

**International Swaps and Derivatives Association
International Securities Market Association
International Primary Market Association
Association of Norwegian Stockbroking Companies
Bankers and Securities Dealers Association of Iceland
Danish Securities Dealers Association
Finnish Association of Securities Dealers
London Investment Banking Association
Swedish Securities Dealers Association
The Bond Market Association**

Response to CESR Call for Evidence on Establishment of a Mediation Mechanism, April 2005

Dear Mr. Demarigny,

In their respective responses to the “Himalaya Report”, the above-listed Associations welcomed the role being played by CESR in promoting convergence of supervisory practices. These same Associations are now grateful for the opportunity to provide their comments on this new initiative to establish a mediation mechanism where it may 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.

To this end, the Associations acknowledge the support expressed to CESR by the European Commission, the Inter-Institutional Monitoring Group and the European Securities Committee in order to establish a mediation system to solve conflicts between its members and further enhance CESR’s role at level 3 towards an even more consistent and effective transposition, application and enforcement of EU legislation.

In their previous submissions in response to the “Himalaya Report”, the Associations encouraged CESR to provide mediation facilities where there is **evidence of a lack of cooperation** between regulators and **to the extent that CESR members find this role useful**. They also stressed that the success of mediation would build with trust over time and that CESR should not seek to force mediation on its members. Moving from these assumptions, the Associations would like to express the following additional points as to the actual proposals set forth in the above call for evidence.

1. Key features of a mediation mechanism. In the absence of a reform of the institutional framework in which CESR and its members operate, any form of

third party involvement in disputes involving national competent authorities should not question the **right of self-determination and sovereignty of member states**. Consistently, the Associations strongly support CESR's view that any decision to be taken under the mediation mechanism cannot be binding on the parties involved. However, the Associations would also like to convey their concern about the possibility envisaged in the call for evidence that the competent authorities could be required to refer a case to the CESR mediation mechanism before an action at EU level can be initiated (Paragraph 6, third bullet, second hyphen). A mandatory role of the mechanism would be questionable under the present constitutional framework and give rise to sensitive issues concerning the **accountability** of the institutions called upon to settle a dispute or provide an amicable composition to it. Each competent authority should have total freedom to decide, on a case-by-case basis, whether it wishes to use mediation, and be able to use mediation without fettering any other course of action that it could take.

2. Transparency of the mediation process. The Associations would like to express their support for any form of transparency that CESR may envisage as regards the mediation process. Still it is of the outmost importance that any such transparency does not undermine the confidentiality of any information (including business related information) that supervisors may come across in the discharge of their activities.
3. Cooperation in investigations and for law enforcement purposes. There is probably wide scope to extend to other sectors of the financial market the mediation framework introduced by the MAD to provide rapid solutions to controversies arising because of competent authorities' failure to provide each other with appropriate cooperation. Any role which CESR (this being the CESR secretariat or a CESR member with no jurisdiction on the events under investigation) may envisage in this context needs to be carefully structured to avoid any direct or indirect disclosure of supervisory or business sensitive information to the third party(ies) involved in the dispute, which would result in a breach of the **confidentiality requirements** imposed by existing directives on competent authorities.
4. Interpretation of EU law. It would be difficult to envisage any role for CESR in resolving disputes about the interpretation of EU law without impinging on the **responsibilities of the EU institutions and ultimately the European Court of Justice**.
5. Pre-clearance of products or services (mutual recognition of decisions). The mediation mechanism should not, where a service is provided (or a product offered) on a cross-border basis (or through the establishment of a branch), provide a competent authority with the possibility to dispute a decision taken by the home country authorities of the service provider in areas covered by Community law and in particular by directives or regulations. In no event should the mediation mechanism provide for such a possibility, even where the host authorities consider that a decision taken by the home authorities runs contrary to the conditions set out in the relevant directives or regulations. Any verification of the conditions allowing the granting of EU passport to an

institution or a product can only be carried out by the home member state alone. Solutions to disputes as such cannot take any route other than a referral of the case to the European Court of Justice. Any action to be undertaken by CESR in this field should be aimed at removing obstacles which impede or delay the provision of cross-border business, rather than introducing new administrative procedures such as pre-clearing, which would preclude rather than encourage the innovation in products or services. It should be for the host member state competent authority to seek **ex-post solution** (namely without any possibility to hold the commencement of cross-border activities or establishment of branches) to problems arising because of differing interpretation of EU provisions.

6. Finally, the Associations would like to stress the importance, as CESR notes under the first bullet of paragraph 6 of the Call for Evidence, of finding techniques to ensure **input from market participants**. This is because the main points of difficulty in the interpretation or application of EU law arise from the interpretations that competent authorities impose on firms, not from disputes between CESR members themselves.