

FESE Response to the Paper for Comments - CESR Mediation Mechanism

(Ref: CESR/05-483c)

I. Introduction

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments. Established in 1974 as a small forum of Stock Exchanges in Europe, FESE today has 24 Full Members representing 36 Securities Exchanges and clearing houses from all the countries of the EU, Iceland, Norway and Switzerland as well as 6 Corresponding Members from other non-EU countries. FESE co-operates with European settlement and securities depository organisations and works closely with the European Association of Central Counterparty Clearing Houses (EACH).
2. We welcome CESR's consultation paper on the Mediation Mechanism. CESR has made a clear effort to incorporate the views expressed in the Call for Evidence on the same subject and provided a considerable degree of detail in this paper concerning the scope, the basic features and the procedures that would have to be settled before CESR's proposed mediation mechanism can be put into practice. These improvements notwithstanding, there remain several important points that need further clarification; we therefore appreciate the opportunity to submit comments at this stage.
3. Our response is structured as follows: We first provide a **summary** of our views on CESR's proposals. In the subsequent section we provide **answers to the specific questions** posed in the Consultation Paper (from henceforth, the CP). The paper will conclude with a summary of our views concerning the **next steps**.

II. Executive Summary

4. We agree that a mechanism along the lines proposed by CESR could be useful in dealing with disputes between competent authorities that could undermine supervisory cooperation and convergence. We commend CESR for having taken into account the comments received during the Call for Evidence to a large extent and believe that the proposal is generally moving in the right direction. We therefore support the plan to set up such a mechanism as quickly as possible once CESR has had a chance to take the last round of comments into account.
5. We support the basic **features of the mediation mechanism** as proposed by CESR. In particular, we agree that it should be:
 - **non-binding**;
 - **voluntary**;
 - aimed at cross-**border cases**; and
 - structured in a way that is likely to result in **efficient and speedy** results.
6. We agree with the proposed **scope of cases** it should be used for, in particular concurring with CESR that:
 - While the mechanism should be used as a last resource and for a limited number of issues, the potential range of cases should be **open-ended**;

- Positive as well as negative **criteria** should be used in limiting the scope;
 - **Mutual recognition** decisions should under no circumstances be called into question through the mediation mechanism;
 - Cases accepted for mediation should not undermine the role of the **European Commission** or the recourse of citizens to legal remedies through the **European Court of Justice** (although we also argue that, under very limited case, issues submitted to legal proceedings may be included if mediation is deemed to offer an interim solution or the possibility of an amicable resolution outside of court).
7. We see benefit in extending the scope of the mediation mechanism to all competent authorities active in the **EU/EEA area and Switzerland** as the overarching objectives of mediation would potentially benefit all jurisdictions working towards the consolidation and integration of the EU markets.
 8. We support the basic proposal of a **Gatekeeper** and agree with assigning three of the existing CESR Chairs (CESR-Pol Chair, CESR-Fin Chair, and a third one for all other disputes) as specialised Gatekeepers. The evaluation done by the Gatekeeper should be based on clear, objective, verifiable and pre-existing conditions, and not turn into an additional bureaucratic layer of case-by-case, subjective evaluation.
 9. We support a **simple, single procedure** that could be adapted to the characteristics of the dispute in question; the evaluative and facultative models proposed by CESR could be developed as slightly differentiated versions of a single procedure. The decision as to which model a given dispute would fall under should also be clearly defined on an ex ante basis.
 10. If a **standing panel** is to be used, it should be **supplemented** by experts chosen on an ad-hoc basis; equally, we would see benefit in an ad hoc panel composed with regard to the expertise needed in each case.
 11. We believe that CESR should explore further the role of market participants in its mechanism:
 - Market participants should be given a clearer opportunity for **requesting** a CESR member to **initiate mediation** (although we accept that the actual decision to initiate mediation would be left to the CESR member in question); and
 - Incorporation of market views in the evaluation of a mediation case should not be limited to consultation of the Market Consultative Panel or the Consultative Working Groups (although such consultation is to be welcomed); market participants should also be invited **to sit in the standing or ad hoc panels**, depending on the nature of the dispute and the expertise required. At the same time, CESR's discretion over the input that is to be requested in each case should not be called into question.
 12. Even after CESR adjusts its proposal to clarify the role of market participants, however, we believe that by definition CESR's mechanism will likely provide only a limited and indirect opportunity for market participants to resolve their disputes. We therefore believe that now is a useful opportunity to start the consideration of a parallel, **complementary mechanism** to be managed by the Commission, CESR, or a 3rd party coordinated by market participants (such as **an ombudsman system** as proposed by FESE); we are fully prepared to work with CESR and all other interested parties to develop such a proposal further;
 13. We fully support **transparency of the results of all mediation activity** to the wider public via appropriately anonymised information about the cases and a period disclosure of the outcomes. We urge CESR to develop these proposals further to ensure that the wider public acquires adequate information on the evolution of the mediation mechanism and the nature of the disputes emerging during the implementation of the FSAP.

