European Banking Federation
Secretary General

EBF ref. 0575
NF/BA

Email

m&a@c-ebs.org

Brussels, 3 October 2008

Subject: ***EBF response to the 3L3 Consultation Paper on Guidelines for the prudential assessment of Mergers and Acquisitions***

Dear Sir/Madam,

Please find attached (enclosure 1) the EBF response to the above-mentioned joint 3L3 Consultation.

The EBF overall supports the proposed Guidelines. In particular, it supports the emphasis on applying the proportionality principle as provided in the Directive. This is a key element to avoid burdensome requirements on the acquirer and delays in the assessment process as well as to ensure a level playing field across Europe.

Nevertheless, we believe that the information requirements contained in Appendix II in particular need to be further clarified to allow for an efficient assessment as well as limit the room for arbitrary requirements. Information requirements must be kept relevant and reflect the practical aspects of the proposed transaction concerned.

Do not hesitate to contact either myself or my colleague Noémie Francheterre (n.francheterre@ebf-fbe.eu) should you have any question on that matter.

Yours faithfully,

Guido RAVOET

Enclosure: 1 (D1514E)

a.i.s.b.l.

10 rue Montoyer B- 1000 Brussels
+32 (0)2 508 37 11 phone
+32 (0)2 511 23 28 fax
http://www.ebf-fbe.eu

D1514E
Brussels, 1st October 2008

EBF response to the joint Level 3 Committees' guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by Directive 2007/44/EC

General comments

1. The EBF overall supports the proposed Guidelines. In particular, it supports the emphasis on applying the proportionality principle as provided in the Directive. This is a key element to avoid burdensome requirements on the acquirer and delays in the assessment process as well as to ensure a level playing field across Europe.

2. Yet, the Guidelines do not distinguish between different types of transactions related to acquisitions. In particular cases such as in the event of an acquisition proposed by means of a public offer on a listed entity, it is not possible to gather in advance the required information with respect to issues such as the level of control after acquisition, the costs of acquisition, changes in boards or committees, changes in policies and IT-systems. This all depends on the outcome of the offering process and possibly even on rival bids by other companies. If a public offer results in a qualifying holding without any actual control, certain changes would not take place.

3. Consistently with the proportionality principle (as referred to in paragraph 18), we would consequently request the Level 3 Committees to explicitly state in their Guidelines that where a public offer is concerned supervisors should not oppose a proposed acquisition on the grounds that the information provided is incomplete.

4. It should also be explicitly stated that the guidelines apply equally to cross-border mergers (when the latter would result in a change of ownership).

5. Terms such as "directors" "senior management" and "manager" have not been defined at European level and are interpreted in various ways across Member States. Reference to these terms should therefore be limited to examples. The Guidelines should instead use the expression "persons who effectively direct the business" which is the terminology used in European Directives.

6. Furthermore, considering the significant differences across Member States regarding the interpretation of corporate bodies which 'effectively direct the business', we would suggest that Member States be encouraged to create and publish a list of all the categories of persons which fall under the expression "persons who effectively direct the business" in their respective jurisdiction. We believe this would avoid time-consuming research and possible disagreements concerning who would be concerned and thus facilitate the assessment. In any case, this should not refer to levels below the Board and/or Executive Committee.

7. The proposed Guidelines are very useful for operations within the EEA. However, we consider that competent authorities in third countries should be strongly encouraged to align their prudential assessment rules with the ones in effect in Europe to help achieving equal access to investment worldwide. Especially, competent authorities within the EEA

a.i.s.b.l.

10 rue Montoyer B- 1000 Brussels
+32 (0)2 508 37 11 phone
+32 (0)2 511 23 28 fax
http://www.ebf-fbe.eu

should strive to implement the same standards based upon identical provisions in their respective bi/multi lateral MoU's with their third-country counterparts.

8. Last but certainly not least, we have serious concerns regarding the lists in Appendix II. They contain too many vague terms and references whereas information should really be kept relevant. It is even questioned whether some information could actually be provided. Also, the list does not consider the materiality of information which is most relevant to the application.

