structuring); matters relating to the management of the company (such as board composition or directors' remuneration); or matters relating to corporate social responsibility (such as environmental policy or compliance with recognised standards or codes of conduct).

- 3.2 National competent authorities agree that national takeover rules should not be applied in such a way as to inhibit such cooperation. Therefore, a "White List" of certain activities in which shareholders might wish to engage for the purposes of exercising good corporate governance (but without seeking to acquire or exercise control over the company) has been identified, based on existing laws, regulations and practices in the Member States. When shareholders cooperate to engage in any activity included on the White List, insofar as that activity is available to them under national company law, that cooperation, *in and of itself*, will not lead to a conclusion that the shareholders are acting in concert, and thus to a risk of those shareholders having to make a mandatory bid.
- 3.3 However, national competent authorities, when determining whether cooperating shareholders are acting in concert, decide each case on the basis of its own particular facts. If there are facts, in addition to the fact of the shareholders' engagement in any activity on the White List on a particular occasion, which indicate that the shareholders should be regarded as persons acting in concert, then the national competent authority will 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 on the White List is not merely an expression of a common approach on the particular matter concerned but one element of a broader agreement or understanding to acquire or exercise control over the company.
- 3.4 On such a basis, where shareholders engaging in an activity on the White List are in fact cooperating with the aim of acquiring or exercising control over the company, or, in fact, have acquired or are exercising control, those shareholders will be regarded as persons acting in concert and may have to make a mandatory bid.

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implement a common policy or strategy in relation to a company or in order to exercise a dominant influence over it. See Appendix C.

<sup>6</sup> In this document, "board" refers to the supervisory and/or managerial body in companies having a dual board structure and to the single administrative body in companies having a unitary board structure.

#### 4. The “White List” of activities

*Whenever there is any uncertainty about proposed shareholder cooperation, including, in particular, when the proposed cooperation relates to voting on a resolution which is not included in the list in paragraph 4.1(d), parties concerned are encouraged to consult the relevant national competent authority for guidance as early as possible. Guidance will be provided within the framework of national laws, regulations and practices. Relevant contact details are provided in Appendix A.*

4.1 When shareholders cooperate to engage in any of the activities listed below, that cooperation will not, *in and of itself*, lead to a conclusion that the shareholders are acting in concert:

- (a) entering into discussions with each other about possible matters to be raised with the company's board;
- (b) making representations to the company's board about company policies, practices or particular actions that the company might consider taking;
- (c) other than in relation to the appointment of board members, exercising shareholders' statutory rights to:
  - (i) add items to the agenda of a general meeting;
  - (ii) table draft resolutions for items included or to be included on the agenda of a general meeting; or
  - (iii) call a general meeting other than the annual general meeting;<sup>7</sup>
- (d) other than in relation to a resolution for the appointment of board members and insofar as such a resolution is provided for under national company law, agreeing to vote the same way on a particular resolution put to a general meeting, in order, for example:
  - (A) to approve or reject:
    - (i) a proposal relating to directors' remuneration;
    - (ii) an acquisition or disposal of assets;

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<sup>7</sup> Minority shareholders' rights provided by Article 6 of the Shareholders' Rights Directive (Directive 2007/36/EC).

- (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 accounts; 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

(B) to reject a related party transaction.

4.2 If shareholders cooperate to engage in an activity which is not included on the White List, that fact will not, *in and of itself*, mean that those shareholders will be regarded as persons acting in concert. Each case will be determined on its own particular facts.

## **5. Cooperation in relation to the appointment of members of the board of a company**

5.1 Cooperation by shareholders in relation to the appointment of board members can be particularly sensitive in the context of the application of the mandatory bid rule. This is because, if shareholders cooperate in the appointment of board members, they may be in a position to control the operational management of the company. Different approaches are adopted in different Member States towards determining whether shareholders who cooperate in relation to board appointments are persons acting in concert. To some extent these differences depend on national company law and the prevailing shareholding structures. As a result of these differences, the White List does not include any activity relating to cooperation in relation to board appointments.