14. We support the proposed **review period of two years** and recommend that it incorporate a wide scale consultation of all market participants and the institutions involved.

III. Specific Comments

Question 1

Do you agree with the key features proposed by CESR?

15. We agree with the basic characteristics of the mechanism as described by CESR in the section pp. 4-7. In particular, we agree that the mechanism should be **non-binding, voluntary**, aimed at **cross-border cases**, and structured in a way that is likely to result in **efficient and speedy** results.
16. Crucial to achieving such results is the role that will be played by market participants in such a mechanism. While we believe that CESR already recognises this, we urge CESR to re-consider the possible involvement of market participants in its proposal. We also recognize some natural limitations to the role that market participants could play in CESR's proposal but believe that this role needs to be explored a bit more. In particular, we accept that the role of market participants in initiating mediation and in deciding over matters submitted to mediation could only be indirect and limited; by contrast, their role in providing market expertise to assist CESR should be explored further.
17. In Para 20, CESR states that "market participants may well have a role in requesting mediation as envisaged below in par. 29") but does not provide a clear role for market participants in **initiating** the mediation mechanism. We assume that CESR would allow market participants to ask a CESR member to initiate mediation; we support this principle and believe that it needs to be clearer in the proposal. In this regard the wording of Para 29 is somewhat unclear since it states that, while "[m]arket participants will always be able to bring potential matters to the attention of their national CESR member", the mechanism is not intended to become a "complaints mechanism". We believe that allowing market participants to initiate mediation mechanism – with the agreement of a CESR member - would not necessarily turn it into a complaints mechanism as long as appropriate safeguards are applied to the initiation by market participants. We therefore believe that CESR should at least consider whether the mediation mechanism could include a clear structure for market participants to initiate the mechanism via the competent authorities.
18. At the same time, we see a clear benefit in envisaging a **parallel mechanism** to be set up for market participants (to be operated under the auspices of the Commission, by CESR or a 3rd party coordinated by market participants). Such a mechanism would have the advantage of dealing exclusively with conflicts that arise between market participants and CESR members and would be fully complementary with CESR's own mediation mechanism. CESR could well consider hosting such a parallel mechanism. In fact, as FESE, we have initiated work over the last few years in the direction of an **independent Ombudsman mechanism**. We would see value in a variety of different possible arrangements, including one along the lines we have proposed, as long as the basic premise of allowing market participants a fair and independent way of seeking quick and efficient solutions to disputes is met.
19. Moreover, as we will discuss in greater detail below, we believe that any mechanism operated by CESR should allow for some input from market participants to be incorporated in the **evaluation of** matters submitted to mediation. This should of course not interfere with the ability of CESR to decide on the matters independently and its discretion over the input it will require in each case.
20. As far as the participation of a competent authority is concerned, we see merit in the proposed approach that would require the CESR member in question to **accept** the request for mediation or to **explain** its reasons for rejecting it. This approach would safeguard the voluntary nature of the

mechanism while ensuring that the reasons for the rejection of a competent authority are made transparent.

