

May 2005

## ESTABLISHMENT OF A MEDIATION MECHANISM

### **CESR'S CALL FOR EVIDENCE - APRIL 2005**

#### **COMMENTS OF EURONEXT**

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In order to ensure a fair and consistent implementation of the Financial Services Action Plan in Europe, Euronext regards it as essential that enforcement of the measures adopted at a European level is efficient in all Member States. Where CESR has adopted non-legislative Standards, fair and consistent implementation is also crucial.

In that perspective, Euronext welcomes CESR's initiative to consider the creation, as a complement to the Lamfalussy process, of a **mediation mechanism** aiming at resolving conflicts that may arise **among securities regulators**. Such mechanism would be useful in order to deal with cross-border disputes between national regulators that may result from any failure to implement European financial law satisfactorily or from any inappropriateness or inconsistency in its application. Without prejudice to the European Institutions' competences in that respect, this could be a preliminary and more rapid, thus efficient, step in trying to reach a co-ordinated implementation of such legislation and supervisory convergence among regulators. Euronext recognises that failure to implement EU legislation satisfactorily may also involve Member States' legislative processes. Although such defects are by definition outside CESR members' competence, a mediation mechanism could serve to draw a defect to the attention of the Member State(s) concerned and to the Commission.

In addition, we consider it would also be necessary to envisage a **complementary mediation process** that would be dedicated to resolving disputes **between regulators and securities industry participants**. There is a need to establish a voluntary, fast and flexible process to deal with the cross-border regulatory difficulties that may generate conflicts between market participants and the national regulators concerned.

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As regards the key features of the mediation mechanism proposed by CESR, we understand that the current intention is that disputes between regulators should be resolved within an internal mediation mechanism among CESR's members.

We believe, nevertheless, that market participants should be involved at an appropriate stage in the process, in order to ensure that such mechanism benefits from practitioners' experience and takes full account of the practical aspects of the issues considered. It would also reduce the risk that such conflicts become political questions between national authorities and provide more credibility and hence efficiency to the mediation. In that perspective, it seems desirable that independent experts from the industry be consulted in the course of the procedure: they could for instance be appointed to be members of the "case panel" - though, of course, without any power of decision.

Moreover, it is essential that cases submitted to or resolved by CESR's mediation mechanism shall be subject to a certain level of transparency. Therefore, the proceedings, decisions and related information should be published in order to inform the industry thereof (for example on CESR's website), without prejudice to the concerned third parties' anonymity.

The scope of CESR's mediation mechanism should comprise the resolution of all types of disputes arising between its members in the course of their duties. There could, for example, be conflicts between national regulators when one of them fails to exchange information when required, or is more generally reluctant to cooperate with its peers when the European legislation or CESR standards require it.

More generally, the mediation mechanism would also be an efficient way of highlighting inconsistencies in the interpretation and application of European legislation or of CESR Standards by the various regulators, and provide a way to resolve such inconsistencies, as a first step and without prejudice to the European institutions' competences in that respect.

In order to remain as efficient as possible, the mediation within CESR's mechanism should, whenever difficulties emerge, take place *ex-ante*. Once decisions have been made and made public, it becomes difficult politically to reverse them. Nevertheless, *ex-post* review should also be possible.

Concerning the mediation procedure within CESR, and in view of ensuring the most simple and rapid operation possible, a single procedural framework could be envisaged. Nevertheless, a fast-track procedure could be set up in case of situations that require an urgent resolution. The mediation process should in any case remain flexible and expeditious to offer a real benefit to the industry as a whole.

A particularly important criterion is that the procedure should take account of the need for regulators to respond positively to innovation.

Access to mediation should be open in any case where a regulator so wishes; hence no quantitative nor qualitative criteria should be met, provided the issue fits within the scope of CESR's mediation mechanism as hereabove described.

We are also of the opinion that the establishment of a complementary mediation procedure is necessary to resolve cross-border disputes that may arise between any professional in financial services and the regulator(s) concerned. Such mechanism would offer businesses an alternative to address conflicts in specific cases with regulators - including others than their own - regarding the application of European laws and

regulations, without recourse to the European Commission or to the European Court of Justice. The mediation should offer market participants an independent and flexible procedure to deal with their complaints about cross-border cases with the regulators (e.g. passporting issues, prospectus approvals etc). It should in any case remain anonymous in terms of the individual firms involved and expeditious. The mediators should be independent experts to ensure that independent decisions are taken on a pragmatic basis. Such experts would need to bind themselves to confidentiality.

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**In conclusion, we consider that the proposed creation of a mediation mechanism within CESR would be a positive further step in ensuring the fair and consistent implementation of European financial legislation in Europe, without prejudice of the European Commission and Court of Justice's competences in that field.**

**Nevertheless, it is crucial that such peer review is never used to bring about resistance to legitimate innovation.**

**In order to be efficient, we believe that such process should take account of the financial industry's input for pragmatic outcomes.**

**Such mediation procedure should, where possible, take place before decisions are made public, which should not preclude ex-post mediation. Moreover, results of mediation need to be made public, without prejudice to anonymity for industry's participants.**

**In addition, in cross-border situations, market participants should also be able to challenge CESR members in relation to potentially illegitimate actions or failures related to EU legislation by regulators in any Member State. The procedure used should ensure that decisions are taken from an independent and objective standpoint.**