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CESR's mediation mechanism

Paper for comments

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Contribution by BNP Paribas

□ Presentation of BNP Paribas

BNP Paribas (www.bnpparibas.com) is a European leader in banking and financial services, with leading positions in Asia and an active presence in the United States. It is the first bank in terms of net income and market capitalisation in the Euro zone. The group has one of the largest international banking networks with a presence in 85 countries and 90,000 employees world-wide. BNP Paribas enjoys key positions in Corporate and Investment Banking, Private Banking & Asset Management, Insurance, Securities Services and Retail Banking.

□ Introduction

1 BNP Paribas supports the establishment by CESR of a mediation mechanism at CESR level insofar as 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 enforcement of EU legislation. However, the mechanism should be open to market participants in a concrete way. Market participants are indeed the best placed to provide inputs and to identify subjects which could potentially be transferred to mediation. What is needed is a bottom-up process because market participants are the first concerned by and involved with EU Directives and Regulations in the securities field. We believe that CESR should not be concerned that the mediation mechanism might turn into a complaints mechanism, as expressed in § 29. Market participants should be in a position to bring matters to the attention of the home supervisor as well as to host supervisors. The CESR member would then submit the case for mediation. This procedure would guarantee that such matters are actual problems for the market as a whole and would not be qualified as 'complaints'.

Lastly, it seems wrong that CESR wants to, first, get the contributions and, second, know the viewpoints of market participants to this Paper when the same market participants are not involved in practice in the items under discussion. We would generally favour any form of input into the mediation mechanism coming from market participants. It is important to bear in mind that the main points of difficulty in the interpretation or application of EU law arise from the interpretations that competent authorities impose on market participants.

2 With respect to the three specialist Gatekeeper (envisaged in §50), we feel strongly the industry should be consulted.

Regarding the third bullet point in § 50: if CESR itself is not sure of how and on what basis to appoint a third Gatekeeper, then it would seem important to request the industry's view? The industry should not be faced with stated arrangements, which seem non-negotiable, while such arrangements have actually not been dealt with.

Furthermore, we support the setting up of a three-Gatekeeper committee (see below § 8), since wide experience and competence in a variety of fields is required to consider the merit of escalation to mediation. However, there remains blur areas in § 50 on which explanations are necessary, since they deal with key aspects, such as the appointment of the Gatekeeper and how to handle disputes in which the Gatekeeper has a conflict.

Similarly, § 46 and 49 require clarifications and explanations, on which we will then be able to further comment.

3 Another point which deserves further explanation is § 59, which states that "disputes would normally be referred to the mediation panel of experts, *without any involvement of CESR Chairs*". However, § 50 explains that the three specialist Gatekeepers, whose role in the mediation mechanism is unavoidable, are three CESR Chairs. How then could disputes be referred directly to the mediation panel without any involvement of CESR Chairs when it is these Chairs which, as Gatekeepers, decide whether the disputes fulfil the conditions for mediation?

4 We would like to stress our support for the idea of a publication of the outcome of the mediation (§ 74). However, not only should the outcome be published but also the motivations and reasoning. It is essential that the whole mediation process (motivation – reasoning – outcome) is published as widely as possible as it will serve as guidance for other non-involved supervisory authorities and market participants. Publication will also contribute towards supervisory convergence and best practice. Besides, this idea couples with the transparency principle, which we strongly advocate.

Question 1: *Do you agree with the key features proposed by CESR?*

5 We generally agree with the mediation mechanism's key features. We appreciate the mechanism would only deal with issues of cross-border nature, which is a good way of facilitating greater convergence of supervisory practices. Moreover, we welcome the mechanism's objective of rapid, effective and fair responses.

However, we reassert our desire for market participants to be fully involved in the mediation mechanism. The input they can provide in identifying potential issues suited to mediation is of paramount importance. We believe market participants' involvement would not turn the mediation mechanism into a complaints mechanism, because market participants are better

placed to identify cases they know constitute genuine obstacles to the integration of European markets.

The use of the term “national” in § 29 is unclear. It would be more coherent to replace it with “home” or “host supervisor”.

In addition we would welcome a commitment from CESR members to provide explanations for not accepting mediation or for not conforming to a decision taken under the mediation mechanism.

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?*

6 If a dispute is already being dealt with through legal proceedings, considering it for mediation, which has non-binding effects, would in some cases be useless, since the judicial ruling would prevail over mediation. However, the possibility to provide interim solutions to disputes, whenever feasible, must be considered, especially in view of the long delays incurred in legal proceedings.

We believe that only the home country authority is in a position to ascertain the conditions allowing for the granting of the EU passport to a market participant or a product. Host country authorities should not avail themselves of the mediation mechanism to dispute decisions taken by the home country authorities of the service provider in areas covered by Community law, when host country authorities consider that a decision taken by the home authorities runs contrary to the conditions set out in the relevant directives or regulations. If the mediation mechanism were to be used in that way, it would lead to great legal uncertainty.

Question 4: *Should the mediation mechanism be made available to competent authorities that are not CESR Members?*

7 Expanding the mechanism to non-CESR Members may be useful. Supervisory authorities of the European Economic Area (EEA) Member States have common financial and economic interests with EU Members. Therefore, we think it could bring greater convergence and facilitate access to non EU financial markets.

