

C L I F F O R D
C H A N C E

MEMORANDUM

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SUBJECT	CESR Mediation Mechanism – Observations on Consultation Paper		

The September 2005 CESR Paper for Comments on the proposed CESR Mediation Mechanism (the "Paper") asks several questions about the feasibility of mediation for disputes between the CESR Members. We will set out below some non-exhaustive observations made when studying the Paper. Should you wish to discuss the Paper, or raise additional questions, we would of course be happy to do so at any time. We would also be pleased to assist in the further process of implementing mediation.

GENERAL

By way of a preliminary remark, we would like to point out that the CESR mediation scheme will have to reflect that mediation between two or more public authorities of two (or more) independent states may require different features than pure private/commercial law mediation. This relates in particular to the issue of the enforceability of mediation results and, most likely, to the role of public policy interests in negotiation.

On the other hand the key advantages of mediation will also apply to CESR mediation: mediation, i.e. negotiation between two or more parties with the assistance of a neutral mediator, can be an efficient, informal and flexible instrument of dispute resolution. By using mediation, the parties to a dispute keep their responsibilities for both, the procedural framework and the substantive solution to the dispute. In other words: the situation in mediation is not too different from the "normal" negotiation situation, CESR Members face already today.

Bearing in mind that mediation is a generally applicable (and applied) technique of dispute resolution, we would also like to stress that the CESR mediation scheme should be of a general nature, thereby remaining uniformly applicable to any dispute between CESR Members. Any adjustments to the mediation process, which may be required due to the specific substance of the dispute, should only be made in a second step, i.e. once an individual mediation process has started.

In detail:

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

While, generally, we deem the framework set out in the Paper to constitute an appropriate approach for CESR mediation, we will address some of the key features below: the scope of participants in mediation (*see* 1.1 below), the obligation to participate in mediation (*see* 1.2), the question of whether or not the results of mediation should be binding upon the parties (*see* 1.3), and the issue of an oral negotiation as a general rule of mediation (*see* 1.4).

1.1 Only CESR Members entitled to participate in mediation?

The Paper suggests (*see* paras. 20, 28 *et seq.*) that only CESR Members should be entitled to participate in mediation, thereby, in particular, excluding any market player having an individual interest in the resolution of a dispute.

While, in theory, it would – of course – be good to have as many potential parties as possible participate in CESR mediation, we believe that, for practical reasons access to the CESR mediation scheme should be restricted to only CESR Members. In particular, we doubt that mediation could be conducted at arm's length between a CESR Member and a market player, since their respective positions provide them with quite different powers: the market player is dependent on the CES Member's decision. The market player also has to take into account that the CESR Member will potentially deal with future issues of the market player. Therefore, it is difficult, if not impossible, to achieve a well-balanced and fair negotiation.

In addition, it cannot be excluded that a CESR Member may base its decision vis-à-vis a market player on policy issues that it may not want to disclose to the market as a whole.

However, in the interest of a functioning co-operation between market players and CESR Members, we believe it to be important that market players have the opportunity to try to urge a CESR Member to initiate mediation proceedings against another CESR Member. This would ensure that the market player's arguments on a case find their way into mediation. In this regard one could also consider granting market players the right to force a CESR Member to either approve or reject the market player's request for initiation of mediation by a formal decision. Such a formal decision could then be subject to legal review in the competent national courts. However, we think, that solution would be rather far-reaching. A compromise could consist in granting market players the possibility to suggest to the respective CESR members to initiate mediation proceedings.

Finally, for the sake of transparency, it may also be considered to inform the CESR Market Participants Consultative Panel (MPCP), on an anonymous basis, about any pending mediation.

1.2 Obligation to participate in mediation?

The Paper raises the question whether there should be an obligation to take part in a proposed mediation (*see* para. 21). The question is answered in the negative. Like in private law mediation, a party should only be obliged to take part in mediation if it has agreed accordingly in a previous contract or other commitment.