9. Neither Annex II nor the Guidelines make any reference to the language(s) in which documents can be provided. We believe it is essential to clarify the issue of the language to avoid delays and frustration.

10. In the same way, neither Annex II nor the Guidelines explain whether specific documents should be provided as originals, notarized copies or legalized copies. We would urge the Committees to clarify this very relevant issue to also prevent delays and frustration.

Detailed comments

Assessment procedures

11. *Paragraph 6, sub. iv*: We understand that supervisors may request additional information until the 50th working day of the assessment period. We believe that supervisors should be encouraged to make such requests as early as possible in the assessment process to avoid reaching a situation whereby supervisors would only have limited time left to assess the additional information. Moreover the demand for any supplementary information should be restricted to exceptional cases.

12. *Paragraph 6, sub. v*: In cases when a proposed acquisition is opposed, the guidelines should clarify that the competent authorities should not only communicate their decision to the acquirer but also demonstrate that the latter does not fulfil the criteria or has not fully provided the necessary information, thereby justifying their decision to reject the proposed transaction.

13. *Paragraph 8:* When the target supervisor can obtain information from another supervisory authority, we believe that the acquirer should be exempted from providing it. The current wording ("In such cases, the target supervisor may expressly exempt the acquirer from providing…") allows for subjectivity and should be changed to: "In such cases, the target supervisor ~~may~~ expressly exempts the acquirer from providing…"

14. *Paragraph 9:* It should be clarified that additional information, which supervisors may request, should be strictly related to the list of required information and the prudential assessment criteria. The current wording seems to suggest that additional information requests could open the door to any other piece of information.

15. *Paragraph 12*: it is mentioned that notification is also required in the case of "*a decrease in an existing shareholding*". While this is consistent with Article 20 of the Directive, it seems inconsistent with paragraph 19 of the Guidelines: "*The Directive focuses on the prudential assessment of a proposed acquirer only at the time of an acquisition or an*

increase in a qualifying holding in a financial institution". These two paragraphs should be clarified to ensure their coherence.

16. *Paragraph 15*: it is indicated that the supervisors of the subsidiaries of the target company are considered as target supervisors and should therefore be notified of the proposed acquisition by the acquirer. While we would understand the information-sharing purposes behind this requirement, we would not find it acceptable that "indirect" target supervisors be able to block a proposed transaction. We understand from the discussions held at the CEBS' hearing on 19th September that the aim is not for indirect supervisors to block a transaction; this is reassuring. We would nevertheless like that this be more explicitly stated in the Guidelines to avoid any misunderstanding. As provided in the Directive, decision on a proposed transaction is in the remit of the acquirer supervisor and the target supervisor or, ultimately, of the latter only.

17. *Paragraph 18*: It should also be mentioned that the type of information required from the acquirer may be influenced by the acquirer being an institution supervised in the EEA or a third-country institution.

18. *Paragraph 19:* This should be amended to be consistent both with Article 20 of the Directive and paragraph 12 of the Guidelines as follows: "The Directive focuses on the prudential assessment of a proposed acquirer only at the time of an acquisition, ~~or~~ an increase in or a reduction of a qualifying holding in a financial institution".

1st assessment criterion

19. *Paragraph 25*: we support the evaluation of the integrity of the proposed acquirer. However, we feel that it would be more efficient to examine fewer situations. We would propose to retain only administrative fines of 1 million Euros and above, and to limit the 'look back' period to a period that should not significantly exceed two years. Practically-speaking, the acquirer will often not be able to deliver such information if it dates back to too many years.

20. *Paragraph 30*: the statement by the proposed acquirer, that none of the situations described in points 24 to 26 occurs or has occurred in the past, should be made through a standard document, which the proposed acquirer would then sign. We would ask that the Level 3 Committees define the lay out and content of that standard document. This would allow avoiding that target supervisors reject a document developed by the acquirer itself e.g. because it is not conform to their own standards. A template developed at European level would moreover facilitate exchanging this information amongst the respective supervisory authorities.

