



FEDERATION BANCAIRE DE L'UNION EUROPEENNE
BANKING FEDERATION OF THE EUROPEAN UNION
BANKENVEREINIGUNG DER EUROPÄISCHEN UNION



EUROPEAN SAVINGS BANKS GROUP
GROUPEMENT EUROPEEN DES CAISSES D'ÉPARGNE
UROPAISCHE SPARKASSENVEREINIGUNG



EUROPEAN ASSOCIATION OF COOPERATIVE BANKS
GROUPEMENT EUROPEEN DES BANQUES COOPERATIVES
EUROPÄISCHE VEREINIGUNG DER GENOSSENSCHAFTSBANKEN

DOC 274/05

16 March 2005
ROH/JOY

Securities Clearing and Settlement Commission Impact Assessment Input from the ECSAs¹ on-Governance/Competition Law

The current discussion on the possible content of a framework Clearing & Settlement Directive is very much focussed on the question whether potential cross-subsidisation between the so-called monopolistic „core services“ of a CSD and its value-added-services (for which there is a competitive market) should be prevented by some kind of *ex-ante* measures (e. g. „unbundling“ or a price regulation by the competent supervisory authority - comparable to the control exerted on monopolistic enterprises in the energy sector) or whether an *ex-post* control pursuant to general competition law is sufficient in this respect. So far, it appears that there does not exist any reliable survey or legal opinion examining specifically the applicability of general competition law to such cases.

The European Credit Sector Associations (ECSAs) believe that an analysis of the above topics carried out by the Commission in the course of its Impact Assessment on a future clearing and settlement Directive would make a significant and objective contribution to the abovementioned discussion.

Preferably such an analysis should be based on a **case study** approach that examined various possible constellations where cross subsidisation can occur.

Example:

Having regard to the fact that:

- CSDs offer their users the settlement of registered shares, including book entry and data transfer (identification of vendor and purchaser), to the share register,
- such service can be regarded as a monopolistic “core service”,
- the number of transactions in registered shares in the market covered by the CSDs has increased significantly throughout the last five years (a particularly significant trend in Germany) and that consequently CSDs have benefited from “economies of scale” (constant fixed costs resulting in lower costs per individual settlement transaction),

¹ The ECSAs are: The European Banking Federation, The European Savings Banks Group and the European Association of Cooperative Banks

- the fee charged by CSDs for settling a single transaction in a registered share has nevertheless remained the same, and finally
 - the CSD itself or another company of the group in which the CSD is a member, offers value-added services in the clearing & settlement area:
1. Is there a case for challenging such a practice by means of an ex-post control under “general” competition law in the European Union?
 2. If yes, is it realistic to assume that a user can prove excessive pricing and/or undue restrictions on access in order to pursue its claim?
 3. If yes, how long will it take on average until the user gets a binding judgement of a national law court or a decision of the Commission bringing the anti-competitive behaviour to an end? Is it likely that remedial actions may follow too long after the infringing conduct to have any significant commercial effect?

These questions should be answered in the light of the fact that

- None of the mergers of ICSDs with CSD’s that took place in Europe in the recent past have reached the turnover threshold to be submitted to the Commission for consideration under European Competition Law,
- User Group’s established by CSD/ICSD for governance purposes are not granted any rights to influence the CSD/ICSD pricing policy,
- the recent competition case in the area of clearing and settlement (DG Comp. vs. Clearstream-June 2004) showed, for the first time, that there can be a case for infringement of competition law in the C&S field. The Commission also recognized that there is no Community case law or jurisprudence dealing with the competition analysis of clearing and settlement and that there is a wide-ranging debate on clearing and settlement within different institutions and fora in order to better define the role of the different protagonists in the industry (see EU press release n. IP/04/705 - 2 June 2004).
- Exclusive arrangements exist with respect to the clearing and settlement of securities transactions in almost every member state, as documented in the Overview of EU 25 securities trading, clearing, central counterparties and securities settlement commissioned by DG Competition from London Economics (dated February 2004).

For these reasons, there are apparently no up-front-means in place for a soft ex-ante control of any anti-competitive behaviour shown by a CSD/ICSD. Accordingly, the ECSAs recommend strongly that the Commission also investigates in its Impact Assessment whether current EU Competition Law is adequate to address public interest and user needs in a securities clearing and settlement industry that will be dominated by ever increasing consolidation or whether some form of ex-ante governance rules are considered appropriate.