5.2 However, national competent authorities recognise that shareholders may wish to cooperate in order to secure the appointment of members to the board of a company in which they have invested. Such cooperation might take the form of:

- (a) entering into an agreement or arrangement (informal or formal) to exercise their votes in the same way in order to support the appointment of one or more board members;

- (b) tabling a resolution to remove one or more board members and replace them with one or more new board members; or
- (c) tabling a resolution to appoint one or more additional board members.

5.3 When considering cases of such cooperation in relation to board appointments, with a view to determining whether the shareholders are persons acting in concert, national competent authorities may, in addition to examining facts described in paragraph 3.3 (including the relationship between the shareholders and their actions), also consider other facts such as:

- (a) the nature of the relationship between the shareholders and the proposed board member(s);
- (b) the number of proposed board members being voted for pursuant to a shareholders' voting agreement;
- (c) whether the shareholders have cooperated in relation to the appointment of board members 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 board members; and
- (e) whether the appointment of the proposed board member(s) will lead to a shift in the balance of power on the board.

5.4 Further details about the different national approaches towards determining whether or not shareholder cooperation in relation to board appointments will lead to the shareholders being regarded as persons acting in concert or not are provided in Appendix D.

## APPENDIX A

### Contact details for Member States

Whenever there is any uncertainty about proposed shareholder cooperation and, in particular, where the proposed cooperation relates to voting on a resolution which is not included in the list in paragraph 4.1(d), parties concerned are encouraged to consult the relevant national competent authority for guidance as early as possible. Guidance will be provided within the framework of national laws and regulations. Relevant contact details are provided below.

	Queries and information about national legislation or practice		
	Authority Section (if such exists)	Website Email	Telephone
<b>Austria</b>	Übernahmekommission / Austrian Takeover Commission	<a href="http://www.takeover.at">www.takeover.at</a> <a href="mailto:uebkom@wienerbourse.at">uebkom@wienerbourse.at</a>	+4315322830613
<b>Belgium</b>	Financial Services and Markets Authority (FSMA)	<a href="http://www.fsma.be">www.fsma.be</a> <a href="mailto:soc.fin@fsma.be">soc.fin@fsma.be</a>	+3222205408
<b>Bulgaria</b>	Комисия за финансов надзор / Financial Supervision Commission	<a href="http://www.fsc.bg">www.fsc.bg</a> <a href="mailto:take-over-bids@fsc.bg">take-over-bids@fsc.bg</a> <a href="mailto:djorgova_i@fsc.bg">djorgova_i@fsc.bg</a>	+35929404858
<b>Croatia</b>	Hrvatska agencija za nadzor financijskih usluga / Croatian Financial Services Supervisory Agency  Sektor za tržište kapitala / Capital Market Division	<a href="http://www.hanfa.hr">www.hanfa.hr</a> <a href="mailto:capital.markets@hanfa.hr">capital.markets@hanfa.hr</a>	+38516173 245
<b>Cyprus</b>	Επιτροπή Κεφαλαιαγοράς / Cyprus Securities and Exchange Commission (CySec)	<a href="http://www.cysec.gov.cy">www.cysec.gov.cy</a> <a href="mailto:legal@cysec.gov.cy">legal@cysec.gov.cy</a>	+35722506600
<b>Czech Republic</b>	Česká národní banka / Czech National Bank	<a href="http://www.cnb.cz">www.cnb.cz</a> <a href="mailto:podatelna@cnb.cz">podatelna@cnb.cz</a>	+420224411111
<b>Denmark</b>	Finanstilsynet / Danish FSA	<a href="http://www.finanstilsynet.dk">www.finanstilsynet.dk</a> <a href="mailto:finanstilsynet@ftnet.dk">finanstilsynet@ftnet.dk</a>	+4533558282
<b>Estonia</b>	Finantsinspektsioon / Financial Supervision Authority	<a href="http://www.fi.ee">www.fi.ee</a> <a href="mailto:info@fi.ee">info@fi.ee</a>	+3726680500