21. *Paragraph 32*: Based upon our understanding that the updating of the material would only be relevant in case of a substantial increase in an existing qualifying holding, we expect a threshold (absolute or based upon level of control) to be determined with respect to that increase.

22. *Paragraphs 37 & 38*: with regards to the management and technical competences of the acquirer we consider that the Guidelines should specify how the acquirer should demonstrate his due skill, care, diligence and compliance with the relevant standards.

23. *Paragraph 40*: Regarding the assessment of technical competence, the wording of this paragraph should be aligned with the wording of paragraph 36 as follows: "the assessment of technical competence in the area of the financial activities carried out by the target institution should relate primarily to the financial activities…"

24. *Paragraph 41*: what is meant by "decisive influence" would need to be clarified, particularly as compared to "significant influence".

25. *Paragraph 44*: it seems that there is a contradiction between this paragraph where the integrity of the acquirer is subject to certain conditions and paragraph 22 where the acquirer is generally assumed to be of good repute if there is no evidence of the contrary. For EEA/EU supervised acquirers the presumption-rule should be explicitly taken into account. We see no need to re-examine the integrity of a bank - subject to the ongoing supervision under the CRD – in the event of an acquisition assessment. We ask the Level 3 Committees to clarify this issue.

26. *Paragraphs 44 and 46*: with respect to the condition whereby the acquirer is regulated and supervised by the same competent supervisor, it would need to be clarified whether this refers to the solo or to the consolidated supervision of the acquirer.

2nd assessment criterion

27. What is meant by "directors or managers" is unclear as it varies across the EU. As we stated in our general comments above, these terms should be replaced by "persons who effectively manage the business".

28. *Paragraph 51*: the possibility for a target supervisor to reject a proposed acquisition solely because the person who is intended to effectively direct the business is considered not to be fit and proper is disproportionate. Instead, we would suggest that in such cases the acquirer be informed of the situation and allowed to make changes to remedy it.

29. *Paragraph 52*: we welcome the mapping exercise of the domestic provisions implementing "fit and proper" requirements for individuals in financial institutions. However, we would urge the Level 3 Committees to take the opportunity of this exercise not only to map the provisions but also to strive for their further harmonisation.

3rd assessment criterion

30. *Paragraph 54*: the reference to the strategy of the acquirer concerning the proposed acquisition is not relevant for the decision of the target supervisor. Only information relating to a change in the strategy of the target company should be of interest to the target supervisor.

31. *Paragraph 56*: the scope of the condition whereby the proposed acquirer should be capable of implementing its business plan is not clear. The test on the implementation of the business plan should be limited to the core principles of such business plan related directly to the target company and should not be extended to the overall business plan (including strategy, market position, etc.).

We would also ask the Committees to clarify whether such condition would be used to regulate more stringently acquisitions made by private equity funds.

32. *Paragraph 59*: This paragraph should also explicitly emphasize that the depth of the assessment should be lower in case of an acquirer subject to supervision in the EEA. While supervisors reassured industry representatives at the CEBS' hearing in that respect, we would insist that this be clearly stated in the Guidelines.

33. *Paragraph 62*: what is meant by "full financial information" and "full assessment" should be clarified, and particularly where it regards acquirers that have already been assessed in that respect.

4th assessment criterion

34. We support the prudential objective of the 4th criterion "compliance with prudential requirements" and acknowledge the concern supervisors may have as regards the risk of the creation of non-transparent group structures. However, we fear that its interpretation (especially with respect to §73) may hinder the clarity of the supervisory assessment as the concerns in question are already addressed by existing prudential requirements. Article 12(3) of Directive 2006/48/EC, indeed, does not authorise group structures, which prevent "the effective exercise of supervisory functions"; Article 143 of the same Directive states that a credit institution may not become part of a third-country group which is not subject to consolidated supervision equivalent to that implemented in the EU.

35. We therefore call on the Level 3 Committees to explicitly refer in their guidelines that this criterion should be interpreted against the afore-mentioned CRD provisions and, in application of the proportionality principle, not to impose additional requirements when the latter have already been complied with by the acquirer and the target institution.