However, given the fact that mediation is a purely voluntary dispute resolution mechanism, which can be abandoned by either party at any time, the question of mandatory participation appears to be of less relevance: In practice, there will have to be a deadline for a CESR Member's decision whether or not to take part in mediation. While the request for mediation is still pending, no party should be allowed to unilaterally initiate another dispute resolution mechanism. Only upon expiration of such deadline, other means of dispute resolution should be permitted.

If a CESR Member does not wish to participate in a proposed mediation, it should be obligated to state the reasons for its decision. Clearly, a plain refusal by a CESR Member approached to agree to mediation, without giving any reasoning for such refusal, would lead to frustration among all parties involved. Therefore, we believe that the proposed "Accept or Explain" (*see* para. 23) approach can be a useful instrument to ensure that all CESR Members take the mediation mechanism seriously.

1.3 Binding results?

The Paper suggests that a result achieved in mediation should not be binding upon the parties to the mediation (*see* para. 24). While we recognise that a different approach than in private law mediation may be worth considering, it is our view that mediation results should in fact be of a binding nature also within the framework of the CESR mediation scheme:

The usual way of concluding mediation proceedings is the parties signing a settlement agreement, which contains the results agreed upon by the parties. The voluntary nature of mediation refers only to the question of whether or not a party wishes to take part in mediation at all. Once it has made a positive decision, it will be bound by the results it has negotiated. We do not see any reason why such an agreement should have a different nature in CESR mediation than any other agreement between CESR Members agreed in purely bilateral negotiations.

In our view at least two issues would become problematic, if a mediation result were not binding:

- First, for a party, which is uncertain about whether or not to participate in mediation, the fact that the potential result of mediation would not be binding anyway would certainly constitute a disincentive to take part in mediation at all.
- Secondly, it would be all too easy for a party obliged under a mediated settlement agreement to find arguments (for instance by referring to an allegedly superior public interest) against the binding effect of a mediation result. If only one or two such situations arose, the reputation of the CESR mediation scheme would be severely, if not irreparably, damaged.

Therefore, any result of mediation should be reached in the form of an agreement between the CESR Members in dispute. Such an agreement should have the same binding nature as any other agreement.

Since CESR Members are not private parties but public authorities of sovereign states, it should be borne in mind that there is a difference between the binding nature of a settlement agreement and its enforceability. In other words: while a settlement agreement should be binding, it may not be enforceable. Also, the fact that a settlement agreement is binding, does not interfere with the European Commission's right to initiate proceedings under Art. 226 of the Treaty establishing the European Community, or the European Court of Justice's competence to finally decide on any matter of EC law.

Lastly, we should also like to point out that in order to ensure that a valid settlement agreement can be concluded at the end of the proceedings, it is important that each participating CESR Member is duly represented in mediation.

1.4 Oral negotiations?

The Paper suggests that, generally, the mediation panel shall decide on the basis of the written submissions made by the parties to mediation (*see* para. 58).

However, we strongly recommend there to be an oral negotiation as a general rule. According to our experience, oral negotiations contribute to a large extent to the success of mediation. A party that has to present its case before a mediator and discuss potential settlement scenarios will act differently than a party only filing written submissions. Therefore, we believe that the chances for a successful mediation will be greatly influenced by an oral hearing.

2. **QUESTION 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?**

We believe that in, in principle, any kind of conflict between CESR Members should be eligible for mediation.

3. **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?**

With regard to negative criteria for mediation, the guideline needs to be that contradictory results of mediation and parallel legal (court) proceedings need to be avoided.

Therefore, if court proceedings covering the subject matter of the potential mediation, but pending between a CESR Member and a market player (who is not entitled to take part in a CESR mediation anyway), are initiated, it would not make much sense to conduct parallel mediation proceedings between two CESR Members on the same subject matter, thereby excluding the market player. In the event of contradictory outcomes of the court proceedings and mediation, the CESR Member would most likely have to comply with the national court ruling, unless there is an overruling decision by the Commission or the ECJ.