European Securities and  
Markets Authority

<b>Finland</b>	Finanssivalvonta / Financial Supervisory Authority	<a href="http://www.finanssivalvonta.fi">www.finanssivalvonta.fi</a> <a href="mailto:markkinat@finanssivalvonta.fi">markkinat@finanssivalvonta.fi</a>	+358108315585
<b>France</b>	Autorité des Marchés Financiers (AMF) Direction des Emetteurs – Division des Offres Publiques	<a href="http://www.amf-france.org">www.amf-france.org</a> <a href="mailto:offrespubliques@amf-france.org">offrespubliques@amf-france.org</a>	+33(0)143456280
<b>Germany</b>	Bundesanstalt für Finanz- dienstleistungsaufsicht / Federal Financial Supervisory Authority (BaFin)	<a href="http://www.bafin.de">www.bafin.de</a> <a href="mailto:angebotsunterlage@bafin.de">angebotsunterlage@bafin.de</a>	+49(0)228/4108-0
<b>Greece</b>	Στοιχεία Επικοινωνίας / Hellenic Capital Market Commission	<a href="http://www.hcmc.gr">www.hcmc.gr</a> <a href="mailto:infotakeovers@cmc.gov.gr">infotakeovers@cmc.gov.gr</a>	+302103377246 +302103377235
<b>Hungary</b>	The Central Bank of Hungary	<a href="http://www.mnb.hu">www.mnb.hu</a> <a href="mailto:takeover@mnb.hu">takeover@mnb.hu</a>	+36(1)4899653
<b>Iceland</b>	Fjármálaeftirlitið/ Financial Supervisory Authority	<a href="http://www.fme.is">www.fme.is</a> <a href="mailto:fme@fme.is">fme@fme.is</a>	+3545203700
<b>Ireland</b>	Irish Takeover Panel	<a href="http://www.irishtakeoverpanel.ie">www.irishtakeoverpanel.ie</a> <a href="mailto:takeoverpanel@eircom.net">takeoverpanel@eircom.net</a>	+35316789020
<b>Italy</b>	Commissione Nazionale per le Società e la Borsa (CONSOB) Corporate Governance Unit – Takeover Bids Office	<a href="http://www.consob.it">www.consob.it</a> <a href="mailto:vigilanzaopaeasseti@consob.it">vigilanzaopaeasseti@consob.it</a>	+390684771
<b>Latvia</b>	Finanšu un kapitāla tirgus komisija / Financial and Capital Market Commission (FCMC)	<a href="http://www.fktk.lv">www.fktk.lv</a> <a href="mailto:takeovers@fktk.lv">takeovers@fktk.lv</a>	+37167774800
<b>Lithuania</b>	Lietuvos bankas / Bank of Lithuania	<a href="http://www.lb.lt">www.lb.lt</a> <a href="mailto:takeoverbids@lb.lt">takeoverbids@lb.lt</a>	+370(5)2680538 +370(5)2680532
<b>Luxembourg</b>	Commission de Surveillance du Secteur Financier (CSSF)	<a href="http://www.cssf.lu">www.cssf.lu</a> <a href="mailto:maf@cssf.lu">maf@cssf.lu</a>	+35226251-276
<b>Malta</b>	Malta Financial Services Authority (MFSA)	<a href="http://www.mfsa.com.mt">www.mfsa.com.mt</a> <a href="mailto:takeoverbids@mfsa.com.mt">takeoverbids@mfsa.com.mt</a>	+356 25485112 +356 25485371



