



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

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European Savings Banks Group (ESBG)

Response to CESR Consultation on Mediation Mechanism

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Profile European Savings Banks Group

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of €4,345 billion (1 January 2004). It represents the interests of its members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG members are typically savings and retail banks or associations thereof. They are often organised in decentralised networks and offer their services throughout their region. For decades ESBG members reinvest responsibly in their region and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



1. GENERAL REMARKS

The ESBG would like to thank CESR for the opportunity to comment upon the envisaged establishment of a mediation mechanism. Such a mechanism could be beneficial as it should facilitate an effective solution to the disputes between national securities authorities from different Member States. To this end, the CESR Consultation Paper offers a comprehensive and analytical basis for further discussions on the possible implementation of a mediation mechanism. However, we would like CESR to provide a clearer description of cases and situations in which the mechanism could be deployed, in order to avoid legal uncertainty and to keep a balance of mediation and other ‘Level 3’ measures in the longer run. Especially as regards decisions in cases of mutual recognition disputes, the practical necessity and the scope of mediation mechanism is not fully clear to us.

As stated in our response to CESR’s call for evidence in May, the crucial point which should be observed at all times is that the mediation mechanism must not interfere with the respective roles of the Commission and the European Court of Justice in the interpretation and enforcement of EU law. It is essential to keep in mind that the decisions reached through the mediation mechanism are legally non-binding, as they could otherwise undermine the competence of Member States. We therefore welcome the firm commitment of CESR to these principles, expressed both in the Consultation Paper and in the public hearing in Paris on 21 November 2005.

2. SPECIFIC QUESTIONS

Question 1:

Do you agree with the key features proposed by CESR?

We agree with the key features proposed by CESR. In particular, we share CESR’s view that disputes regarding mutual recognition decisions will probably be a major source of “hard cases” as to the practicability and a legal certainty of the mediation mechanism. We fully agree with CESR that it will not be appropriate to expect a CESR member to revisit an individual regulatory decision already taken through the mediation process. However, as the purpose of mediation in such cases would be to settle acceptable terms for the disputed issues



for the future, we feel unable to clearly distinguish such cases from ‘Level 3’ work of CESR Expert Groups. We would rather assume that in cases where a CESR Member has deviated from an existing CESR ‘Level 3’ recommendation this issue should be clearly addressed within the respective CESR Expert Group. In cases of continuous disregard of existing ‘Level 3’ recommendations this might give reason to call upon the Commission in order to take action against that CESR Member or its Member State at ‘Level 4’ of the Lamfalussy procedure.

To us it is not fully clear why a mediation mechanism is needed in the aforementioned cases. In other words, for the time being we are not fully convinced that there is a case for implementing a mediation mechanism (at least) in cases of disputes regarding mutual recognition.

Finally, we believe that it should be analysed whether it would be better, once the mediation process is ended, to maintain the mediation process and its results confidential.

Question 2:

Are there examples of other potential disputes or cases where agreement between competent authorities is required, in addition to the ones set out in the last bullet point in par. 41 that should be considered for mediation?

No. On the contrary, we would like to note that the mentioning of “other potential disputes or cases” in the last bullet point creates some uncertainty about the actual scope of the mediation mechanism. This should rather be avoided although the examples mentioned in brackets sound fairly reasonable.

Question 3:

Should the negative criteria set out in the first bullet point in par. 42 apply to legal proceedings, which are initiated by the CESR Member in relation to an underlying dispute to which that CESR Member is party?

Yes. We consider that mediation should be excluded in cases of legal proceedings initiated by a CESR Member who is at the same time a party in an underlying dispute.

**Question 4:**

Should the mediation mechanism be made available to competent authorities that are not CESR Members?

Yes, subject to further terms and conditions we consider that the mediation mechanism should be available to competent authorities that are not CESR Members, as this may benefit greater convergence at 'Level 3'.

Question 5:

Do you have any comments on the proposed role of a gatekeeper?

While we consider that the gatekeeper may be a good barrier for those cases in which the parties have not made all the efforts to reach a solution, it should be taken into consideration that especially in cases of disputes regarding mutual recognition decisions the gatekeeper will have a significant power of discretion as to whether the case qualifies for mediation or should rather be deferred to a CESR expert group. For this reason, it is important to draw a fairly clear borderline between mediation and more general CESR 'Level 3' work at the outset of implementing any mediation mechanism.

Question 6:

Which of the options in par. 53 is most appropriate in your view, or could there be a combination of them?

We consider that the first option is most appropriate. Given that cases which qualify for mediation will be rather rare, we believe that this option is simpler and it will contribute to a better ad hoc-running of the procedure.

Question 7:



Could proceedings on similar issues in the framework of the EU SOLVIT system (see Annex 2 for a description of that system) be relevant for disputes subject to mediation?

In your view, if a CESR Member has turned down a mediation request from a market participant, would it be useful to inform CESR?

Subject to further consideration, it is our view that proceedings on similar issues in the framework of the EU SOLVIT system may serve as a reference for disputes subject to mediation.

Yes, we consider that CESR should be informed about the Members that have turned down a mediation request and about the specific arguments given when turning down the request.

Question 8:

Do you have any views on the role of the Commission envisaged in paragraphs 66 and 67?

Is there any further input to the CESR mediation process, in addition to the mechanisms mentioned in pars. 30 and 68, that could be usefully provided by market participants?

We consider that this role may help to have similar views in connection with specific issues. In principal we consider that the mentioned inputs from CESR Market Participants Consultative Panel to the actual case dealt within the CESR mediation process might be sufficient. We would, however, recall that the involvement and consultation of the market in the elaboration of CESR ‘Level 3’ guidelines should not be pre-empted by some kind of general “standard setting” within the course of mediation processes.

Question 9:

Do you agree with the proposed procedural framework of the mediation mechanism?

Do you agree with the mediation process outlined in Annex 3 for cooperation and information exchange cases?

Yes, we agree with the proposed procedural framework of the mediation mechanism.

We also agree with the mediation process outlined in Annex 3.