29 September 2006

Mr Charles McCreevy
Commissioner
European Commission
Rue de la Loi 200
BE-1049 Brussels
Belgium

Dear Mr McCreevy

Cross-border consolidation

The European Commission on 12 September published proposals for a directive amending certain sectoral directives regarding the procedural rules and criteria for the prudential assessment of acquisitions and increase of shareholdings in the financial sector. In the spirit of cooperation and with the positive intention of assisting the next stage of the discussions, the EU's supervisory community - comprising all three sectors - wishes to offer serious suggestions to improve the texts. Given that the Commission has now formally published its proposal, which now enters the co-decision process, this letter and its attachment are copied to the chair of the Council working group, and to the chair and rapporteur of the ECON committee of the European Parliament.

From the outset let us firmly state the EU supervisory community's absolute support and commitment to the Commission's aim of ensuring that mergers and acquisitions proceed according to market needs and that there is a level playing field in the European markets. As supervisors, our involvement in this process is, quite rightly, restricted to taking actions in the interests of protecting depositors, consumers, policy holders, investors, helping to prevent financial crime, and ensuring the stability of the financial system.

In this respect, we have an obligation to ensure that our decisions are sound, well informed and taken on the basis of all relevant prudential considerations and fully consistent with the authorisation procedures. In this respect the Committees believe that the Commission's proposals would greatly benefit from improvements in three key areas, namely the time limits, the assessment criteria and the Commission's access to detailed prudential information. Without these improvements we believe the current text could endanger our ability to fulfil the fundamental objectives of the legislation. Our recent analysis has only served to underline these concerns.

While the aim of the proposition is cross-border consolidation, the Commission's proposal implies that the ability of supervisors to assess an application will be curtailed for all acquisitions, even by non regulated entities or third country entities.

In addition the Committees understand that the Commission is considering the extension of the directive to regulated markets. CESR is not convinced that a case has yet been made for their inclusion. The prudential concerns that the directive aims to address do not apply to these undertakings that are of a completely different nature and do not undertake proprietary trading.

We have summarised our concerns below.

Time-limits

Whilst European supervisory authorities fully agree that the process for supervisory decision-taking regarding applications for mergers and acquisitions should not be lengthy or open-ended, our professional experience has shown that meeting the time limits in the current EU legislation already poses a challenge in particularly complex cases. A significant reduction in the time limits, coupled with a reduced degree of flexibility to seek further information could put a considerable strain on supervisors' ability to fulfil their statutory objectives. This will be especially true in cross-border operations calling for new and extensive consultations with other supervisors. An amendment to the draft text, differentiating between simple cases (for which a fairly short timeline could be introduced), and more complex cases (which should be assessed within a longer time frame - ideally, 65 working days), would greatly help in this respect. The definition of the criteria for classifying the cases could be left to Level 2 legislation. In developing such criteria, the approach adopted by the Commission for the evaluation of mergers and acquisitions from a competition policy viewpoint could provide a useful benchmark.

In addition, we believe that some ambiguity in the provisions, defining when the clock starts ticking, may open up the possibility of abuse by the proposed acquirer, e.g. via delayed transmission of documents, while others may in fact work against the interests of market participants, as they could lead to a bias towards rejection of the application for incomplete information. The Lamfalussy Committees believe that the speed of the decision-making process, while undoubtedly important, should not be the overriding objective. The fundamental goal should be to ensure a proper and reasoned decision within a reasonable timeframe. The time allowed should be sensibly capped, and supervisors should be accountable if they are not able to justify the decisions they have taken or the way in which they have conducted the process.

Assessment criteria

Regarding the proposed list of criteria against which an application should be assessed, we again support the objective of the proposal, which is to have greater clarity. However, we would stress two key concerns.