<b>Netherlands<sup>8</sup></b>	-	-	-
<b>Norway</b>	Oslo Børs	<a href="http://www.oslobors.no">www.oslobors.no</a> <a href="mailto:juridiskavdeling@oslobors.no">juridiskavdeling@oslobors.no</a>	+4722341795
<b>Poland</b>	Komisja Nadzoru Finansowego / Polish Financial Supervision Authority (KNF)	<a href="http://www.knf.gov.pl">www.knf.gov.pl</a> <a href="mailto:dno@knf.gov.pl">dno@knf.gov.pl</a>	+4822262-50-00
<b>Portugal</b>	Comissão do Mercado de Valores Mobiliários (CMVM)  Departamento de Supervisão de Mercados, Emitentes e Informação / Markets, Issuers and Information Supervision Department	<a href="http://www.cmvm.pt">www.cmvm.pt</a> <a href="mailto:cmvm@cmvm.pt">cmvm@cmvm.pt</a>	+351213177000
<b>Romania</b>	Autoritatea de Supraveghere Financiară / Financial Supervisory Authority (ASF)	<a href="http://www.cnvmr.ro">www.cnvmr.ro</a> <a href="mailto:cnvm@cnvmr.ro">cnvm@cnvmr.ro</a>	+40213266875
<b>Slovak Republic</b>	Národná banka Slovenska / National Bank of Slovakia	<a href="http://www.nbs.sk">www.nbs.sk</a> <a href="mailto:info@nbs.sk">info@nbs.sk</a>	+421257871111
<b>Slovenia</b>	Agencija za trg vrednostnih papierjev / Securities Market Agency (ATVP)	<a href="http://www.a-tvp.si">www.a-tvp.si</a> <a href="mailto:info@atvp.si">info@atvp.si</a> <a href="mailto:webmaster@atvp.si">webmaster@atvp.si</a>	+38612800400
<b>Spain</b>	Comisión Nacional de Mercado de Valores (CNMV)	<a href="http://www.cnmv.es">www.cnmv.es</a> <a href="mailto:opas@cnmv.es">opas@cnmv.es</a>	+34915851500
<b>Sweden</b>	Aktiemarknadsnämnden / Swedish Securities Council	<a href="http://www.aktiemarknadsnamnden.se">www.aktiemarknadsnamnden.se</a> <a href="mailto:info@aktiemarknadsnamnden.se">info@aktiemarknadsnamnden.se</a>	+46(0)850882270
<b>United Kingdom</b>	The Takeover Panel	<a href="http://www.thetakeoverpanel.org.uk">www.thetakeoverpanel.org.uk</a> <a href="mailto:supportgroup@thetakeoverpanel.org.uk">supportgroup@thetakeoverpanel.org.uk</a>	+44(0)2073829026

<sup>8</sup> In the Netherlands, the Enterprise Chamber of the Amsterdam Court of Appeal has competence on matters regarding acting in concert. Since the Enterprise Chamber is a judiciary authority and as such cannot provide guidance in an ad hoc manner, no contact information is provided for the Netherlands.

## APPENDIX B

### Summary of aspects of national laws/regulations relating to acting in concert and the mandatory bid rule

#### 1. National thresholds determining “control”

- 1.1 In the majority of Member States, the percentage of voting rights that confers control of the company under Article 5.1 of the Takeover Bids Directive (the “primary threshold”) has been set at around 30%. Some have set the primary threshold at higher or lower levels than 30% and some have an alternative primary threshold.
- 1.2 In some Member States, a shareholder, who, together with persons acting in concert, holds securities carrying a percentage of the voting rights in a company equal to or exceeding the primary threshold, may also trigger a mandatory bid to all remaining shareholders if he (or any person acting in concert with him) acquires further securities carrying a specified additional percentage of voting rights, in some cases within a specified period (e.g. 2% of voting rights within a 12 month period) (“creep-in” threshold). The creep-in threshold may be exceeded in certain Member States if the shareholder (or any person acting in concert with him) increases his holding of voting rights without making any further acquisition of securities.
- 1.3 Some Member States have also set a higher percentage of voting rights, in addition to the primary threshold, that will trigger a mandatory bid (“secondary threshold”).
- 1.4 It should be noted that even when national thresholds are reached or exceeded, a mandatory bid may not always be required; this may be because the national definition of control requires additional conditions to be met or because an exemption may be available.

