BRITISH BANKERS' ASSOCIATION

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BBA RESPONSE TO THE CESR MEDIATION MECHANISM PAPER FOR COMMENTS

The British Bankers' Association represents more than 250 banks carrying on business in the United Kingdom. The majority of these banks come from outside the United Kingdom and our members cover the whole range of investment services.

In terms of the key features of a mediation scheme; we would suggest that an important aspect to consider is that mediation is non-binding on Member States' regulators. The BBA supports the proposal that the process should be non-binding.

As outlined in our response to the CESR Call for Evidence on mediation, we would draw CESR's attention to the Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE). FIN-NET recommended that all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes respect the following principles: independence, transparency, adversarial, effectiveness, legality, liberty and representation. CESR should take into account the extent to which some of these principles may be relevant for a CESR mediation process.

It is vital that the mediation mechanism be given time to bed in and not be overwhelmed by the volume or scope of the work it is presented with. Consequently it would seem appropriate to begin the mediation procedures initially only in relation to the Market Abuse Directive. The mediation process could then be expanded to cover a wider remit following an assessment of its initial performance.

We welcome the opportunity to respond to this CESR Paper for Comments on behalf of our members. We would be happy to discuss with CESR any questions arising from our response. If you have any queries please do not hesitate to contact myself or Michael McKee.

Yours faithfully,

Ross Barrett
Director
British Bankers' Association

1. *DO YOU AGREE WITH THE KEY FEATURES PROPOSED BY CESR?*

The BBA would support the key features of a potential mediation scheme outlined in the paper for comment. Our members consider that the most important aspect to highlight is that mediation should be non-binding on Member States' regulators. As outlined in the paper, the mediation mechanism must operate within the context of the existing EU law framework. We support CESR's proposal that the process should be non-binding.

As outlined above, we would draw CESR's attention to the Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE). FIN-NET recommended that all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes respect the following principles: independence, transparency, adversarial, effectiveness, legality, liberty and representation.

CESR should consider the importance of transparency for the mediation process. In combination with a strict timetable, CESR should publish on its website where in the process the mediation discussions are. This will act as a strong driver for Member States regulators to adhere to the principles of rapidity and efficiency. In the case that a Member States' regulator refuses the mediation request, CESR should operate an "accept or explain" procedure. The regulator not wishing to enter into mediation should give an appropriately detailed response that can be posted on CESR's website.

We would support CESR's proposal for the mediation mechanism to only have a cross border scope to its activities. Similarly our members would support a focus on conflicts between authorities, that is, there should be no automatic right for referral to mediation by market participants.

CESR should not limit the application to the mediation mechanism to decisions already taken by a regulator in one country. Regulators should have the option to raise the possibility of mediation before a final decision is taken by another Member States' regulator. This will provide additional flexibility to the mediation mechanism. Should the second regulator refuse mediation at this stage, this should not preclude re-application after the decision is taken.

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?*

CESR should consider carefully those requests that are refused on the basis of:

"National legislation that does not allow …..any leeway in accommodating the demands from the CESR Member seeking mediation".

CESR should satisfy itself that this reason, when employed, is genuine and not simply a cloak for a decision it wishes to take.

As stated in our cover letter, regarding the scope for mediation it would seem appropriate to begin the mediation procedures initially only in relation to the Market

Abuse Directive. The mediation process could then be expanded to cover a wider remit following an assessment of its performance.

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 BBA has no comment on this question.

4. ***SHOULD THE MEDIATION MECHANISM BE MADE AVAILABLE TO COMPETENT AUTHORITIES THAT ARE NOT CESR MEMBERS?***

Given the global nature of the financial markets, it would make sense to allow non CESR members access to the mediation mechanism. Given the process is non-binding, as well as being optional, it may provide Member States and 3rd party regulators with an efficient means of resolving international disputes.

The same argument applies to allowing institutions that are not regulators but that have competency for a particular area where mediation is being sought, to participate in the process.

5. ***DO YOU HAVE ANY COMMENTS ON THE PROPOSED ROLE OF A GATEKEEPER?***

The BBA would support the ‘gatekeeper’ principle as long as it is a light touch approach. If both Member States’ regulators wish to enter CESR mediation, it would seem sensible to allow them to do so. If one regulator did not want to engage in the process, the mediation mechanism provides no means to ‘force’ them to. Therefore it is unclear how the gatekeeper taking a strong position and having a veto over mediation would benefit the process.

6. ***WHICH OF THE OPTIONS IN PAR. 53 IS MOST APPROPRIATE IN YOUR VIEW, OR COULD THERE BE A COMBINATION OF THEM?***

Concerning Gatekeepers, please see the response to Q.5.

Our members support the model of differentiated procedures set out in the CESR paper. However there must be sufficient flexibility within the system so that the panel can change from one set of procedures to the other, should all parties to the mediation agree to it.

The BBA would support the suggestion of having a standing panel of experts who are able to build up a body of knowledge and experience. CESR should have the option to appoint other specialist experts in addition to the standing panel if it is deemed appropriate.

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 SOLVIT system seems more applicable to widespread use by EU citizens, with dispersed ‘centres’ in different Member States that communicate with each other. This does not seem an appropriate model for mediation between Member States’ regulators.

In the event that a Member States’ regulator turns down an application by a market participant to go into mediation, it seems unclear what informing CESR of this action will achieve. Given the process is voluntary and CESR has no powers to coerce regulators into mediation it seems a redundant provision.

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 PARAS. 30 AND 68, THAT COULD BE USEFULLY PROVIDED BY MARKET PARTICIPANTS?***

It is unclear how involving the European Commission in the mediation mechanism would work. By definition, all disputes must involve a differing interpretation of EU law. If the European Commission gives a decision on interpretation in these cases it would seem to negate the usefulness of the mediation mechanism as a two way discursive process. This would be especially highlighted in those cases where CESR had chosen to take the facilitative rather than the evaluative model.

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 BBA welcomes the explicit (and short) timetable outlined in Annex 3. This rapid resolution of disputes between Member States is central to the value of proposed mediation mechanism.

Our members support the general framework of the mediation mechanism and would view it as a positive proposal to undertake a review of the success and efficiency of the mediation framework after two years.