

**International Swaps and Derivatives Association
International Capital Market Association
Norwegian Securities Dealers Association
Bankers and Securities Dealers Association of Iceland
Danish Securities Dealers Association
Finnish Association of Securities Dealers
London Investment Banking Association
Swedish Securities Dealers Association
The Bond Market Association**

Response to CESR Paper for Comments on Mediation Mechanism- September 2005

5th December 2005

Dear Mr Demarigny,

The above-listed Associations would like to renew their encouragement to CESR in establishing effective mechanisms to increase the efficiency of supervisory arrangements and provide fast and effective remedies to unjustified obstacles to the provision of cross border services which arise from inconsistent or uncoordinated application of EU legislation.

The Associations welcome the fact that CESR has confirmed its previous position whereby any decision to be taken under the mediation mechanism will not be binding on the parties involved. If it is to be useful, mediation must be an entirely voluntary process, without any constraints or compulsion. For the same reason, the Associations also welcome the deletion in the new CESR draft of the proposal put forward in the call for evidence to require competent authorities to refer a case to the CESR mediation mechanism as a precondition to initiate an action at EU level (Paragraph 6, third bullet, second hyphen of the April paper).

The Associations would like to stress from the outset that the mediation mechanism proposed by CESR should not be used as a means to delay the resolution of disputes. Any "explanation" requirement needs to be consistent with the mediation mechanism's purpose of promoting supervisory convergence and trust between regulators, and should not, as already noted, be considered as a precondition for initiating action at a more formal EU level.

The Associations would also like to express their concerns with respect to the risk that the proposed procedure might not adequately protect the rights of individual supervised firms to confidentiality. Whatever mediation mechanism CESR may consider should respect the strict confidentiality requirements in EU directives and national laws. The directives and national law require strict confidentiality of firm's information, subject to very limited "gateways" which allow disclosure in particular circumstances which would not seem to be available to cover disclosures pursuant to the mediation mechanism. A CESR member should obtain the supervised firm's consent before disclosing confidential information about the supervised firm to other CESR members (or their staff) acting in the capacity of gatekeeper, mediator or otherwise in relation to the mediation mechanism (or to staff of CESR itself or the European Commission).

In some places, the paper suggests that it may be sufficient to withhold the supervised firm's name in order to make information anonymous e.g. when making disclosures to the European

Commission. However, in many cases, it will be possible (either contemporaneously or subsequently) to identify the relevant firm from the other facts given even if the firm's name is withheld. The relevant competent authority should only disclose information without the firm's consent where it is satisfied that there is no risk to the firm's rights to confidentiality.

Question 1:

Do you agree with the key features proposed by CESR?

As regards the distinction between the two possible ADR (Alternative Dispute Resolution) models proposed in the paper (facilitative and evaluative) the Associations have the following comments.

It is true that neither the facilitative nor the evaluative model proposes binding decisions on the parties involved. Nor would they pre-empt or call into question the general mechanisms provided for under the EU Treaty for interpreting, monitoring and enforcing EU law. Still, where compared to the evaluative approach, the facilitative approach appears more respectful of the self-determination and national sovereignty of the competent Authorities involved and of their respective legal systems, and is also more consistent with mediation as a voluntary process.

Moreover, recourse to the facilitative model appears more suitable for disputes pertaining to the exchange of information and cooperation, especially with respect to cases not covered by specific provisions in the relevant directives (Art. 16 MAD and Art. 25 MIFID), in that it would also better preserve the confidentiality of the supervisory information which are the subject of the dispute. As a matter of fact, the facilitator would not need to be made knowledgeable of the requested information.

Recourse to the evaluative approach could still be explored with respect to cases of exchange of information and cooperation provided for under internal market directives or regulations (such as Art. 16 par. 2 and par. 4 of the MAD and Art. 25 par. 3 of the MIFID) as well as with respect to disputes concerning financial information and the mutual recognition of decisions.