21. We also agree with the proposed **scope** of the mediation mechanism. In particular we support the statement in Para 26 which concerns **mutual recognition decisions**, which under no circumstances should be called into question through the mediation mechanism. In this regard, we find CESR's distinction between the *criteria* applied to support mutual decisions and the mutual recognition *decision itself* potentially useful, but would need further clarification from CESR as to how this distinction would function in practice. Above all we wish to highlight the concrete risk of the mechanism being used to undermine or disregard the mutual recognition principle enshrined in many of the FSAP measures. In this sense, cases having a wider implication – e.g. arising from a disregard of CESR's own Level 3 principles – can be considered as categorically inappropriate for the mechanism.

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?

22. As we are at a relatively early stage of implementation of the FSAP framework, it is difficult to foresee all future categories of cases where the use of the mediation mechanism would be constructive. Moreover, constant innovation in the securities industry would make it impossible to foresee the range of all potential disputes. We therefore believe that the list of types of conflict should remain **open**.
23. We fully agree with CESR that the mediation mechanism must not take on a role in the development of **Level 2 or Level 3 measures** or the review process of the **Review Panel** (Para 40). In fact, given the importance of keeping these activities separate, we encourage CESR to establish clearer guidelines that will ensure that the mediation mechanism will not enter into the scope of any of these areas.
24. Finally, we wish to reiterate our view that the mediation mechanism should not be utilised to undermine the right of market participants to benefit from the **mutual recognition** of their EU passport.

Questions 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?

25. We agree with the proposed negative criteria/restrictions set out in Para 42. With regard to the first bullet, while we agree that the mediation mechanism is generally not suitable if **legal proceedings** have been initiated at the EU or national level, we believe that in certain (rare) cases, the mediation mechanism may nevertheless prove useful in solving the problem in a faster manner or providing an interim solution (subject, as in all cases, to the agreement of all parties involved). Thus CESR may wish to reserve the right to allow mediation in such cases on an exceptional basis.
26. In line with our statement with respect to **Level 2 and Level 3 activities**, we fully support CESR's statement in the 2nd bullet point that matters subject to these activities are covered by the negative criteria.

Question 4

Should the mediation mechanism be made available to competent authorities that are not CESR Members?

27. We see benefit in extending the scope of the mediation mechanism to all competent authorities active in the **EU/EEA area and Switzerland**, even in those cases where the authorities in question are not members of CESR. This is because the overarching objectives of mediation would potentially benefit all jurisdictions working towards the consolidation and integration of the EU markets as targeted by the FSAP.

Question 5

Do you have any comments on the proposed role of a Gatekeeper?

28. We can agree with the basic logic of a **Gatekeeper** as described on pp. 9-10. In particular, it seems important to ensure that the mechanism is used only for those cases where all bilateral efforts have been exhausted and where the nature of the dispute satisfies all the other positive and negative conditions laid out by CESR. That a CESR official takes responsibility for this function seems sensible. However, the evaluation done by the Gatekeeper should be based on clear, objective, **verifiable and pre-existing conditions**, and not turn into an additional bureaucratic layer of case-by-case, subjective evaluation. In fact, the clearer the conditions, the more straightforward the evaluation of the Gatekeeper will be. The conditions laid out in Para 48 may need to be fleshed out in greater detail to provide comfort on this point.
29. CESR proposes using several **specialist gatekeepers**, each one in charge of a specific type of dispute. We agree with this broad proposal and more specifically with the suggestion of assigning three of the existing CESR Chairs (CESR-Pol Chair, CESR-Fin Chair, and a third one for all other disputes) as the specialised Gatekeepers, as laid out in Para 50.

Question 6

Which of the options in par. 53 is most appropriate in your view, or could there be a combination of them?

