

**ESTABLISHMENT OF A MEDIATION MECHANISM
CALL FOR EVIDENCE
CESR/05-253**

A RESPONSE BY FIDELITY INVESTMENTS

Fidelity Investments was founded in Boston in 1946 under the name of Fidelity Management & Research Company (FMR Co.). Today FMR Co. is a subsidiary of FMR Corp.

Fidelity International was set up by FMR in 1969 to act as a management centre for Fidelity's offshore funds. In 1979 Fidelity International was spun off from FMR and established as a separate and independent holding company for the Fidelity International group of companies. In 1979 FIL's assets under management amounted to US\$ 0.5 billion; today they stand at more US\$ 200 billion, illustrating investors' growing interest in global diversification of portfolios. Combined, FIL and FMR Corp. currently have over 20 million clients and customers and US\$ 1.2 trillion of assets under management

Fidelity International Limited serves the major markets of the world by providing investment products and services to individual and institutional investors outside the US. FIL's products and services include equity funds, fixed-income funds, money market funds and institutional portfolio management.

Within Europe, FIL has three significant mutual fund centres: the UK, Luxembourg and Dublin with around US\$ 71bn in assets. All the key fund ranges have multiple registrations outside their home jurisdiction and this underlines the importance of the creation of an efficient Single Market for Fidelity. An effective regulatory regime to encompass the Single Market is key.

We are therefore grateful for the opportunity to respond to CESR's call for evidence.

Before moving on to the specific questions raised by the paper we would like to make some general points.

- We do not see the existence of, or need for a mediation mechanism as an adverse commentary on the existing regulatory structures but rather as a process to be embraced enabling a more efficient working of those structures.
- We further believe that the adherence by CESR's members to the mechanism (albeit there is no legal force to the decisions) will help in developing strong and healthy relationships between Europe's regulators.
- In our view CESR's role as mediator is contingent upon the organisation's increasing accountability to the democratic institutions of the EU being realised.

Key features of a mediation mechanism

Although we note such a mechanism is not to be legally binding we believe that all parties should sign up to some form of protocol describing how they plan to abide by the mechanism and that such a protocol should be a public document.

We understand the reasons why market participants should not have an automatic right of referral, but are concerned that without an ability for someone with a legitimate interest to table a matter for consideration, the process will become either too slow and/or not be addressing those issues which it should. Therefore we feel each regulator will need to ensure that it has a mechanism for identifying issues with its constituency that might be relevant to the CESR process and for that mechanism to be communicated to market participants.

It will help if the mechanism has a clear authority to be used in certain circumstances. If the mechanism requires the approval of all parties to the issue before it can be activated that is likely to limit its usefulness. However, to ensure maximum flexibility we would suggest that an application for a matter falling outside the existing criteria may be made and accepted where all the parties agree and this does not conflict with EU law.

Scope for mediation

The dictum that justice delayed is justice denied is particularly true of the financial services environment and therefore there should be an ability for a matter to be referred to mediation prior to formal decisions being taken. However, we acknowledge that the mechanism should only be triggered where a substantive position has been adopted over which the mechanism may have authority. It is important that the mechanism not itself become part of the negotiating process between interested parties.

We believe that the scope could extend to all those areas covered by Directives which are within the scope of CESR for Level 3. This lends a consistency of treatment for Level 3 issues which could otherwise compromise CESR's effectiveness.

The question of whether the mechanism should be limited to "operational disputes" or have a broader ambit is a complex one. It would seem that the type of issue on which the mechanism might be employed could relate to a dispute over the extent of national discretion within a Directive, the meaning of the Directive itself, or the meaning of CESR advice at Level 2. Its key usefulness, we suspect, will be at the bread and butter level of mutual recognition for the purposes of authorisation and registration for example, but feel that it should have the ability to address any matter which affects the efficient functioning of the Single Market.

Mediation procedure

Experience tells us that a single speed procedural framework risks being too slow for some types of decision and too fast for the considered evaluation of other types of decision. Given that the right but slow answer is generally better for the many (though problematic for the specific party in the initial case) than the quick but wrong answer, we would suggest that the default procedure should allow for due consultation, representation and reflection. However, where time is of the essence we believe that it will be vital to have a "fast-track" solution. That option should be at the discretion of those managing the mechanism within pre-determined criteria and should not be contingent upon the agreement of the parties, as delay can of itself represent victory or loss for one side or the other.

As to confidentiality we are of the view that there will be times when it will be justified, but many when it will not. Our preference is to assume that confidentiality is not a pre-requisite, but to allow the parties being mediated to apply for confidentiality on grounds such as commercial sensitivity. Openness will also allow any interested parties to join the mediation process or at least be able to identify their interest in the outcome.

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