EUROPEAN SAVINGS BANKS GROUP
GROUPEMENT EUROPEEN DES CAISSES D'EPARGNE
EUROPÄISCHE SPARKASSENVEREINIGUNG

DOC 520/05

Brussels, 10 May 2005

VCI

European Savings Banks Group (ESBG)

Establishment of a Mediation Mechanism: A Response to CESR's Call for Evidence

Ref.: CESR/05-253

Rue Marie-Thérèse, 11 • B-1000 Bruxelles • Tél: (+ 32 2) 211 11 11 • Fax: (+ 32 2) 211 11 99
E-mail : first name.surname@savings-banks.com • Website : http://www.savings-banks.com

Profile European Savings Banks Group

Established in 1963 and based in Brussels, ESBG represents the needs and interests of its members and generates, facilitates and supports the management of cross-border banking projects. ESBG has 24 members from 24 pan-European countries, comprising more than 900 individual savings and retail banks, operating 63,000 branches and employing 691,000 people. At the start of 2004, total assets of ESBG members amounted to €4,345 billion and total non-bank loans to €2,205 billion. ESBG members are typically savings and retail banks with a customer-oriented, socially responsible approach and a market focus of individuals, households, SMEs and local authorities.

1. GENERAL REMARKS

The ESBG would like to express its support towards the establishment of a mediation mechanism. Such a mechanism is perceived as beneficial as it should facilitate an effective solution to the disputes between national securities authorities from different Member States. In the long run, this should lead to a better application of the EU legislation and to further integration of the financial markets.

2. KEY FEATURES OF A MEDIATION MACHANISM

The crucial point which should be observed at all times is that the mediation mechanism must pay full respect to the competence of the European Commission at Level 4 and it should not interfere with the respective roles of the Commission and the European Court of Justice in the interpretation and enforcement of EU law. Furthermore, the national sovereignty and competence of the Member States must also be respected.

The mediation mechanism could be monitored by an independent body within CESR (e.g. a Committee). It could function in a way that all the parties involved in a conflict present information to explain their standpoints to the mediation body, which would then propose a solution. If any of the involved parties disagree with the proposed solution, it should have the right to file a formal complaint and initiate a legal action. If necessary, the mediation mechanism could refer the matter to the Commission or the ECJ in the event that it couldn't effectively resolve a dispute.

It is essential to keep in mind that the decisions reached through the mediation mechanism are legally non-binding, as they would otherwise be capable of undermining the competence of Member States. Therefore, a superior supervising authority (e.g. a ministry of finance) must be assigned with the right to overrule the decision made through the mediation mechanism.

As the mediation mechanism should settle disputes between authorities, with no automatic right or referral by market participants, there is a clear need to protect market participants' interests. They should have the right to inform their home authorities of any cross-border business in which they are involved and where they feel that their rights are not fully

observed. The home authority should then act on behalf of the market participant and try to resolve the conflict with the host authority. In the case where such an effort would not be effective, it should refer the matter to the mediation mechanism. Moreover, market participants should be granted the possibility to appeal before national courts against a decision made through a mediation mechanism. It should still be defined whether the mechanism created by home authorities to receive information by market participants should be shaped as a mechanism of complaints, or as a mechanism to receive information of the market participants regarding their experiences in cross-border cases.

3. SCOPE FOR MEDIATION

As a rule, the mediation mechanism should focus on ex-post mediation procedures. However, ex-ante mediation might be justified when it is clear that a dispute cannot be avoided in the near future. The mediation mechanism should not be consulted before conflicting positions are clearly formulated and affirmed. Only when there is enough information available about the dispute and it is clear that at least one of the parties is clearly breaching the Community law applicable to cross-border issues, may the mediation body decide to start the mediation process.

The mechanism should cover all types of cross-border disputes between authorities in connection with the EU securities legislation (including the ones under Articles 16.2 and 16.4 of the MAD) and therefore no extra mechanism is necessary in this respect.

The mediation mechanism should not be limited to operational disputes regarding the mutual recognition of decisions and it should encompass other categories of disputes as well (for example those arising from the provisions of the MiFID, Transparency Directive, MAD, Prospectus Directive or Takeover Bids Directive).

4. MEDIATION PROCEDURE

In order to simplify the mediation mechanism and to reduce the operational costs, a single procedural framework for all issues should be adopted. However, a “fast-track” process should be kept as an option for certain cases in which a solution should be given with priority to avoid significant damages.

It should be mandatory for CESR members to refer a case to the mediation mechanism before initiating a legal action at the EU level. This is considered to be the essence of a mediation mechanism, to avoid possible claims arising from disputes at an early stage.

Access of a dispute to the mediation mechanism should not be subject to any quantitative or qualitative conditions or thresholds. However, a mediation mechanism must be granted the right to reject claims for which it believes that the mediation is not necessary (for example in proposed ex-ante mediation procedures).

Information concerning an ongoing procedure should remain confidential until a solution is proposed. In order to ensure transparency, the decisions should be publicly disclosed.