EUMEDION
CORPORATE GOVERNANCE FORUM

Submitted by e-mail

European Commission
Directorate Financial Institutions
Mr Mario Nava, Director
B-1049 Brussels
BELGIUM

Amsterdam, 10 February 2012

Our ref: B2012.12
Reg. ID-no: **65641341034-11**
Subject: Eumedion response to consultation on acquisitions and holdings in the financial sector

Dear Mr. Nava,

We are grateful for the opportunity to comment on the European Commission services' consultation on the application of Directive 2007/44/EC as regards acquisitions and increase of holdings in the financial sector. By way of background, and to put our comments in context, Eumedion is the Dutch based corporate governance forum for institutional investors in listed companies. Our 68 Dutch and non-Dutch participants - with a long term investment horizon - have in total more than EUR 1 trillion assets under management.

We have confined our response to those questions that we feel are most relevant to institutional investors with a worldwide shareholding portfolio.

(1) In your view, has the Directive and its application reduced barriers to cross-border mergers and acquisitions ('M&A') in the financial sector and resulted in a more equal treatment of domestic and cross-border M&A? What obstacles in the supervisory notification and approval process remain? What in your view are the remaining key obstacles?

We believe the Directive has certainly reduced barriers to cross border mergers and acquisitions in the financial sector by introducing harmonized procedural rules for the prudential assessment of acquisitions and increases in holdings. However, there are still obstacles that need to be addressed. One is the fact that a single acquisition of a qualifying holding in a financial institutional could still be

subject to prudential scrutiny by different authorities in several Member States. Another key obstacle is the time national competent authorities consume for the assessment of cross-border acquisitions.

(6) Are there in your view any reasons to amend the definition of the notification requirement (i.e. definition of qualifying holdings/provided thresholds)? Please explain.

Under the existing regime a 'qualifying holding' means a direct or indirect holding in a financial institution which represents 10% or more of the capital, or of the voting rights, or a holding that makes it possible to exercise a significant influence over the management of that undertaking. A person (or persons acting in concert) that intends to hold, directly or indirectly, such a qualifying holding is required to notify the competent authority in advance. Such a person shall also notify the competent authorities if he decides to further increase his qualifying holding so that the proportion of the voting rights or of the capital held by him would reach or exceed 20%, 30% or 50% or so that the financial institution will become its subsidiary. In 2009, the European Securities Market Expert Group (ESME) issued an opinion on the disaggregation of shareholdings. It advised the European Commission to consider amendments to Directive 2007/44/EC to bring this Directive in line with the disaggregation rules in the Transparency Directive (not only the rules laid down in article 12 of that Directive, but also in article 23 of the Transparency Directive), but should also consider whether additional safeguards are necessary in relation to the threshold levels in Directive 2007/44/EC to protect the interests of minority shareholders and the public interest. An additional safeguard could, in our view, be a clearer definition of acting in concert, especially in relation to the 30 and 50% threshold (see also our answer to the next question).

(7) Do you believe it is sufficiently clear when persons 'are acting in concert' for the purposes of the directive? Have you encountered any difficulties with the application of the definition of acting in concert given in Appendix 1 of the Level 3 Guidelines or with another definition of 'acting in concert' applied by the regulator in relation to the obligations of the Directive? Please explain.

We believe it is not crystal clear under which circumstances persons are acting in concert in the meaning of the Directive. Whilst 'acting in concert' is used in its key provisions, the Directive does not give a legal definition. Appendix 1 of the Level 3 Guidelines gives a description of acting in concert but that is not very specific.[1] Other European financial markets directives, e.g. the European Take Over Bids Directive and the Transparency Directive, in which the 'acting in concert' element is also used, include definitions of acting in concert which significantly differ from the description mentioned in the Level 3 Guidelines.

We would advise to also include a definition of acting in concert in Directive 2007/44/EC, which is aligned with the Transparency Directive as far as the 10% and 20% thresholds is concerned. In some Member States' national legislation, including the Netherlands, such a broad definition already exists.