Firstly, it is extremely important to maintain the equilibrium between the requirements for authorisation and the requirements for acquisition contained in the directive, and thereby to ensure that the door is not opened to regulatory arbitrage. For example, the legislation should certainly not permit individuals and institutions wishing to conduct banking business to circumvent stricter authorisation requirements by acquiring a bank to do the same business. In particular, we believe that it is essential in acquisition/merger situations to be able to take account of the need to ensure the sound and prudent management of the institution, in line with the authorisation criteria.

Secondly, while CEBS' earlier advice to the Commission argued in favour of maintaining an 'open' list of criteria, the 'closed' list now contained in the

Commission's proposal seems adequately comprehensive to cover for all the relevant aspects. The wording could however be improved by stressing with even more clarity that institutions must comply with all applicable prudential requirements.

Commission's access to information

Supervisors fully understand that the Commission needs adequate access to information to pursue its tasks under the Treaty. However, the current criteria (see Recital 6), for absolute and unfettered right of access to all confidential prudential information by the Commission, is too vaguely defined. A clear link with the objective of ensuring the smooth working of the Single Market is needed to help clarify the scope of the provision.

In addition, there is an issue of proportionality. The supervisory community, and all the individual members of Level 3 Committees, naturally wish to be fully accountable for their actions, and there is no objection to providing information, also of a confidential nature, on processes or on the rationale behind specific decisions. But there is already the possibility to challenge in the courts any supervisory decision; the draft proposal is not proportionate if it seeks to ensure that all confidential prudential information in the hands of the competent authorities is open to the Commission.

On a longer term perspective we would stress that we will, of course, strive for the highest possible and necessary degree of convergence at level 3 on the application of the provisions, whatever their final form and content. We hope you find these suggestions helpful and constructive. We have also attached some more detailed information for your consideration. We would be glad to discuss this with you, or with any interested party.

Yours sincerely

Arthur Docters van Leeuwen Chairman of CESR	Daniele Nouy Chair of CEBS	Henrik Bjerre Nielsen Chairman of CEIOPS

Copies to: **Mr. Erkki Sarsa**, chair of the Council working group

Mrs Pervenche Berès, chair of the ECON committee of the European Parliament

Mr Wolf Klinz, rapporteur, and **Mr Joseph Muscat** shadow rapporteur, of the ECON committee of the European Parliament.

Annex

Further comments on the directive amending certain sectoral directives regarding the procedural rules and criteria for the prudential assessment of acquisitions and increase of shareholdings in the financial sector

Time limits

Banking supervisors have analysed all relevant merger and acquisition cases in 2005. This analysis shows that in many recent cases submitted to supervisory authorities, the assessment took the full period *currently* allowed by the legislation (and this includes the fact that for larger/more complex cases interruptions were allowed to gather the necessary data). Therefore, it is clear that, in many cases, supervisors would not be able to conduct a sound assessment within the new (significantly reduced) deadline contained in the Commission's proposal.

Moreover, given that the proposal also now places the burden of proof on the supervisory authority to demonstrate, before the conclusion of the time period, that the assessment criteria are not met, there is a risk that supervisors will be obliged to allow applications even if they have not had time to conduct a proper analysis of what is often complex and extensive information. This clearly could put prudential and financial stability objectives at risk, and could even open a door for potential abuse of the system by applicants, which can be unregulated institutions of any country.

Furthermore, the current legislation provides a certain degree of flexibility for supervisors to seek further information, as necessary, in order to make their decisions. Practice has shown that this flexibility has been widely used, for a number of reasons (e.g. failure by the acquirer to disclose certain information in sufficient detail, deals being completed during the course of the application process). In the Commission's proposal, the flexibility to seek further information, and the time limit for acquirers to provide it, has been greatly restricted, and there is a lack of clarity about how "completeness" of information is to be judged. It would also be sensible to make allowances for unforeseen events or "triggers" which could and indeed should result in a longer – but still limited - determination period. These factors could not only jeopardise the quality of the process, but could also work against the acquirer in some cases.

