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Mr Manuel Conthe
Committee of European Securities Regulators
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Dear Sir

Establishment of a Mediation Mechanism

I am responding on behalf of CEDR, the Centre for Effective Dispute Resolution, to your call for evidence regarding the establishment of a general mediation mechanism that goes beyond that envisaged by the Market Abuse Directive (Ref: CESR/05-253).

We are aware that this response may be published on your website or be otherwise made publicly available, and we confirm that this gives us no concerns.

About CEDR

CEDR is an independent non-profit organisation. Our mission is to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public sector disputes and civil litigation. We are the largest operator in this sector in Europe. Considerable information about CEDR and alternative dispute resolution is available on our website www.cedr.co.uk.

Our services arm, CEDR Solve, is Europe's leading independent mediation service and to date has managed over 10,000 individual dispute referrals. Over 500 separate law firms used our services last year. As the field's leading trainer, we have to date trained over 2,100 mediators and over 3,000 lawyers and professionals in dispute resolution. We have been at the forefront of the development of civil and commercial mediation within the EU, including working with the Commission on the development of 2004's draft directive and code of conduct for mediation centres, and we have also recently published '*The EU Mediation Atlas: Practice and Regulation*', which is the first ever geographical guide to the position of mediation within each member state of the EU.

CEDR Solve has appointed independent neutral mediators in a large number and wide range of financial services industry disputes involving quoted and unquoted securities, bonds, futures contracts, options and a wide range of other instruments including trading of distressed third world debt.

In 2001 we were appointed by the Enforcement Division of the UK's Financial Services Authority (FSA) to design build and then operate the initial pilot of its mediation scheme used in a regulatory context. We believe that this was the first formal use of mediation in a financial services regulatory context within the EU. Put at its most simple, once the FSA has issued a warning notice to a regulated individual or firm, that

individual or firm then has (in most circumstances) the ability to ask for third party neutral mediator to be appointed to manage further dialogue between the regulator and the regulated. A description of the process can be found on the website of the FSA at www.fsa.gov.uk and a review of the success of this early use of mediation in a regulatory context appears in the FSA's consultation document number 199 dated September 2003 at chapter 8 also available through the FSA web site.

Response to the call for evidence

With regard to the specific questions raised in the call for evidence, we have limited our responses to those which derive from our background as experienced mediation practitioners.

1. *Key features of a mediation mechanism*

Our starting point for a consideration of the key features of any mediation mechanism is to recognise that, in terms of the overall spectrum of possible means of resolving any particular dispute, mediation is only one step removed from direct negotiation by the principals involved. Mediation is, in effect, assisted negotiation, and we would suggest that mediation can be used in any situation in which direct negotiations might ultimately settle a dispute.

Arguably, therefore, a mediation mechanism should replicate as closely as possible the workings of direct negotiation, subject only to the additional dynamic of the third party mediator to assist in the negotiation process. Hence, the extent to which a mediation mechanism should be capable of producing legally binding outcomes should be no more and no less than that which might be achievable through direct negotiation. Similarly, the mechanism should only be available to authorities who would normally negotiate with each other under the auspices of CESR (i.e. members rather than individual market participants).

As to the workings of the mediation mechanism (particularly in terms of how a dispute is referred to mediation, how it is then handled and by whom), we customarily break this down into two separate areas of work: a secretariat function which handles case referrals; and a team of specialist mediators who may work either individually or in small teams on particular matters. The expertise and training of the mediators, in particular, will be key to the success of any effective mediation scheme, and we strongly recommend that very careful consideration is given as to the selection of the individual mediators involved. There is often a temptation in setting up a scheme such as this to invite other members of the community to take on the mediator role (effectively peer group mediation), but our experience is that this can prove a false economy if those individuals are not first formally trained as mediators.

Mediation is a skilled process to which not all individuals are suited, regardless of professional background or seniority; and formally trained and experienced mediators are far more likely to achieve higher rates of dispute settlement and client satisfaction. We would also add that they bring a benefit in terms of clear independence and neutrality (both actual and perceived) which cannot always be so easily achieved if mediators are drawn from a small group of industry insiders, many of whom will no doubt already be known to each other and possibly have ongoing business relationships.

We would, therefore, urge the CESR to carefully consider the possibility of engaging formally trained and accredited external mediators to deal with any disputes arising under the scheme. A service provider such as CEDR Solve would certainly be capable of providing a multi-national panel of experienced mediators with relevant financial sector experience. We would also be happy to advise on the use of co-mediation teams, possibly involving a specialist external mediator working alongside a CESR official on cases where particularly technical issues are involved.

2. *Scope for mediation*

Over the past fifteen years, CEDR has been involved in the introduction of mediation into a diverse range of dispute sectors, and one of the most frequently asked questions we have encountered is: how do you identify which disputes are suitable for mediation? Our experience, however, is that this is not the most helpful question to ask since it tends to lead to an inappropriate narrowing of the discussion.

Rather we prefer to look at the issue the other way around, and ask instead which disputes are not suitable for mediation. The most commonly cited responses to this question are where

a. direct negotiations are clearly progressing satisfactorily and efficiently;
b. a legal or industry precedent is required; or
c. a speedy injunction is required to preserve rights / property.

In virtually every other instance, we would argue that mediation could well be an appropriate mechanism for resolving a particular dispute. We would, however, frequently ask a supplementary question: namely whether a particular dispute is ready for mediation. This question elicits a far more useful range of responses, generally based around the issues of whether or not both sides have reached a point at which they have a genuine interest in seeing an end to the dispute and whether they each know enough about their respective positions as to enable them to evaluate settlement options.