Details of thresholds are provided below.

Country	Threshold(s)			
	Primary threshold	Alternative primary threshold	Creep-in threshold*	Secondary threshold
<b>Austria</b>	>30%	A company may include a lower primary threshold in its articles of association	>2% increase between 30% and 50% within 12 months	
<b>Belgium</b>	>30%		na	

<b>Bulgaria</b>	>1/3		>3% increase above 1/3 but under 2/3 of the voting rights within 12 months if holding not resulting from a previous offer	>2/3
<b>Croatia</b>	>25%		na	
<b>Cyprus</b>	≥30%		Anything over 30% unless it is justifiable to apply for an exception	
<b>Czech Republic</b>	≥30%		na	
<b>Denmark</b>	≥ 1/3		If the result of a voluntary bid is that the offeror has between 1/3 and 1/2 of the voting rights the offeror must make a mandatory offer	
<b>Estonia</b>	50%+1	controlling influence***	na	
<b>Finland</b>	>30%		na	>50%
<b>France****</b>	>30%		>2% increase between 30% and 50% within 12 months	
<b>Germany</b>	≥30%		na	
<b>Greece</b>	>1/3		>3% increase between 33% and 50% within 6 months	
<b>Hungary</b>	>33%	>25% if no other shareholder holds at least a 10% interest	na	
<b>Iceland</b>	>30%	na	na	>9/10
<b>Ireland</b>	≥30%		>0.05% increase between 30% and 50% within 12 months	
<b>Italy*****</b>	>30% A SME may include a different primary threshold in its articles of	>25% if no other shareholder holds a higher stake: it applies only to non-SMEs	- >5% increase between 30% or the different holding set by the SME's articles of association and 50% within 12 months  - Reduced to 1% within the 12 months following a partial bid	

	association (not lower than 25% and not higher than 40%)			
<b>Latvia</b>	≥50%		na	
<b>Lithuania</b>	>1/3		na	
<b>Luxembourg</b>	≥1/3		na	
<b>Malta</b>	50%+1		na	
<b>Netherlands</b>	≥30%		na	
<b>Norway</b>	>1/3		na	>40% >50%
<b>Poland</b>	>33%*****		na	>66%
<b>Portugal</b>	>1/3		na	>50%
<b>Romania</b>	>33%		na	
<b>Slovak Republic</b>	≥33%		na	
<b>Slovenia</b>	≥1/3		≥10% increase after a successful offer	≥75%
<b>Spain</b>	≥30%	Or acquisition of <30% and appointment of >50% of the board within 24 months of the acquisition	Only for parties who, on 13/08/07 were holding 30%≤X<50% and either:  - acquire ≥5% within any 12 month period; or - through acquisitions reach ≥50%; or - make any further acquisitions and appoint >50% of the board members within 24 months of the acquisition.	
<b>Sweden</b>	≥30%		na	
<b>UK</b>	≥30%		Any increase between 30% and 50%	

\* Crossing the indicated creep-in thresholds would trigger a mandatory bid.

\*\* Controlling influence: when a shareholder not holding more than 50% of the voting rights in a company has 1) a right of disposal of more than 50% of the voting rights by virtue of an agreement

with other investors, 2) the authority to manage the financial and operational conditions in a company pursuant to the articles of association or an agreement, 3) the authority to appoint or dismiss a majority of the members of the supervisory body, and this body has controlling influence of the company, or 4) more than one-third of the voting rights in the company and the actual majority of votes at the general meeting or a similar body, thus having controlling influence over the company.

\*\*\* Defined as a shareholder who has the right to appoint or remove a majority of the members of the management or supervisory board or has a dominant influence or control over the company or the possibility of exercising it.