Finally, the Commission proposal will require the supervisor of the institution to be acquired, to undertake a consultation with the supervisory authority of the proposed acquirer, where relevant in the framework of Article 129, for all acquisitions. While we support the aim of this provision (cooperation procedures are already largely in place) it is evident that such contacts will require time, especially as the new provisions require explicit indications of the views of the authority of the acquirer. They will thus need to be conducted formally in all cases, and also bearing in mind administrative issues such as the possible need to arrange translations. This complex aspect of the proposal is not taken into account in the proposed time limits.

MiFid

The reasons for extending the proposed directive to MiFID could be questioned, since that directive has not even been implemented or proven insufficient in member states yet. The Committees consider that as investment firms will be affected by this draft directive the reasons for considering these amendments to be

necessary need to be clearly stated in its preamble. Similarly the Commission is contemplating a proposal to extend the rules in question to regulated markets.

Access to information

The Commission's proposal includes a controversial and quite general provision granting the Commission an explicit right of access to confidential prudential information (and respectively the obligation for competent authorities to provide such information). There is no clear statement in the preamble of the draft directive stating why the Commission should have prompt access to confidential documents and on which grounds the Commission might take action. At this stage it would be useful to see more analysis explaining why the powers currently granted by the Treaty to the Commission (and to other European institutions) do not permit the European institutions to adequately review whether Member States fulfil their obligations according to European law.

It is also not clear from the proposal what the scope of this power is. According to the wording of the provision, the Commission has the unconditional right to request documents and information for specific merger and acquisition cases (even purely domestic cases) at anytime and under any circumstances. The current text of the proposal might give rise to interpretations according to which the Commission will have the power to oversee the exercise of powers and the decisions of the national competent authorities. According to the EU directives of the relevant sectors, the administrative decisions of the competent authorities can be challenged and appealed in at the national Courts. The three committees consider that this parallel power of the Commission will create confusion and legal uncertainty regarding the national system of appeal.

Finally, we would urge you to only consider such an exception to the professional secrecy of supervisors on the basis of a clear demonstration of its necessity and its compliance with EU law.

Some additional concerns

The level 3 Committees would also highlight a number of other concerns. The first is the Commission's proposals on the motivation of an objection decision (the 'burden of proof' question) which will require the supervisory authorities to "find that the criteria are not fulfilled", in all cases, while in the authorization process the supervisory authority has to be satisfied of the suitability of the shareholder. This could however cause quite severe problems for many Member States. We suggest that the proposals revert to the status quo, where it is determined at national level, pending further work on the implications of such a change.

We would add that the implementation of these changes should be as smooth as possible. It is important that the dates of implementation, including the date when the changes come into force, for the amendments to each of the sectoral directives are aligned. It is likely that a transitional period will be required to ensure that the process continues to operate smoothly in respect of applications that are already proceeding.

The proposed changes also affect the thresholds for the notification. Supervisors have consistently underlined that the "reasonable" thresholds for notification will very much depend upon the company legislation of each country and the (general) ownership structure of its banking system. Supervisors believe that requiring different thresholds within the EU does not imply an uneven playing field, but rather

gives important prudential information.[1] The ownership structure of the target institution is important given that the same shareholding could have different implications depending on the more or less concentrated ownership. Supervisors agree with the industry assessment that the current thresholds do not impose an undue burden, and as such the application of the maximal harmonization to Article 19 is problematic. It is also important in the case of take-over bids, that supervisors should have the possibility to set a minimum level of shareholding, in order to ensure the adequate functioning of the governing bodies of the institution and to avoid conflict between two major shareholders having a blocking minority but less than the control. The aim is to avoid a situation which could paralyse the institution. Therefore the prohibition, on setting prior conditions in respect of the level of shareholding that must be requited, should be removed.

[1] There are least three different situations that deserve notification: (i) Shareholdings allowing the exercise of a significant influence; (ii) Shareholdings giving the possibility to block decisions; (iii) Shareholdings providing control.