[1] It is stated 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'.

In the Dutch Financial Supervision Act (' *Wet financieel toezicht*') a single definition of 'acting in concert' applies both to the notification of substantial holdings in listed companies and to the requirements for the acquisition of qualifying holdings in financial institutions. Regarding the 30% and 50% thresholds the definition could be harmonized with the 'acting in concert' definition in the Take Over Bids Directive. We would also recommend that the amended Directive 2007/44/EC mandates the European Supervisory Authorities (ESAs) to provide further guidance on the definition of 'acting in concert'.

(13) Do you consider that the principle of the sole responsibility of the target authority for the prudential assessment is satisfactory for cross-border acquisitions? Should "acquirer" authorities be given more powers in the context of cross-border acquisitions? Please explain.

We concur with the Commission services' view. However, not only the acquirer authorities should be given more powers, but also the shareholders' meeting of acquirer. Given the fact that major acquisitions (related to the size of the acquiring bank) will probably change the acquiring bank's risk profile, we would welcome a requirement for acquiring banks to ask shareholder approval for major acquisitions. After shareholder approval, the acquiring bank should obtain regulatory approval of the major acquisition. We believe that this issue of shareholder approval ought to be addressed in the upcoming reviews of the European Company Law Directives.

(14) Should institutions at EU level, such as for example the European Supervisory Authorities (ESAs), be involved in the prudential assessment of cross-border acquisitions? Please explain your views.

Yes. In order to actually achieve identical application of the prudential assessment of cross-border acquisitions, it is important that the ESAs obtain a coordinating role in this process. Enhanced responsibility for the ESAs will further minimise the scope for public authorities to invoke prudential rules in order to hinder cross-border mergers and acquisitions for protectionist reasons.

(15) Is the 60 day time limit satisfactory in practice? How often has the 60 day time limit been exceeded in your experience with the notification process? Is there any difference related to the time needed for the assessment of cross-border acquisitions of holdings and domestic acquisitions? Is there any need to increase or shorten this time limit? Is there any need to provide for longer interruption periods? Please explain.

There might be good reasons to shorten the time limit. Six to eight weeks should in principle be sufficient for competent authorities to perform the prudential assessment. Especially when the acquisition involves a take over of a listed financial sector company and/or distressed financial

institution the procedure's duration needs to be limited. The existing interruption periods appear to be adequate.

(20) The experience in the financial and economic crisis has triggered several important regulatory initiatives aiming at reinforcing financial stability. Do you consider it necessary to adjust the prudential assessment criteria to address for example concerns about financial stability and the emergence of financial institutions that are "too big to fail" resulting from M&A activity?

Yes, we think there is a strong case to adjust the current prudential assessment criteria. The current criteria include (a) reputation of the proposed acquirer; (b) reputation and experience of those who will direct the business; (c) financial soundness of the proposed acquirer; (d) compliance with any relevant prudential legislation; and (e) suspicion of money laundering and terrorist financing. The possible consequences of an acquisition of a qualifying holding in a certain financial institution on the financial system's stability are not a explicitly addressed. The experiences in the current financial and economic crisis have taught us that failure of a single financial institution can put the overall financial system at risk. Given that knowledge we are in strong favour of adding an additional criterion regarding financial stability.

33) In your view, is there any need to introduce a similar framework in any other upcoming or existing legislation in the financial sector (i.e. derivatives, regulation of central securities depositories, regulated markets)? Please explain

We are in favour of a similar framework for prudential assessment of acquisitions of qualifying holdings in central counter parties, central securities depositories and regulated markets operators.

If you would like to discuss our views in further detail, please do not hesitate to contact us. Our contact person is Wouter Kuijpers (wouter.kuijpers@eumedion.nl Tel. + 31 20 708 5882)

Yours sincerely,

on behalf of
Rients Abma
Executive director