5 December 2005

CESR MEDIATION MECHANISM

CESR'S PAPER FOR COMMENTS - SEPTEMBER 2005

COMMENTS OF EURONEXT

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, we welcome 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 useful contribution to foster a co-ordinated implementation of EU legislation as well as supervisory convergence among regulators. Moreover, when defects cannot be remedied by CESR members, a mediation mechanism could nevertheless still serve to put some pressure on the Member State(s) concerned and draw such defects to the attention of the European Commission.

Although we support in principle the establishment of a mediation mechanism for all the reasons identified above, we consider that two essential elements are missing in the proposal to allow reaching the envisaged goals.

First, we consider **essential that the industry is involved in this mediation procedure**, in particular through participation in the course of the procedure in **providing their expertise** to the decision panels.

Second, we also consider that a **complementary mediation process** dedicated to resolving disputes **between regulators and securities industry participants** is absolutely necessary. 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, as suggested in the Financial Services Committee's Report on Financial Supervision, that highlights the growing need for the private sector to be able to trigger such mechanism (i.e. private operators' voices should be heard & given appropriate attention, as they are often the best placed to detect harmful or diverging interpretations) as well as being able to judge the relative market impact of such interpretations.

ON THE KEY FEATURES OF THE MEDIATION MECHANISM PROPOSED BY CESR:

We can endorse the nature of the mechanism proposed by CESR in its paper, i.e. an internal mediation mechanism among CESR's members to aid the resolution of cross-border disputes between securities regulators. More generally, the mediation mechanism should 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.

As regards the features of the described mediation process, we share the view that its characteristics should remain those of voluntary nature, rapidity, efficiency, fairness and confidentiality targeted by CESR.

Nevertheless, and without aiming at reintroducing a "self-regulatory" dimension, we believe 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 as well as providing 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, or at least participants, in the "case panel" - though without any power of decision - and not simply to draw issues to the attention of CESR's members on a more general basis, as currently foreseen in CESR's paper, though this, of course, remains important.

Furthermore, we can concur that CESR's "comply or explain" approach seems reasonable. We also share the view that mediation should ideally take place before individual regulatory decisions are taken, but we nonetheless believe that the fact that such decisions have already been made should not be an absolute limit to the use of the mechanism - especially if it is to be activated by market participants.

We also agree that the mediation mechanism should/would not pre-empt nor call into question the general European system for monitoring and interpreting EU law, and particularly not challenge the prerogatives of the European Commission nor of the European Court of Justice. Above all, implementing such mediation mechanism should/would not challenge the role of the European Commission as Guardian of the Treaty.

Although we take note of CESR's intention not to transform its mediation mechanism into a "complaints mechanism", we are 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 is needed to give businesses a possibility to settle amicably conflicts with regulators - including others than their own - regarding the application of European laws and regulations, before any recourse to the European Commission or to the European Court of Justice. It would be rather a test of conformity than a formal appeal.

Such a complementary mediation procedure is necessary since, in some cases, regulators might have some conflict of interest in initiating the mediation procedure, or at least hesitation to open a debate with another regulator. There might also be situations where some differences could be solved for the sake of the internal market's efficient functioning, even if there is no conflict between national regulators.

Some practical illustrations of situations were regulators may remain passive although it creates inefficiencies for the private sector can be found, for instance, in the implementation of the Market Abuse Directive, in which regulators may have competing competences, notably as regards the publication of inside information. The status quo that regulators may be ready to accept to keep existing powers, or acquire more powers, brings additional burden to the private entities concerned (in this case issuers of securities). Furthermore, in the case of cross-border entities, inefficiencies and additional costs might arise when a national regulator does not accept the outsourcing of functions to another Member State in respect of the control and regulation of such entities. This again would not create a conflict between regulators but undermine the operation of the entity concerned. Some differences of interpretation as to the "administrative" or "contractual" nature of rules by the various national regulators might also raise issues for cross-border market participants whereas it would not bother individual regulators.

Such complementary mediation procedure 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.

