



London
STOCK EXCHANGE

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Dear Mr Demarigny

THE ESTABLISHMENT OF A MEDIATION MECHANISM

Thank you for the opportunity to provide views at an early stage on proposals to establish a CESR mediation mechanism. As we stated in our response to CESR's analytical paper, "Which Supervisory Tools for the EU Securities Market", we are very supportive of the use of an effective mediation mechanism to resolve disputes between national regulators in a quick and cost efficient manner. The call for evidence provides the opportunity to consider the function and scope of the mechanism in more detail. However, given the early stage of the debate and the lack of any concrete proposals, our comments are necessarily high level.

We hope that our views are helpful to CESR's work. Please do not hesitate to contact us if you wish to discuss any aspect of this letter.

Yours sincerely

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Key Features

- 1. How might such a mechanism work given that it must abide by the previous principles and be legally non binding, be a mediation mechanism between authorities and deal only with cross-border cases.***

A mediation mechanism could afford a quick and cost effective way of resolving disputes between competent authorities. This is important given the speed of international capital markets and the need to promote consistent cross border supervision. However, in order to achieve this, it is vital that the mechanism is impartial, efficient, transparent and flexible. In particular, the mechanism should:

- focus on discussion of practical problems rather than complex legal interpretation;
- take account, where possible, of the views of market participants;
- be a single procedural framework with a short and clear timetable; and
- be transparent as regards the commencement and outcome of proceedings.

Furthermore, we believe that there should be clear understanding and agreement among CESR members about the scope and function of the mechanism. In particular, we believe that the distinction between CESR-POL and the mechanism should be clearly understood. As the role of CESR-POL is to facilitate the sharing of information in order to enhance surveillance and enforcement activities between CESR members, it will be vital to distinguish between the functions of the two bodies.

As envisaged by the Market Abuse Directive, the focus should be on discussion between the relevant competent authorities rather than on compliance with formal procedural requirements which might lead to a defensive legal approach. To ensure an unbiased process, CESR should consider the appointment of external experts, but this should not lead to any delay. There should be clear timetables and as much transparency as possible about the commencement and outcome of proceedings.

We welcome the commitment in the paper that any CESR mediation mechanism should respect the competence of the European Commission at Level 4 and should not interfere with the respective roles of the Commission and the European Court of Justice in the interpretation and enforcement of EU law. Presumably, the mechanism would not vest any decision making authority in CESR.

2. *What techniques might be incorporated in the mechanism to ensure input from market participants whilst maintaining rapid decision making?*

The mechanism should make provision for the submission of written and/or oral evidence from market participants. In order to ensure rapid decision making, early notice should be given to all parties and clear timetables should be set.

Scope for Mediation

3. *What type of disputes would most likely benefit from the new mediation mechanism?*

We believe that, as envisaged by the Market Abuse Directive, operational disputes concerning the sharing of information, joint working and co-operation would most likely benefit from the mechanism. For example, in cases involving overlapping jurisdiction which risk “multiple jeopardy” for market participants and in disputes as regards investigation and enforcement, discussion between competent authorities should clarify facts and resolve misunderstandings.

Disputes which relate to complex legal interpretation are possibly least likely to benefit from the mechanism because they would be time consuming and difficult to resolve. Also, they might foster a defensive legal approach and risk being seen to interfere with the respective roles of the Commission and the European Court.

4. *Should the referral of an issue to the mediation mechanism wait until the supervisor has adopted the decision (ex-post mediation) or take place before the decision is made (ex-ante mediation)?*

We believe that this should be decided on a case by case basis depending on the particular facts of the dispute and the views of the competent authorities concerned.

5. *Which areas beyond the scope of the MAD (i.e. failure to exchange information) could helpfully be addressed by this type of mediation mechanism?*

Under MiFID competent authorities are under an obligation to cooperate in relation to the carrying out of their duties in relation to their powers under that Directive. In principle, the mechanism could be applied across the spectrum of FSAP legislation where cooperation is required between competent authorities. However, we would urge CESR to consider an initial pilot mediation exercise, restricting the matters that may be considered to those

arising under MAD and possibly MiFID. This would give CESR and competent authorities the opportunity to review and fine-tune the mechanism.

Mediation Procedure

- 6. *Should a single procedural framework be adopted for all issues or should specialised procedures be envisaged, depending on the nature of the case (for instance, should the mediation procedure for disputes related to the exchange of information differ from the one applicable to authorisations)?***

Given the non binding and flexible nature of the mechanism, we believe that a single procedural framework should be adopted for all issues. We are concerned that specialised procedures would risk an overly formalistic mechanism and lead to delay.

- 7. *Should it be optional or mandatory for CESR members to refer a case to the CESR mediation mechanism before initiating legal action at EU level?***

We do not see how a non binding mechanism can be anything except optional. Compulsion would be incompatible with the legally non binding nature of the process and the recommendations.

- 8. *Whether access of a dispute to the mediation mechanism should be subject to certain quantitative or qualitative conditions or thresholds?***

We believe that quantitative or qualitative thresholds would be inconsistent with a flexible and effective mechanism. We believe that such thresholds would lead to unnecessary uncertainty and complexity. The only conditions should be that there is agreement between the relevant competent authorities that the dispute would benefit from the discussion envisaged by the mediation mechanism and that such mediation process will help them achieve the aim envisaged by the relevant directive.

- 9. *Whether the mediation mechanism should include a special “fast track” process (e.g. using the good offices of the CESR Secretariat or from senior officials from CESR members), with the possibility of review by a Panel of CESR chairs if concerns remain?***

We believe that all cases referred to mediation should be dealt with by means of a “fast track” process. In cases involving clear and imminent systemic risk an expedited process might be appropriate. We have misgivings about the possibility of review by a Panel – this appellate feature seems incompatible with the flexible, non-binding, and ideally discursive, nature of the process.

10. To what extent or until what stage should proceedings or information concerning a case remain confidential?

There should be as much transparency about the commencement and outcome of proceedings as possible, subject to necessary restrictions on disclosure of information. Disagreements between supervisors may create uncertainty in markets and it is important that market participants are informed, at the very least, about the results of discussions between competent authorities.