However, one could also consider that the court proceedings are stalled until the mediation expert panel and the mediating parties have come to a decision. Such a decision could then have, with the consent of both parties, the character of an "expert opinion" in the national court proceedings.

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

We believe that, if possible, the authorities of the EEA Member States should be admitted to the mediation scheme.

Furthermore, also other authorities of the CESR Member States should be allowed to take part in mediation. However, if a dispute involves an authority that is not a CESR Member, mediation should mandatorily include the CESR Member of the relevant country.

Given the important role of the CESR S-G in the organization of mediation, it would have to be made sure that non-CESR Members are always entitled to fully co-operate in CESR me-

diation, even if they normally do not participate in CESR. However, only if third authorities agree to comply with the scheme and accept the S-G's leading role, should they be admitted to CESR mediation.

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

We understand that the Gatekeeper decides on, *inter alia*,

- Whether or not the necessary level of escalation for mediation is achieved (para. 45 *et seq.*);
- The mediator(s) handling a case (para. 53);
- The referral of a case directly to CESR Chairs, upon the request of only one party to the mediation (para. 59);
- Whether or not a matter shall be forwarded to the Review Panel or a relevant Expert Group (para. 63);
- Whether or not - and if yes, how - interested third CESR Members shall be informed of a case, and how to get input from them (para. 64);
- Whether or not the European Commission is asked for advice on EU law (para. 67).

In light of these potential tasks, we deem the role of a Gatekeeper to be questionable. The powers of the Gatekeeper outlined in the Paper would create a peculiar position, which is hardly compatible with the mediation parties' personal responsibilities for both the procedure and the outcome of mediation. This principle of self-determination, however, is one of the underlying rationales - and advantages - of mediation.

Apart from the impact on the parties' freedom of self-determination, we see several further risks associated with the role of the Gatekeeper as defined by the Paper:

- First, by installing a Gatekeeper between the mediation parties/mediators and any potential addressee of information arising from the mediation, the whole mediation procedure risks to become inefficient. We cannot see any reason why the mediation parties, in cooperation with the mediator, should not be capable to handle themselves any information requirements vis-à-vis third parties. This would also be more in line with the characteristics of mediation.

- Secondly, and independently of the merits of such allegation, the installation of a Gatekeeper, "with the full support from the CESR Secretariat" would cause suspicion as to his/her impartiality. One can well imagine situations where the Gatekeeper/the Secretariat are susceptible to manipulation or undue exertion of pressure.
- Thirdly, the person(s) of the mediator(s) is (are) of critical importance for the success of mediation. Therefore, it should be the parties to mediation in the first place deciding on the person of the mediator(s).

To summarize: In our view, the parties to mediation - and the mediator(s) - can decide themselves, if a dispute has reached the level of sufficient escalation for mediation. The same is true for choosing (a) mediator(s), making decisions on the forwarding of information to interested third parties or expert panels or involving the European Commission. Therefore, we do not see the need for the aid of a Gatekeeper for those decisions.

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

As already mentioned above, the person of the mediator is of major importance for the success of mediation. While we do not believe that a mediator must have "grey hair", she/he should nevertheless

- have sufficient authority within the area of dispute;
- be a person who is taken seriously by the parties to mediation; and
- be able to mediate, i.e. to moderate negotiations between the parties, and have a certain feeling for communication.

Considering the characteristics of a good mediator set out above, it becomes clear that - depending on the parties involved and the substantive area of the dispute - a mediator needs to be chosen on a case-by-case basis. In addition, we believe it to be important that the parties to mediation decide themselves in the first place about the person(s) of the mediator(s).

Therefore, both options proposed in para. 53 are not optimal. In our view, a mediator should be nominated *ad-hoc* for each new case. Thus, we would suggest a two-step mechanism:

- (i) the parties to mediation get a specified (short) time frame to mutually agree on the person(s) of a mediator; and
- (ii) if the parties to mediation cannot agree within the given time frame, the CESR Secretariat will nominate a suitable candidate from a list of CESR mediators.

With regard to the mediators' personal capabilities, we would also like to stress the importance of a thorough training in the field of mediation/communication, which is an important prerequisite for successful mediation.