Alternatively, and if CESR chooses not to open its mediation mechanism to market participants, we would propose that the European Commission designs a mechanism having the same effect. Although, the private sector has currently the possibility to address complaints to the European Commission, a standard process/procedure would solve a number of issues that arise at present: which persons to be addressed in the Commission and the consequences this may have; what is to be done exactly with the said complaint; what confidentiality guarantees are available; etc. Importantly this would also change the way such recourse is perceived and make it more of an ordinary step rather than the exceptional and extraordinary move that it is for the time being.

ON THE SCOPE OF THE CESR MEDIATION MECHANISM:

We agree with CESR that the disputes eligible for its mediation mechanism should only be those of cross-border nature - being defined on a "functional" basis - and that they should cover cooperation and exchange of information, enforcement of financial information as well as operational disputes between regulators, including those related to mutual recognition decisions. More globally, the scope for mediation should comprise the resolution of all types of disputes arising between CESR's members in the course of their duties. Hence, we consider that **any list of competence should remain open**.

It is our opinion that CESR should be cautious in dismissing requests for mediation.

In that respect, regarding the negative criteria or restrictions posed by CESR to limit the type of disputes that can be examined under the mediation procedure - among which the fact that legal proceedings have already been initiated before a competent national authority - we believe that it would be inappropriate to reject examination of legal proceedings initiated by a CESR member in relation to an underlying dispute to which that CESR member is a party. As a matter of fact, there would indeed be a risk in that case that the said CESR member does not show the appropriate diligence and/or neutrality in relation to the national procedure in order to avoid a mediation procedure.
We share CESR's view that the mediation mechanism should also be made available to competent authorities that are not CESR members (notably those from the EEA countries).

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 indeed more difficult politically to reverse them. Nevertheless, ***ex-post*** **review should also be possible**.

ON THE PROCEDURAL FRAMEWORK FOR A CESR MEDIATION MECHANISM:

As a general concern, we wish to say that 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**.

We can agree with the principle and role of the "Gatekeeper" proposed by CESR to screen mediation requests and assess whether they meet established requirements. It will notably ensure that prior bilateral efforts between the CESR members to resolve the dispute have been fully exhausted, hence provide for more efficiency. We do not have any specific objection in having three "specialized" gatekeepers as suggested by CESR, depending on the issues tackled (cooperation & exchange of information/ financial information/ all other disputes). We would nonetheless insist as a matter of neutrality on the importance of avoiding that the CESR member involved in a specific case for mediation is a gatekeeper for that case. Furthermore, access to mediation should be open in any case where a regulator so wishes; hence no quantitative nor qualitative criteria should have to be met, provided the issue fits within the scope of CESR's mediation mechanism.

CESR proposes differentiated procedures, as concerns cooperation & exchange of information issues on one hand ("evaluative approach", with a panel of "expert evaluators" providing a recommendation) and all other types of disputes on the other hand ("facilitating approach", i.e. help the parties reaching an agreement). In any way, the procedure used should ensure the most simple and rapid operation possible, and that decisions are taken from an independent and objective standpoint.

As concerns the composition of mediation panels/ selection of mediators and the various solutions proposed by CESR (choosing the mediators on a voluntary basis; having a "standing" or a "ad hoc" panel), we take note that CESR only envisages having experts belonging to its members. We would like to reiterate here our view that it is essential to **include market experts/practitioners in the mediation panels** in order to take account of the financial industry's input for pragmatic outcomes. It would also be useful that the European Commission have some representatives in the panels, in order to be able to express its opinion at that stage of the process.

In the mediation process as currently proposed by CESR (i.e. no direct initiative by market participants, but the latter can alert their national regulator), and if a CESR member has turned down a mediation request from a market participant, we consider that it is of the utmost importance to offer this market participant the **possibility to inform CESR of this rejection**, so that CESR can then apply pressure on its member if justified.

Consultation of the European Commission is foreseen by CESR, on an anonymous basis, for cases of conflicting interpretations of applicable legislation. We agree that it would be a most useful and important added value to get the Commission's views on such cases.

Finally, 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 need for appropriate anonymity.