36. *Paragraph 68*: again it should be mentioned that, where relevant, the competent supervisor should take into consideration that the acquirer is an entity supervised in the EEA. As regards the possibility to back the intentions towards the target by commitments, it is important that this be a possibility and not an obligation. We would ask the Committees to delete the list of examples of commitments. Finally, when used, this option should not lead to new commitments but be based on existing ones.

37. *Paragraph 71*: We are concerned that the assessment of the effectiveness of the information exchange between the new group structure and the relevant supervisors introduces a degree of subjectivity which would be contrary to the objective of the Directive. It should therefore be required that supervisors justify their judgement when they would deem that a transaction would render such information exchange ineffective.

38. *Paragraphs 71 to 76*: as far as institutions supervised in the EEA are concerned, the acquirer should not be required to present its whole group structure but only details of that part of its group structure which is concerned by the transaction.

5th assessment criterion

39. *Paragraph 85:* With regard to the reference to countries or territories which have been designated by the FATF to be non-cooperative it should be noted that the FATF has

discontinued the practice of designating and listing "non-cooperative" countries/territories (although we acknowledge that this does not mean that it will not resume this activity in the future, as explained at the CEBS' hearing on 19th September). Nevertheless, the EU Member States have recently reached a common understanding on a list of countries/territories which can be considered to have an AML/TF-framework equivalent to the EU ("EU equivalency list"). For clarity purposes, should reference be made to that list, it would need to be taken into consideration that the list is a "white list" and focused on equivalence with the EU Directives and not specifically with the FATF-recommendations.

40. Therefore countries/territories currently not listed on this "EU equivalency list" may still have an AML/TF framework which conforms to the standards set by the FATF. Specifically, the conclusion must not be drawn that territories/countries not listed on the EU equivalency list have to be categorized to be similar to the now defunct category of designated non-cooperative countries/territories. Rather, particular caution should be taken in the assessment. In general, any future discussions of this issue should be followed closely in order to see how the regulatory authorities will address the significant practical difficulties in detecting a sufficiently substantial suspicion of an AML/TF connection, as this could be a helpful insight for any future discussions with the regulators on the obligations of banks.

Guidance to facilitate coordination and exchange of information between supervisory authorities

41. *Paragraph 96*: we would appreciate some clarifications as to how the respective roles of the acquirer supervisor and the target supervisor will be clearly defined. Would this be through MoUs, Level 3 guidelines, a Level 2 Directive? As highlighted during the above-mentioned CEBS' hearing, the sectoral Directives already require close cooperation and exchange of information amongst supervisory authorities. Thus one possibility could, for instance, be to consider organising the roles of supervisors in the prudential assessment of mergers and acquisitions within the respective MoUs for colleges of supervisors.

42. *Paragraph 98*: it is important to ensure an objective determination of "equivalent supervision". Leaving the competence for the determination of a third-country's supervision to European supervisory authorities may give way to protectionism, which is a barrier to cross-border mergers and acquisitions and which the Directive aims at preventing. Clarifications from the Committees as to how to make such determination would, in our view, consequently be highly necessary.

43. *Paragraphs 99 and 103*: supervisory authorities are "encouraged to open a preliminary dialogue with each other" or to "use secure Internet website and/or e-mail addresses to exchange information". In our view this is not enough committing; communication lines should rather be enshrined through guidelines or MoUs.

44. *Paragraph 106*: this paragraph needs to be aligned with the Directive's provisions and paragraph 6 (ii). "As soon as possible" should consequently be replaced by "within two working days".

Appendix I

45. *Acting in concert*: the currently proposed definition would result in any form of alliance that is formed in the future, to be retrospectively held to this definition. It would be perhaps beneficial to adopt clearer definitions from other EU general law i.e. the Take-over Directive, but we will also need to consider the Transparency Directive provision (Article 10 of 2004/109/EC).

46. *Significant influence*: the proposed definition is too broadly formulated. The fact that having the possibility to appoint one representative on the board of directors is not, in our view, sufficient to conclude that the acquirer has a significant influence. Reference to the CRD definition (threshold of 10%) would avoid a subjective assessment.