However, we are concerned with how restrictions to render disputes unsuitable could be established if the mechanism is made available to EEA Member States. The first bullet point in § 42 indeed stipulates that mediation would be excluded when ‘legal proceedings have already been initiated at EU level’. These EEA Member States being unable to refer a case at EU level, we wonder whether expanding the mechanism to them would not mean a de facto enlargement of the mechanism’s scope of intervention too. Or, put differently, we would like to know what other negative criteria CESR would set for the mechanism not to be expanded to an unmanageable capacity, while still being available to non-CESR Members.

Question 5: *Do you have any comments on the proposed role of a Gatekeeper?*

8 The principle itself of a Gatekeeper is welcome, especially in its role of assessing whether a dispute is suitable for the mechanism.

However, we advocate the creation of a *committee of three Gatekeepers* with combined expertise instead of one Gatekeeper for each field. An issue of potential dispute is indeed likely to cover and/or affect many fields. A three-Gatekeeper committee would therefore be more able to deal with the issue's ins and outs.

Finally, we would like to recall that transparency in the process of appointing the three Gatekeepers as well as their ability to work on an independent basis are truly essential parameters if the mediation mechanism is to work efficiently.

The three-Gatekeeper committee should be appointed for a period of time on a rotating basis, to respond to the need "to ensure appropriate representation from all Member States and avoid any one particular legal or cultural view from influencing outcomes". The three-Gatekeeper committee would examine all types of disputes; including disputes concerning cooperation and exchange of information.

Question 6: *Which of the options in par. 53 is most appropriate in your view, or could there be a combination of them?*

9 In our opinion, the second option, i.e. the panel approach, seems the most appropriate with regard to transparency requirements. However, this depends on the way such a Panel would be appointed. We strongly advocate the Panel should be independent and appointed on a transparent basis. We recommend CESR should provide us with detailed information on the Panel's composition. In certain circumstances, however, where a rapid solution is of the essence, we would also support the single Standing Panel option.

Concerning requirements for the selection of mediators and the composition of the mediation panel (para. 54), we have the following comments:

- Mediators should also have expertise in the different legal traditions (civil law and common law) of member authorities involved in a dispute;
- Appointment of mediators should strictly follow the order of a pre-existing set list so as to avoid any risk (or doubt) of biased solutions of disputes. Clear procedures should also be established for recusation (disqualification) of a mediator as a member of a panel by a party to a dispute, as well as pre-determined situations where mediators themselves should abstain from providing mediation activities.

Question 7: *Could proceedings on similar issues in the framework of the EU SOLVIT system be relevant for disputes subject to mediation?*

10 We wish to point out the misleading formulation of the question. We assumed the question being asked is whether the SOLVIT system's procedures could be relevant for disputes subject to mediation. We think that some features of the SOLVIT system seem indeed quite efficient, and could probably serve as examples for the set up of the mechanism.

These are:

- the on-line database system, which allows for transparency, efficiency and information gathering;
- the target deadline of ten weeks for reaching an agreement on how to settle the problem.

In your view, if a CESR Member has turned down a mediation request from a market participant, would it be useful to inform CESR?

11 Yes, whenever a CESR Member has turned down a mediation request from a market participant, all unaccepted mediation requests should be reported to CESR. This information could be useful to other CESR Members not involved in the dispute. Information sharing within CESR might prompt CESR to examine specifically an issue raised by a market participant.

It would be paramount that the reasons why the CESR Member decided not to accept the mediation process be disclosed to CESR and to the market participant concerned. We support the widest transparency in this instance.

Question 8: Do you have any views on the role of the Commission envisaged in par. 66 and 67?

Is there any further input to the CESR mediation process, in addition to the mechanisms mentioned in pars. 30 and 68, that could be usefully provided by market participants?

12 We agree with the principle of informing the Commission in case of conflicting interpretation of legislation application. However, we have to express reservations on the ability of the Commission to “express expeditiously any views it may have” (§ 67). We indeed believe this is hardly achievable, given the work overload of the Commission.

We reiterate that we welcome any form of input into the mediation procedure coming from market participants. Indeed the main points of difficulty in the interpretation or application of EU law arise from the interpretations that competent authorities impose on market participants. Therefore market participants should be invited to testify and present their actual experience of the issue at stake.

Question 9: Do you agree with the proposed procedural framework of the mediation mechanism?

13 Yes, we agree with the proposed procedural mediation mechanism concerning timing and publication as set out so far, and apart from the above-mentioned comments. We support the widest transparency concerning publication of outcomes of mediation.

Do you agree with the mediation process outlined in Annex 3 for cooperation and information exchange cases?

14 We agree on the process but disagree on the ‘single’ Gatekeeper approach. We favour a Gatekeeper as a *three-Gatekeeper committee*, as mentioned above in § 7. The task of the

three-Gatekeeper committee would be to assess whether the issue qualifies for escalation to the Mediation Panel.

❑ **Conclusion**

① We would like to stress our support for the idea of a publication of the outcome of mediation (§ 74). It is essential that the whole mediation process (motivation – reasoning – outcome) is published as widely as possible. Publication will serve as guidance for other non-involved supervisory authorities and market participants. It should also contribute to supervisory convergence and best practice. Besides, this idea couples with the transparency principle which we strongly advocate.

Should you wish to contact us, please write to the following email address:
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We thank you for your attention to the above comments, and remain,
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