30. In Para 51, CESR proposes two types of procedures (an “**evaluative**” model versus a “**facilitative**” model) to be used as a function of the complexity of the dispute. To the maximum extent possible, we support a simple, single procedure that could be adapted to the characteristics of the dispute in question, and could therefore see merit in developing these two models as slightly differentiated versions of a single procedure. What is most important is for the mechanism to deliver speedy, objective and credible results. If CESR considers it necessary to develop these possible models in greater detail, then the decision as to which model a given dispute would fall under should also be clearly defined on an *ex ante* basis.
31. The fourth bullet point of Para 52 states that the European Commission would also be consulted during mediation. While we fully support transparency vis-à-vis the Commission and see it as a basic guarantee that the mediation mechanism would not undermine the role of the Commission as the Guardian of the Treaty, we also believe that any such involvement has to be clearly defined. For example, it has to be decided up-front whether the Commission will be asked for its view on the merits of the dispute or its potential interaction with interpretation of EU law only (we believe that it should be the latter). There should also be a clear deadline by which the Commission would be asked to submit its opinion.
32. In relation to the composition of mediation panels, we see benefit in a **standing panel** that could be **supplemented** by experts chosen on an ad-hoc basis. Most importantly, as we noted above, we

strongly believe that market participants should also be invited to sit in such a panel, depending on the nature of the dispute and the expertise required.

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?

33. As the scope of the **EU SOLVIT** system is much wider than that of the proposed mediation mechanism, we find it difficult to make a comparison between the two. However, certain features of the EU SOLVIT system, such as the target deadline, could be useful to replicate here.
34. In principle, we assume that market participants whose requests for mediation have been rejected may find it useful **to inform CESR**, and would in any event be able to do so out of their free will. CESR may wish to establish a clear procedure (including whom to inform and what mechanisms would ensure confidentiality) for market participants to turn to in such a case. We also find it appropriate and useful for the Gatekeeper to inform CESR about the rejection of a mediation request by a member of CESR. This will serve the purpose of allowing CESR to monitor its own members' openness to the mediation mechanism and also the usefulness of the mechanism to CESR's members and the market participants on a continuing basis. As with all other instances of disclosure of information concerning a dispute submitted to mediation, CESR needs to develop in some more detail the procedures to follow regarding the transmission of information so that the case remains confidential and that the concerns of the market participants involved in the specific case are duly respected.

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 mechanism process, in addition to the mechanisms mentioned in par. 30 and 68 that could be usefully provided by market participants?

35. It is undeniable that the very scope of mediation holds a significant interest for the European Commission, since disputes concerning conflicting interpretations of applicable legislation or an infringement of EU laws should be referred to the Commission, and not included in the scope of mediation. Making this distinction accurately within CESR is first and foremost the responsibility of the Gatekeeper, but given that in some cases this distinction may be a matter of debate, it could be useful to include the Commission in the initial procedure determining whether a case is qualified for mediation. As we indicated above, the involvement of the Commission should be well defined and should in particular be subject to a clear timetable so as not to create an additional administrative delay in the procedure.
36. In Para 68, CESR describes a potential inclusion of market views in the mediation decisions through a consultation of the Market Participants Consultative Panel or the Consultative Working Group.
37. We have three comments on this proposal.
38. First of all, we believe that it would be more helpful to reverse the condition of obtaining "the parties' consent" before acquiring the views of market participants. Rather, it should be a natural part of mediation to gather expertise on the dispute in question from the Consultative Working Group, for example, which is established for the express purpose of bringing together experts specializing in each of the areas of the CESR Expert Groups. It is natural that the members of a standing/ad hoc panel retain full autonomy vis-à-vis the parties they consult. However, it would seem to be logical for market input to be provided on a given dispute. All parties submitting a request for mediation should

be considered, by definition, to have accepted their case to be shared with the appropriate market experts, as long as appropriate safeguards are in place to ensure confidentiality of the case. At the same time, we would support the principle that CESR needs to have full discretion over the input it will need in each case. Therefore it would be understandable for CESR to allow a derogation from this basic principle so that, when the merits of the case do not require any such input, then such input does not need to be sought.

