

**Swedish Presidency of the
European Union**

European Parliament

European Commission

Brussels, 30 November 2009

Subject: Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority (the “Regulation”)

Dear [●],

The Council of Bars and Law Societies of Europe (the “**CCBE**”) represents more than 700,000 European lawyers through its member bars of the European Union and the European Economic Area. The CCBE regularly responds, on behalf of its members, to consultations on policies relating to European citizens and lawyers.

On 23 September 2009, the European Commission issued a proposal for a Regulation of the European Parliament and Council to establish a European Securities and Markets Authority (the “**Authority**”).

The CCBE welcomes this initiative by the European Commission which is part of an overall discussion initiated at Community level in response to the recent financial market crisis. The CCBE warmly welcomes this proposal for a Regulation, which should lead to truly European financial supervision.

However, the CCBE would like to draw attention to a technical issue which the proposed regulation raises, and which derives from the specifics of the Community law on takeover bids, which operates with reference to national law more often than in other matters (such as, for example, prospectuses).

Thus Article 19 of Directive 2004/25/EC on takeover bids, establishing a "contact committee" between Member States with a view to the harmonisation of EU law on takeover bids, provides specifically that “*It shall not be the function of the contact committee to appraise the merits of decisions taken by the supervisory authorities in individual cases*”. During discussions on the adoption of Directive 2004/25/EC, Member States indeed agreed that only national authorities would remain responsible for individual decisions.

However, under Article 1 paragraph 2 of the draft Regulation, the future European Securities and Markets Authority would have the powers, inter alia, to ensure proper implementation of Directive 2004/25/EC by national authorities.

Article 9 of the proposal determines the scope of powers of the Authority when it finds that a national financial markets authority is not properly enforcing Community law and states that it can, among others, “adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Community law including the cessation of any practice”.

The CCBE believes that such a power of the Authority to take individual decisions is inappropriate in terms of takeover bids. The procedures for takeover bids should in practice make it possible for the market, national authorities and courts to intervene quickly within a secure legal framework. However, the overlapping control of takeover bids by two supervisory authorities would result in delaying the proceedings for takeover bids and create a risk of conflicting decisions affecting the legal certainty of operations which already are complex.

Given the above, the CCBE suggests that the future European Securities and Markets Authority should not be able to adopt individual decisions addressed to financial institutions in relation to takeover bids. The legal certainty of transactions and the promptness required in such operations dictate that only national authorities should remain competent in the matter. This of course should not prevent the European Securities and Markets Authority from adopting recommendations and positions on the subject of takeover bids. It could also, if deemed appropriate, make its position publicly known when it believes that national authorities have not properly enforced Community law on takeover bids and/or intervene in judicial or administrative proceedings initiated before national courts by the parties to a takeover bid.

Accordingly, the CCBE suggests that Article 9 paragraph 6 of the proposed Regulation should read as follows:

| Proposal from the Commission | CCBE Amendment proposal |
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| Article 9 paragraph 6 | Article 9 paragraph 6 |
| <p>Without prejudice to the powers of the Commission under Article 226 of the Treaty, where a competent authority does not comply with the decision referred to in paragraph 4 of this Article within the period of time specified therein, and where it is necessary to remedy in a timely manner the non compliance by the competent authority in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the legislation referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Community law including the cessation of any practice.</p> | <p>Without prejudice to the powers of the Commission under Article 226 of the Treaty, where a competent authority does not comply with the decision referred to in paragraph 4 of this Article within the period of time specified therein, and where it is necessary to remedy in a timely manner the non compliance by the competent authority in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the legislation referred to in Article 1(2) with the exception of Directive 2004/25/EC, are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Community law including the cessation of any practice.</p> |
| <p>The decision of the Authority shall be in conformity with the decision adopted by the</p> | <p>The decision of the Authority shall be in conformity with the decision adopted by the</p> |

Commission pursuant to paragraph 4.

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When the Authority finds that the requirements of Directive 2004/25/EC are not met by financial institutions through a takeover bid, it may, if deemed appropriate, make public its position and / or intervene in judicial or administrative proceedings which would – if applicable – be initiated before national courts by the parties to a takeover bid

Justification

The directive on takeover bids sets a framework for harmonisation of EU takeover law and makes numerous references to national laws including in respect of decisions taken by individual supervisory authorities. It would therefore be contrary to Directive 2004/25/EC to confer individual decision power to the European Securities and Markets Authority. In addition, such power could seriously harm the functioning and legal certainty of takeover bids within the European Union. Indeed, the duration of the procedure of investigation, recommendation and, where appropriate, individual decision, are incompatible with the promptness required for takeover bids.

Yours faithfully,



Anne Birgitte Gammeljord
President