

PRESS RELEASE

ESMA clarifies shareholder cooperation in takeover situations

The European Securities and Markets Authority (ESMA) has published a statement on practices governed by the Takeover Bid Directive (TBD), focused on shareholder cooperation issues relating to acting in concert and the appointment of board members.

The statement contains a White List of activities that shareholders can cooperate on without the presumption of acting in concert. It also contains information on how shareholders may cooperate in order to secure board member appointments by setting out factors that national authorities may take into account when considering whether shareholders are acting in concert.

The statement is in response to a request by the European Commission for clarity on these issues, following its 2012 report on the application of the TBD. It is based on information collected about the TBD's application and common practices across the European Economic Area (EEA). The statement was prepared by the Takeover Bids Network, a permanent working group, under ESMA's auspices, that promotes the exchange of information on practices and application of the TBD across EEA.

Steven Maijoor, ESMA Chair, said:

“Today's statement means that shareholders can now be confident that they can expect authorities to take a consistent approach across the EEA to their cooperative activities. This consistency should in turn provide the reassurance needed by shareholders for the effective, sustainable engagement that is one of the cornerstones of listed companies' corporate governance model allowing them to hold their boards to account.

“ESMA believes that ensuring a consistent and convergent supervisory approach to this issue will be instrumental in affording equality of treatment to shareholders and investors across the EEA.”

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.

Shareholder cooperation and acting in concert - The White List

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:

1. entering into discussions with each other about possible matters to be raised with the company's board;
2. making representations to the company's board about company policies, practices or particular actions that the company might consider taking;
3. other than in relation to the appointment of board members, exercising shareholders' statutory rights;
4. 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.

If shareholders cooperate in an activity not included on the White List, this will also not result in an automatic assumption that they are acting in concert. Each case will be determined on its own particular facts.

Cooperation in relation to the appointment of members of the board of a company

The White List does not include any activity relating to cooperation on board appointments, due to differences in Member State approaches towards determining whether shareholders who cooperate in relation to board appointments are acting in concert. However, shareholders may wish to cooperate in order to secure board members' appointment in a company in which they have invested. This cooperation might take the form of:

1. 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;
2. tabling a resolution to remove one or more board members and replace them with one or more new board members; or
3. tabling a resolution to appoint one or more additional board members.



The statement therefore indicates which factors may be considered when assessing whether such cooperation is indeed an act of acting in concert.

ESMA will keep the public statement under review in order to ensure that it continues to reflect accurately the practices and application of the TBD in the Member States.



Notes for editors

1. [2013/1642 Public Statement - Information on shareholder cooperation and acting in concert under the Takeover Bids Directive.](#)
2. [2013/1643 Cover Note to the Public Statement.](#)
3. [Takeover Bids Directive \(Directive 2004/25/EC\).](#)
4. The competent authorities represented on the ESMA Board of Supervisors are not in all cases appointed as competent authorities within the Takeover Bids Directive. The authorities not represented on the Board of Supervisors but competent within the area of takeovers are the Austrian Takeover Commission, the Irish Takeover Panel, the Oslo Stock Exchange of Norway, the Takeover Panel of Sweden and the Takeover Panel of the United Kingdom. These five authorities have contributed to the public statement and will have regard to it in the same manner as the other members of the Takeover Bids Network when assessing whether shareholders are acting in concert under their national takeover rules.
5. ESMA is an independent EU Authority that was established on 1 January 2011 and works closely with the other European Supervisory Authorities responsible for banking (EBA), and insurance and occupational pensions (EIOPA), and the European Systemic Risk Board (ESRB).
6. ESMA's mission is to enhance the protection of investors and promote stable and well-functioning financial markets in the European Union (EU). As an independent institution, ESMA achieves this aim by building a single rule book for EU financial markets and ensuring its consistent application across the EU. ESMA contributes to the regulation of financial services firms with a pan-European reach, either through direct supervision or through the active co-ordination of national supervisory activity.

Further information:

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