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Comments of the Zentraler Kreditausschuss[1] on a CESR Mediation Mechanism

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[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,300 banks.

1. The Zentraler Kreditausschuss read the September 2005 consultation paper on the CESR Mediation Mechanism with great interest. The paper and the hearing on November 21 offer a good basis for further discussion of the political and legal issues involved.

2. We are convinced that a mediation mechanism has the potential to enhance co-operation between supervisory authorities and promote convergence in areas where European law is currently interpreted differently across member states. As we pointed out once again at the hearing, however, we firmly believe such a mechanism must not be used to establish rules of substantive law which will be binding on market participants or CESR members. We therefore warmly welcome the fact that CESR shares this view. The paper's insistence that the mechanism will not affect the rights of the European Commission or the European Court of Justice is also to be welcomed. We think it is a good starting point for further discussion to distinguish between issues which are of a bilateral nature and therefore lend themselves to being solved by such a process and issues which are of interest to a number of regulators and/or market participants. The latter should be dealt with on other platforms, such as Level 3 discussions within CESR, or by the Commission. In short, we think that such a distinction is practicable and should be spelt out more clearly in the paper.

3. Another issue of major concern to the German banks is the role to be played by market participants. As long as the mechanism's scope is confined to disputes between competent authorities, there is no need for market participants to be involved.

4. Should this scope be exceeded, however, and the mechanism also seek to clarify questions of substantive law with a direct or indirect effect on the legal position of market participants, we believe it will be essential for them to be given the opportunity to participate in the cases involved. This would apply, for example, if the Commission were asked to deliver an authoritative interpretation of the law. The most important point in these circumstances will be that the procedure and the status of the proceedings are transparent. Those directly affected should, moreover, be able to participate actively in the proceedings and put forward their position. It must also be borne in mind that, in cases involving an interpretation of substantive law, the competences of the Commission or the European Court of Justice could easily be affected.

5. Given these procedural issues which require clarification, the German banks take the preliminary view that the scope of the mediation mechanism should be limited to issues of co-operation between competent authorities. This would enable both regulators and the markets to gain experience with the mechanism before discussing its possible extension and the prerequisites for such a step. Against this background, the scope as envisaged in par. 41 of the consultation paper is too broad. While it is acceptable for the fourth bullet

point to cite specific areas of potential uncertainty regarding the competent authority, the envisaged catch-all phrase ("other potential disputes or cases where agreement between competent authorities is required") should be dropped because it is too all-encompassing.

6. At a later date, after gaining initial experience with the mechanism, an extension of the scope could be considered. Market participants would have to be given a clearly defined role and particular care would need to be taken to ensure that they had access to all the information they required. For the time being, however, we would ask for the scope of the mediation procedure to be described clearly and exhaustively.

7. It is not sufficient for the second bullet point in par. 42 to exclude only disputes concerning issues already referred to, or being dealt with by, CESR at Level 3. Disputes must also be excluded if they concern issues which, due to their general relevance, are matters that should be handled at Level 3 of the Lamfalussy process. Although the hearing gave some indication of how the relationship between the mediation mechanism and Level 3 of the Lamfalussy process is regarded, we would like to see a clear carve-out in the paper for abstract legal questions. It must be ensured that questions of such relevance are dealt with in an open and transparent manner and that market participants are consulted.

   In addition, it would be helpful if CESR spelt out more specific criteria for limiting the scope, especially with regard to the work of CESR-Fin and CESR-Pol.

8. We believe it would be preferable from a cost-benefit angle for the gatekeeper to put together and convene panels on an ad-hoc basis. Establishing a standing panel, on the other hand, would risk creating a costly administrative apparatus although there is no evidence at present to suggest a need for a permanent body of this kind.