As to the activation of the procedure, the Associations wish to confirm the position expressed in their response to the call for evidence whereby each competent authority should have total freedom to decide, on a case-by-case basis, whether it wishes to use mediation. Requiring a commitment from CESR members to provide a substantive explanation about the reasons for not accepting mediation or for not conforming to a decision taken under the mediation mechanism could reduce this freedom, and thereby CESR members' willingness to make recourse to the mechanism. We suggest that any such mechanism should be restricted to a statement by the requested authority of the reasons for rejecting the request, and a requirement for the competent authorities concerned to state quickly whether or not they accept mediation. Compliance with the "accept or explain" requirement may also entail disclosure of confidential supervisory information much beyond the members involved in the dispute. Even if supervised entities consented to extended disclosure of their proprietary information, the restrictions on disclosure of supervisory information arising from current directives cannot be overtaken, not even with the consent of the supervised entities.

In summary, the Associations' view on the key features that CESR enumerates is as follows:

Not legally binding: yes, essential;

CESR Member initiation: yes;

No mandatory participation: yes;

Expectation of participation: likely to be incompatible with the voluntary nature of the mechanism, and the confidentiality requirement applying to supervisory information as regards disputes on cooperation and exchange of information.

Reporting of unaccepted mediation: yes;

Discretion whether or not to accept the result: yes;

No calling into question mutual recognition of competent authorities' decisions: yes;

Referral of wider concerns to CESR: yes, but not in a way that inhibits voluntary use of the mechanism;

Procedural principles: Rapid, Efficient, Suitable, Fair, Confidential: yes, especially the last;

No formal role in legislative interpretation: yes

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?

We would ask CESR to clarify how it sees mediation on mutual recognition being implemented in practice. It is vital that mediation on mutual recognition does not undermine the certainty of the principle of mutual recognition, and it is difficult to see how it will be possible to distinguish the principle from the practical application.

The nature of a voluntary mediation mechanism is such that there is no particular need to specify in advance the types of dispute which it could be used for, but we consider that its possible extension to other types of dispute should not be considered until a later stage.

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 a party?

The Associations consider favourably the possibility for CESR members to provide interim solutions whenever feasible, also to disputes in connection with which a legal proceeding has been initiated before a national court or the ECJ or where the issue underlying the dispute is being dealt with by CESR at Level 2 or 3. The commencement of a concurrent legal proceeding should not prevent mediation where the relevant EU or national provisions still allow for an amicable out of the court settlement of the dispute.

Moreover, whenever the solution of a dispute is beyond a CESR member's responsibility under its domestic legislative framework, the CESR member should undertake to take any possible initiative at domestic level in order to remove potential obstacles which impede accommodation of a legitimate request from a foreign competent authority, especially where these obstacles impede the smooth functioning of the mutual recognition principle.

Finally, the Associations agree that the mediation mechanism should not be used by a (host) competent authority to halt or delay the commencement of business into its territory by an entity duly authorised in its home member state under community law. Where the host authorities consider that an authorisation granted by the home authorities runs contrary to the conditions set out in the relevant directives or regulations, they can start a procedure before the ECJ to verify that the relevant directive has been properly transposed and implemented in the home member state. However, pending a decision from the ECJ, the host authorities cannot take any precautionary measures to impede the provision of cross-border business other than those envisaged by existing directives in the event of breaches of provisions falling within their supervisory responsibilities. In conclusions, the Associations consider that any action to be undertaken by CESR in this field should be aimed at removing obstacles which impede or delay the provision of cross-border business, rather than introducing new administrative procedures such as pre-clearing, which would preclude rather than encourage the innovation in products or services.

Question 4:

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

The Associations consider that, in order to maximise the scope for mediated resolution of disputes, it would seem sensible to make mediation facilities available to all relevant competent authorities within the EEA, regardless of whether they are CESR members or not.