\*\*\*\* In France, the thresholds are expressed in terms of holdings of equity securities or voting rights. Crossing either of these can trigger a mandatory bid.

\*\*\*\*\* In Italy, the primary threshold (30% and the specific threshold set by the SME's articles of association) and the creep-in threshold of 5% are expressed in terms of holdings of equity securities or voting rights: crossing either of these, respectively as a consequence of acquisitions or attribution of additional voting rights, can trigger a mandatory bid; a SME's articles of association may provide that the creep-in threshold does not apply for five years from the admission to trading of its shares. According to the Italian Consolidated Law on Finance, SMEs are listed companies which meet at least one of the following requirements: (a) a turnover lower than Euro 300 million, (b) a market capitalisation lower than Euro 500 million; a listed company is no longer a SME when both the aforesaid limits are exceeded for three consecutive years.

\*\*\*\*\* In Poland, a shareholder crossing the primary threshold will not be obliged to announce a bid for all remaining shares but for a number of shares that, combined with his/her existing shares, are equal to 66% of the votes in the company.

## **2. The consequences of shareholders coming together to act in concert**

2.1 In some Member States, when shareholders come together to act in concert in relation to a particular company in circumstances where, independently, they have already acquired securities in that company which, in total, carry the specified percentage of voting rights that confers "control" under national takeover rules, they will be required to make a bid to all other shareholders (a "mandatory bid"). In other words, the mandatory bid obligation will be triggered even though no further securities have been acquired.

*These Member States are Austria, Croatia, the Czech Republic, Finland, France, Germany, Greece, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden.*

2.2 In other Member States, no mandatory bid obligation will arise initially when the shareholders come together to act in concert in such circumstances. Such an obligation may, however, be triggered if any one of the shareholders regarded as persons acting in concert subsequently acquires further securities carrying voting rights in the company.

*This is the situation in Belgium, Cyprus, Denmark, Hungary, Iceland, Ireland, Luxembourg, Norway and the United Kingdom.*

- 2.3 In *Italy* a mandatory bid obligation will arise when shareholders acting in concert exceed the threshold for “control” as a result of acquisitions of securities carrying voting rights made by any of them or attribution of additional voting rights in favor of any of them. Acquisitions will be considered relevant if they are made at the same time as the shareholders come together to act in concert, in the twelve months before they come together to act in concert or at any time after they come together to act in concert.
- 2.4 In the remaining Member States (*Bulgaria, Estonia, Latvia, Malta*), owing to a lack of cases providing experience of shareholders coming together to act in concert in the situation described in 2.1 above, the consequences for such shareholders have not been settled.

## APPENDIX C

### The definition of acting in concert

1. Member States have adopted different approaches towards the transposition of the definition of “persons acting in concert” in national laws and regulations that implement the TBD. Some have used as the basis of their definition only Article 2.1(d) of the TBD, while others have also incorporated, in various forms, a concept, broadly, of “the concerted exercise of voting rights by shareholders” with a view to pursuing a common policy or strategy in relation to the company or exercising a dominant influence over it. This concept is also found in Article 10 of the Transparency Directive, which states that:

*“The notification requirements defined in paragraphs 1 and 2 of Article 9<sup>9</sup> 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;”*.

2. The following table gives an indication of the approach adopted in individual Member States:

TBD definition only	TBD definition plus the concept of concerted exercise of voting rights (or similar)
Cyprus	Austria
Denmark	Belgium
Greece	Bulgaria
Hungary	Croatia
Iceland	Czech Republic
Ireland	Estonia
Italy	Finland
Latvia	France

<sup>9</sup> Article 9 TD provides for the notification of the acquisition or disposal of major shareholdings.