7. QUESTION 7: COULD PROCEEDINGS ON SIMILAR ISSUES IN THE FRAMEWORK OF THE EU SOLVIT 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 situation of a dispute between CESR Members is too different from a "SOLVIT"-situation. SOLVIT cases occur between private persons and public authorities in the first place, while in CESR matters disputes reflect mostly a CESR Member's own concerns with another CESR Member's behaviour.

With respect to part two of Question 7, we hold that a mandatory information requirement vis-à-vis CESR, or for reasons of confidentiality vis-à-vis the CESR Chairs, about a CESR Member decision turning down a request for mediation from a market participant is desirable. It would

- add a further control mechanism to the mediation scheme;
- ensure a fair treatment of market players; and
- provide transparency.

These effects would certainly add to CESR's credibility in general. Also, CESR Members would be even more motivated to review market player requests for mediation more seriously.

8. **QUESTION 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 PARS. 30 AND 68, THAT COULD BE USEFULLY PROVIDED BY MARKET PARTICIPANTS?**

Generally, we believe that involving the European Commission in the potential interpretation of questions of EC law would foster the production of good and reliable results in mediation.

However, in order to use the speeding advantage of mediation, it needs to be made sure that the Commission acts swiftly upon any request. According to our experience, the dynamics of mediation negotiations play an important role in this dispute resolution method's success.

Likewise, we consider it to be very important – and in the interest of good results of mediation – that market players can express their views on certain disputed items that are subject to mediation. Therefore, getting the view of the Market Participants Consultative Panel may add further substance for a beneficial outcome of potential mediation.

With regard to the additional points on Question 8 mentioned in the Paper, we would like to make the following observations:

8.1 Self-determination of the CESR Members vs. the European Commission's powers to enforce EC law

In the Paper it is stated that **because** mediation outcomes will not be binding, the role(s) of the European Commission (and the ECJ) will not be affected (*see* para. 65).

However, we do not see a direct causal link between the two elements: While it is clear that the European Commission is the watchdog for compliance by CESR Members with EC laws, the parties to mediation must be free to bindingly agree on solutions to their disputes. At first sight, one should expect that such solutions do comply with the applicable EC laws, since all parties involved in mediation, as well as the mediator(s) will be experts in the relevant areas of law. However, if the European Commission has doubts regarding the solution to a conflict found in mediation, it is still free to correct any mistake on the basis of the means granted by EC law. The situation would be the same as with respect to a solution found by two CESR Members in bilateral negotiations.

For these reasons, we do not see a contradiction between the binding nature of a settlement agreement found in mediation and the European Commission's powers to enforce EC law.

As already mentioned (*see* section 5 above), from a procedural point of view we do not understand why it should be a Gatekeeper, and not the Parties or the mediator(s), informing the Commission and other CESR Members of relevant mediation contents.

8.2 Confidentiality

The Paper suggests that the European Commission, as well as CESR Members, will be informed of any case going into mediation on an anonymous basis (*see* para. 66).

With regard to confidentiality, we would like to point out that according to our experience with mediation in industries with few market players, upholding confidentiality is extremely difficult. It may well be that informed persons or groups within the industry can deduct the participants of the respective mediation proceedings already from the structure of the dispute and the underlying national legal framework reported to the Commission or CESR Members.

Therefore, we would question that confidentiality of CESR mediation can really be guaranteed, even if the Commission (and CESR Members) are informed on the basis of only an anonymous description of a case. This should be taken into account when deciding on the sharing of confidential information.

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?**

Generally, we believe that the proposed procedural framework for CESR mediation will constitute a good basis for the amicable settlement of disputes. The same applies to the more specific process outlined in Annex 3 for cooperation and information exchange cases.

As already explained above, we would encourage the Mediation Task Force to reconsider the position of a Gatekeeper. In our view, the CESR Secretariat could perform the organisational tasks of mediation, while any substantive issues and decisions should be left solely in the hands of the parties to mediation and the mediator(s).

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