Question 5:

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

A Gatekeeper may be a sensible means of ensuring that the mediation mechanism does not come into effect without thorough application first of prescribed procedures. The Associations consider, however, that any such pre-clearance of a dispute should not delay its final solution and that access to the mediation mechanism should not be blocked by a Gatekeeper if both parties want to use it and think that it is an appropriate method to resolve their dispute.

Moreover, the Gatekeeper should not be involved in the merit of the dispute. In particular he should not duplicate the work of the mediator(s).

Finally, as to the preconditions to be verified by the Gatekeeper to allow mediation on disputes concerning mutual recognition, it is not clear whether CESR proposes refusing mediation where a dispute questions “the fundamental principle of the principle of mutual recognition in a systematic way”. Indeed the Associations would like to express doubts about the possibility itself for members to question the principle of mutual recognition “in a systematic way”. On the assumption that a member cannot legitimately deny access to its market by not recognising a decision from another member, any such case should be addressed promptly and firmly by CESR and the EU Commission by initiating an infringement proceeding before the ECJ, long before any such dispute even starts to show a systematic feature. Whenever notwithstanding the above the principle of mutual recognition is systematically violated by a member, CESR should promptly appoint an Expert Group to deal with the underlying issue and take all steps to remove immediately any obstacle to the full operation of the principle of mutual recognition until the above Expert Group reaches an agreement on common standards or understanding or the case is decided by the ECJ.

Question 6:

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

A standing panel with the option of specialised expertise seems preferable, as it would best combine consistency of decision making with relevant expertise.

By the same token, the Chair of a relevant Expert Group should play the role of specialist Gatekeeper as this is proposed by CESR to be the case for the Chairs of the CESR-Pol and CESR-Fin. Moreover, the need to “avoid any particular legal or cultural view from influencing outcomes” should be common also to dispute concerning cooperation and financial information. Where there is any such a risk with respect to these disputes, the CESR-Pol Chair or the CESR-Fin Chair, respectively, should delegate the role of Gatekeeper to another member.

As regard the requirements for the selection of mediators or the composition of the panel (para. 54), the Associations have the following suggestions:

Mediators/panellists should also have expertise in the different legal traditions (civil law vs common law traditions) of possible members involved in a dispute;

There should be clear procedures for recusation (disqualification) of a mediator (or a member of a panel) by a party to a dispute, as well as pre-determined situations where mediators/panellists themselves should abstain from providing mediation activities.

As to the Differentiated procedures in pars 51 and 52, we refer to our reply to Q1.

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?

The Associations believe that CESR may add value to the EU SOLVIT procedures in the securities sector in that it may decide to mandate an Expert Group to address a specific issue raised to its attention by a market participant where it considers that this issue amounts to a systematic violation of the principle of mutual recognition.

The Associations would like to stress that any form of transparency in the mediation process should neither undermine the confidentiality of any proprietary information (which could only be disclosed with the consent of the relevant supervised firm) nor allow access to supervisory information beyond the competent authorities involved in an investigation.

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 para. 30 and 68, that could be usefully provided by market participants?

Involving the Commission in mediation could impair the facilitative nature of mediation. If mediation is to be useful as a voluntary process for resolving disputes, there should be no mechanism according to which the Commission can influence the process.

The Associations would welcome any form of input into the proceeding coming from market participants, as the main points of difficulty in the interpretation or application of EU law arise from the interpretations that competent authorities impose on firms.

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?

The Associations agree with CESR's proposals concerning the timing of the proceedings, publication of their outcomes as well as the mediation process subject to the comments set out in the answers to the previous questions.

As to the mediation mechanism described in Annex 3 of the CESR paper, the Associations wonder whether the possibility for the requesting authority to issue a preliminary statement of "non compliance" with the CESR S-G is consistent with the provisions in the CESR and IOSCO Multilateral Memoranda of Understanding which require competent authorities to keep confidential the transmission itself of a request of cooperation. It is the Associations' understanding that under the above-mentioned MoUs, the confidentiality requirements to which competent authorities are bound as regards supervisory information covers both the content of a request of cooperation and the request itself.