39. A second, and equally important, concern raised by this paragraph is the somewhat limited nature of the consultation with market participants envisaged by CESR. Likewise, CESR does not mention the industry in the title of either Section 4 or Section 5 where transparency vis-à-vis CESR members and the Commission is discussed. While we fully support the idea of using the two groups mentioned above as a channel for acquiring market input, we would not consider them to be the *only vehicle* for accessing market expertise. These two groups are by nature exclusive and not representative of the full range of industry expertise. As we noted already, we believe that CESR should be ready to **appoint market participants in a mediation panel** when their expertise is likely to be useful to the resolution of the dispute.
40. Finally, whether the mediation is ongoing or finalised, the disclosure of any of the specific terms of the dispute should be subject to clear and strict rules that will ensure the confidentiality of the case. For example, disclosure to any outsiders – such as the Commission, Market Participants Consultative Panel or the Consultative Working Group- should only happen under the strict condition of **confidentiality** and through the use of **an anonymised format**, unless the parties explicitly allow the full details of the case to be disclosed. It is important to note that an anonymised format is not simply understood as “a format where the names of the institutions have been removed but all other details have been kept intact.” Rather, CESR should work on a common methodology that would remove all specific details that would allow the case to be recognised. Since this point in itself may be a matter of judgement, it would seem most practical to submit the anonymised format to be used for potential disclosure to the parties involved at the start and to get their agreement to it. Of course, any expert assigned to a mediation panel on an ad hoc or permanent basis will have access to the full details of the case and should therefore sign a confidentiality agreement beforehand.

Question 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?

41. In line with our belief in the need for the mechanism to be transparent, we believe that CESR needs **to make public** a properly anonymised and simplified version of each of the cases submitted to mediation and provide comprehensive information on the use of the mechanism on a **periodic basis**. The versions of the cases shared with the wider public may need to be less detailed than those submitted to consultation while the mediation case is going on, but should retain the fundamental elements necessary for the market participants to judge the overall progress with the use of the mediation mechanism and the nature of the underlying disputes emerging during the implementation of the FSAP. We therefore support the intentions expressed in Para 74 with respect to disclosure of individual cases of mediation and periodic reports and urge CESR to flesh out these proposals further.
42. Finally, we support the proposed **review period of two years** and consider that such a review would be highly recommendable given the novelty of the mechanism as well as the early stage of implementation of the FSAP. We trust that such a review would involve a wide scale consultation of

all market participants and the institutions involved. It is recommendable to set from the start clear criteria and benchmarks to evaluate whether the mechanism will be considered successful.

IV. Conclusion

43. In conclusion, we support CESR's proposal, and recommend that it develop its proposal further with the following changes to the current proposal:
- The **role of market participants** should be expanded, both in terms of their role in requesting a CESR member to initiate mediation and being included in the input to be provided to the mechanism (via appointment in the panels and consultation on an ad hoc basis);
 - All authorities and market participants active in the **EU/EEA area and Switzerland** should be included in the scope of mediation;
 - Formats and procedures for sharing of information should be fleshed out further to ensure the appropriate degree of **confidentiality** and **anonymity** in each of the steps of mediation; and
 - Review of the mechanism should be based on clear **criteria of evaluation and benchmarks** to be set from the start.
44. Once these concerns are taken into account, we believe that CESR should set up its mechanism without further delay.
45. In parallel to CESR's mechanism, we urge all parties to start considering **a parallel, complementary mechanism** to be managed by the Commission, CESR, or a 3rd party coordinated by market participants (such as an **ombudsman system** as proposed by FESE). We pledge our full commitment to exploring this proposal further in discussion with all stakeholders and institutions.