Luxembourg

Malta

Netherlands

Slovak Republic

Slovenia

UK

Germany

Lithuania

Norway

Poland

Portugal

Romania

Spain

Sweden

## APPENDIX D

### Summary of approaches in the Member States to shareholder cooperation in relation to board appointments and acting in concert

1. Different approaches are adopted in different Member States towards determining whether or not shareholders who cooperate in relation to board appointments are persons acting in concert. To some extent these differences depend on national company law and the prevailing shareholding structures. An outline of some of the different approaches is given below.
2. In some Member States<sup>10</sup> cooperation between shareholders to vote together for the appointment of board members, who, after all the facts have been examined, are considered, in accordance with national laws, regulations or practice, to be independent from the cooperating shareholders, will not, *in and of itself*, lead to a determination that those shareholders are persons acting in concert. This may be the case even if the proposed board members will form the majority of the members of the board. However, for some other Member States<sup>11</sup>, the concept of independence of the proposed board members from the cooperating shareholders is irrelevant for the purposes of determining whether the shareholders are persons acting in concert.
3. The number of board members being appointed is a determining factor for some Member States. In Italy, for example, shareholders vote for lists of candidates and the law provides that if shareholders have an agreement relating to the submission of such a list, they will not be acting in concert if the number of candidates on the relevant list comprises less than half the number of board members to be elected. Some Member States<sup>12</sup> consider that shareholders cooperating to vote for board members who will form the majority of the board are likely to be acting in concert, while others<sup>13</sup> do not, if the cooperation takes place only on one occasion.<sup>14</sup>
4. As a matter of practice, in some Member States<sup>15</sup>, when shareholders cooperate by agreeing to exercise their votes together on one particular occasion to support the appointment or

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<sup>10</sup> Austria, Ireland and the UK.

<sup>11</sup> Germany, Italy, Latvia, Romania and Spain.

<sup>12</sup> Denmark, France, Germany and Spain.

<sup>13</sup> Finland, Norway and Sweden.

<sup>14</sup> In the Czech Republic, shareholders who have an agreement to vote together on the appointment of board members will be regarded as acting in concert under national rules. However, in practice, in the case of cooperation relating to the appointment of less than the majority of board members, that cooperation is unlikely, in and of itself, to lead to a mandatory bid obligation.

<sup>15</sup> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Norway, Romania, Slovak Republic, Spain, Sweden and the UK.

removal of *one board member only*, that cooperation is unlikely, *in and of itself*, to lead to a determination that those shareholders are persons acting in concert.

5. Further information in the form of relevant rules and guidance or decisions published to date by national competent authorities on the subject of shareholder cooperation in relation to the appointment of board members can be found through the following links:

Country	Links to national rules, guidance or decisions
Austria	-
Belgium	<a href="http://www.fsma.be/fr/Supervision/fm/oa/ooa.aspx">http://www.fsma.be/fr/Supervision/fm/oa/ooa.aspx</a>
Bulgaria	-
Croatia	-
Cyprus	<a href="http://www.cysec.gov.cy/existing_laws_en.aspx">http://www.cysec.gov.cy/existing_laws_en.aspx</a>
Czech Republic	-
Denmark	-
Estonia	-
Finland	-
France	<p>Selected relevant decisions</p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/2003/203C0806.pdf">http://archivesbdif.amf-france.org/fichiers/dop/2003/203C0806.pdf</a></p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/1998/198C1044.pdf">http://archivesbdif.amf-france.org/fichiers/dop/1998/198C1044.pdf</a></p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/2007/207C2792.pdf">http://archivesbdif.amf-france.org/fichiers/dop/2007/207C2792.pdf</a></p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/2005/205C0685.pdf">http://archivesbdif.amf-france.org/fichiers/dop/2005/205C0685.pdf</a></p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/2005/205C1843.pdf">http://archivesbdif.amf-france.org/fichiers/dop/2005/205C1843.pdf</a></p> <p><a href="https://www.amf-france.org/Fiche-BDIF?xtcr=1&amp;isSearch=true&amp;docId=4200C112_211C0024&amp;lastSearchPage=https%3A%2F%2Fwww.amf-france.org%2FmagnoliaPublic%2Famf%2FResultat-de-recherche-BDIF%3FformId%3DBDIF%26DOC_TYPE%3DBDIF%26LANGUAGE%3Dfr%26subFormId%3Dsp%26BDIF_TYPE_INFORMATION%3DBDIF_TYPE_INFORMATION">https://www.amf-france.org/Fiche-BDIF?xtcr=1&amp;isSearch=true&amp;docId=4200C112_211C0024&amp;lastSearchPage=https%3A%2F%2Fwww.amf-france.org%2FmagnoliaPublic%2Famf%2FResultat-de-recherche-BDIF%3FformId%3DBDIF%26DOC_TYPE%3DBDIF%26LANGUAGE%3Dfr%26subFormId%3Dsp%26BDIF_TYPE_INFORMATION%3DBDIF_TYPE_INFORMATION</a></p>