Appendix II

47. We welcome that the content of the list of information, which the acquirer should provide to the target supervisor, is defined at European level by the Level 3 Committees. Not only is this consistent with the maximum harmonisation aim of the Directive but it also ensures clarity and transparency of the required information and reduces the room for subjective requirements. Likewise an exhaustive list of information to be provided would reduce the risk of political interference and permit a level playing field across Europe.

48. However, we do not consider that the list, as currently drafted, actually is clear or exhaustive: too many examples are provided and many unclear or too detailed information are requested. Our concerns in these regards are listed as follows:

49. Avoid the use of "e.g.", "etc", "..." and "among others" as in Part I, points 13, 31 & 33 and footnotes n° 19, 20, 22 & 23; Part II (A) points (I)(b), (II)(c), (III)(c) & (III)(d).

50. *Part I, points (2) & (6):* the use of "equivalent" should be avoided. What other documents could indeed these be?

51. *Part I, points (3), (8) & (9):* Clarify "probative evidence" and "identification". What documents have to be provided?

52. *Part I point (5)*: this should be limited in time and to significant activities.

53. *Part I, points (7) and (24)*: it is not clear how the identification of beneficial owners would be done for listed companies. This information could also be obtained from the acquirer's supervisory authority (following the transparency legislations).

54. *Part 1, points (10) & (20)*: the wording "concerning the acquirer and any company ever directed or controlled by the acquirer" is unworkable. We suggest explicitly limiting this requirement in time to the period when the acquirer directed or controlled companies. This is all the more relevant given our concerns on what is relevant in this respect.

55. *Part 1, points (10) & (20)*: insofar as relevant "investigations" are concerned it should be made clear that one needs to be aware of these (ongoing) investigations, which is not always the case

56. *Part I, points (10)(c) & (20)(c)*: to avoid confusion over self requested withdrawals of licenses, which is a natural process of no relevance in this respect, we suggest inserting

"involuntary" as follows: "(…) or the involuntary withdrawal, revocation or termination…"

57. *Part I, points (11), (12), (21), (22)*: What is meant by "evidence of the assessment"? Proof of the outcome of an assessment should in itself be sufficient. The requirement to examine whether an assessment has already been conducted should be limited in time and the period agreed on a case-by-case basis.

58. *Part I, point (14)*: Only ratings of the relevant companies should be provided rather of any company of the group worldwide.

59. *Part I, points (16)(b) & (23)(f)*: we suggest to reword this so that it refers to the target company: "any person entitled to exercise voting rights of the target institution".

60. *Part I, point (17)*: it should only refer to relevant companies that form part of the group. Especially in cases of a holding company of a global group, the amount of information is enormous and the actual relevance in many cases nil. Any reference to investments (any shareholding of more than 10%) should be avoided as this would lead to an even larger amount of non-relevant information.

61. *Part I, point (19)*: this requirement overlaps with n° (6).

62. *Part I, point (20)*: the scope of this requirement should be limited to the proposed acquirer and any person who effectively directs the business of the acquirer. It should not be extended to all companies in the group of the acquirer.

63. *Part I, points (21) & (22)*: The information should be limited to significant previous assessments, e.g. assessments which led to rejections. It should furthermore be restricted to previous assessments over the past 2 years and to assessments of acquisitions in the EEA.

64. *Part I, point (25)*: Providing a detailed organisational chart for entire groups worldwide is impracticable in the case of large financial groups. We suggest amending to refer to parts of the corporate structure that are relevant in relation to the concerned transaction.

65. *Part I, point (26)*: in the same line as the previous comment, "relevant" should be added to qualify the group's supervised entities.

66. *Part I point (29)*: it should be clarified what is meant by "conflict with the target supervisor".

67. *Part I, point (34)*: we note that some information of shareholder's agreements is confidential and not relevant for assessing a proposed acquisition. This point should be accordingly amended.

68. *Part II footnote n° 25* should be clarified.

69. *Part II, point B (a)(III)*: what information is meant here is not clear. We wonder whether this is e.g. a reference to written guarantees.