Turning, therefore, to the specific questions raised in the call for evidence, our views are as follows:

- The timing of the referral of an issue to the mediation mechanism should be determined by reference to the overall nature and position of the dispute rather than by reference to a specific narrow question concerning whether or not the supervisor has adopted the decision (although clearly for a dispute to exist ex-ante a supervisor will at the least have to have considered a matter, and reached and communicated a provisional conclusion). Mediation could be equally effective either at the point of a dispute over such a provisional conclusion, or once a conclusion was formally adopted, although we recognise that there may well be presentational advantages in one or other approach – for example, it may well be politically more acceptable for a supervisor to mediate (and thus possibly amend) a provisional conclusion rather than be seen to step back from a formally adopted decision.

- In general terms, we do not see any merit in limiting the scope of the mediation mechanism solely to particular classes of dispute (such as mutual recognition of decisions or the failure to exchange information), and we would submit that, if a mediation mechanism is accepted as being effective, then it should be made available for any and all categories of dispute – we would recommend the integration of a mediation-based approach within the entire workings of CESR such that, wherever and whatever disputes may arise between members, mediation would be considered as a resolution option. Hence, we would turn the question around – in what areas of its activities is the efficient and effective working of CESR impaired by disputes, whether formal or informal, between its members? Mediation should be considered in all such areas.

3. *Mediation procedure*

We would strongly recommend that a single procedural framework should be adopted for all issues rather than having a series of specialised procedures that might be dependent on the nature of the case. Mediation is an inherently flexible process, and in our experience it operates more efficiently and

effectively where only a very broad procedural framework is specified at the start of the process, with more detailed procedural issues such as exchange of information, timing of meetings, nature and extent of any written submissions to the mediator each being addressed on a case-by-case basis.

The question of whether use of the mediation mechanism should be optional or mandatory for CESR members will, we suspect, be the most contentious of the questions raised in the call for evidence; and in many respects it reflects a similar debate within the civil and commercial litigation community. On the one hand the argument in favour of mandatory mediation is that since it can be shown to work in some many instances, it is everyone's interests, including that of the parties, that mediation is attempted before incurring the cost of court involvement. Conversely, some argue that such an approach inhibits access to the courts and/or that mediation is essentially a consensual process which can only be effective with the active and willing engagement of the parties (although there is evidence from some jurisdictions that even mandatory mediation can achieve very high settlement rates if experienced mediators are involved). Our own view, in this particular instance, is that CESR will need to make a judgment as to the political attitudes of its members with regard to optional or mandatory mediation. We believe that the process can be made to work under either scenario.

The question of whether access to the mediation mechanism should be subject to any conditions or thresholds depends largely upon how it is proposed that the mediation mechanism should be financed. It seems to us that, if the parties to a dispute bear the true financial cost of its resolution (whether by way of paying professional fees to an external mediation service provider such as CEDR Solve or through a reimbursement of CESR's costs), then there does not seem to be any particular advantage in limiting access to the mediation mechanism only to disputes that meet certain criteria – rather the mechanism could be made available for every issue, but only on the clear basis that the parties involved bore the related costs.

As to the need for a special fast-track process as part of the mediation mechanism, we have already indicated our strong preference for the engagement of fully trained, accredited and experienced mediators in order to ensure high settlement rates and user satisfaction. Even more significantly in this particular instance, we would argue that mediation is already a fast track dispute resolution process, and that there is unlikely to be any need for any additional mechanism (beyond of course the initial direct negotiation between the parties). To exemplify this argument, we would point to CEDR Solve's own commercial mediation statistics – during calendar year 2004 we were involved in the mediation of almost 700 commercial disputes of all sizes, ranging from a few thousand pounds up to many hundreds of millions, and covering a very broad cross-section of issues. Notwithstanding this complexity and diversity, however, 75 per cent of these mediations were settled on the day of mediation or shortly thereafter. Furthermore, the average duration of each mediation was only slightly over a single day (plus appropriate preparation time for the mediator). In other words, mediation is already a fast track - and highly effective - process for resolving disputes efficiently and effectively.

Finally, as to confidentiality, we will restrict our comments solely as to the features necessary for effective mediation. In our view it is an essential element of the mediation process that what takes place during it (including information exchanged, arguments put forward and settlement options explored) should all remain confidential between the parties and should not be used in any subsequent legal proceedings between them (i.e. the concept of without prejudice in English law). We do not, however, have any firm view as to whether or not the fact that a dispute has gone to mediation should also remain confidential – if the existence of the dispute is already in the public domain, then we do not believe there is any disadvantage in indicating that it is to go to mediation rather than to the courts. Conversely, if the parties to a dispute wish to keep its existence confidential, then mediation can be an effective way of achieving that end.

Finally, we have one particular observation that relates to a number of the questions raised in the call for evidence. Whilst we accept that a period of public consultation is essential, mediation is essentially a flexible process which can be adapted to meet the needs of particular environments and one of the simplest ways of achieving this is through a period of experimentation. As in the case of the successful regulatory scheme with the FSA, we therefore recommend that CESR base its strategy around operating a pilot mediation scheme for a fixed period of one to two years. As well as building up a pool of direct experience within the community, this will then provide a body of evidence upon which formal evaluation can be undertaken and a longer-term scheme then established. This is, in our view, a far more cost effective and flexible approach to adopt, rather than trying to cater for every possible eventuality at a very early design stage.

If you or your Task Force have any particular queries in relation to the above, or if you would like us to expand our views in greater detail, we would of course be pleased to do so.

Yours sincerely

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