	<p><a href="#">_SEUIL_PACTE_DEROGATION%26TEXT%3D%26BDIF_RAISON_SOCIALE%3D%26bdifJetonSociete%3D%26REFERENCE%3D211C0024%26BDIF_TYPE_DOCUMENT%3D%26DATE_PUBLICATION%3D%26DATE_OBSOLESCENCE%3D%26valid_form%3DLancer%2Bla%2Brecherche%26isSearch%3Dtrue&amp;xtmc=Seuil--pactes--derogations---examens-211C0024</a></p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/2008/208C1718.pdf">http://archivesbdif.amf-france.org/fichiers/dop/2008/208C1718.pdf</a></p> <p><a href="http://archivesbdif.amf-france.org/fichiers/dop/2007/207C1202.pdf">http://archivesbdif.amf-france.org/fichiers/dop/2007/207C1202.pdf</a></p>
<b>Germany</b>	<p>Report "Acting in concert in the version of the Risk Reduction Act" on page 9 to 11 in the journal BaFinQuarterly Q2/10 of 15 July 2010:</p> <p><a href="http://www.bafin.de/SharedDocs/Downloads/EN/Mitteilungsblatt/Quarterly/bq1002.html">http://www.bafin.de/SharedDocs/Downloads/EN/Mitteilungsblatt/Quarterly/bq1002.html</a></p> <p>Section 30 Paragraph 2 of the German Securities Acquisition and Takeover Act:</p> <p><a href="http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Gesetz/wpueg_en.html?nn=2821360#doc2684280bodyText35">http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Gesetz/wpueg_en.html?nn=2821360#doc2684280bodyText35</a></p>
<b>Greece</b>	-
<b>Hungary</b>	-
<b>Iceland</b>	-
<b>Ireland</b>	-
<b>Italy</b>	<p>Consolidated Law on Finance (Legislative Decree n. 58 of 24 February 1998 – “Consolidated Law”) – Article 101-bis, par.4 , par. 4-<i>bis</i>.</p> <p>Regulation implementing Consolidated Law (Regulation n. 11971 /99 as integrated and amended) – Article 44-quater</p> <p><a href="http://www.consob.it/mainen/legal_framework/index.html">http://www.consob.it/mainen/legal_framework/index.html</a></p>
<b>Latvia</b>	-
<b>Lithuania</b>	-
<b>Luxembourg</b>	-
<b>Malta</b>	-
<b>Netherlands</b>	-
<b>Norway</b>	-
<b>Poland</b>	-
<b>Portugal</b>	-



European Securities and  
Markets Authority

<b>Romania</b>	-
<b>Slovak Republic</b>	-
<b>Slovenia</b>	-
<b>Spain</b>	-
<b>Sweden</b>	-
<b>UK</b>	The Takeover Code: Rule 9.1 (mandatory bid rule) and Notes 1 and 2 on Rule 9.1: <a href="http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf">http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf</a> Practice Statement No 26: Shareholder activism: <a href="http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/ps26.pdf">http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/ps26.pdf</a>