



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/05-253

## Establishment of a Mediation Mechanism

### Call for Evidence

APRIL 2005



### **Background:**

1. CESR was encouraged by the Inter-Institutional Monitoring Group to set up an internal mediation system under its Charter in order to solve conflicts between national securities regulators. This was set out in Page 35 of the Second Interim Report of the Inter-Institutional Monitoring Group published in Brussels on 10 December 2003 which stated:

‘The Group also encourages CESR to set up an internal mediator system under its Charter in order to resolve conflicts between national regulators. Such a mediation mechanism should not pre-empt or call into question the general European system for monitoring and interpreting EU law.’

In addition, the European Securities Committee asked CESR to develop further the practical functioning of a CESR mediation system in the course of the Level 3 work to be undertaken by CESR (ESC Summary Record of the 23<sup>rd</sup> meeting of the ESC held on 22 September 2004 - Ref. ESC 38/2004).

2. CESR announced in its “Level 3 Action Plan for 2005” (Ref. CESR/04-527b) that it will develop a ‘mediation mechanism’ by peers when supervisors disagree or fail to cooperate. Market participants and other interested parties that responded to the consultation process of the Level 3 Action Plan for 2005 and the “Himalaya Report” expressed support for a wider scope of a CESR mediation solution than the one foreseen under the Market Abuse Directive, in particular as it was regarded as an efficient arrangement for solving conflicts between competent authorities. (The responses to the two papers can be found on CESR’s Website under ‘past consultations’.)
3. The scope of the mediation mechanism established by the Market Abuse Directive is set out in Article 16 par. 2 and 4 of the Market Abuse Directive. This sets out that CESR is required to find rapid and effective solutions in case where a competent authority does not provide the information, or does not conduct the investigation, requested by the competent authority of another Member State. The Task Force established by CESR will consider whether it is appropriate to put in place a mediation mechanism which fulfils this requirement and addresses cases beyond this.
4. Furthermore, as stated in the various consultations proposing the establishment of a mediation mechanism, it is critical that any CESR mediation mechanism should be elaborated in full respect of competence of the European Commission at Level 4 and should not interfere with the respective roles of the European Commission and the European Court of Justice in the interpretation and enforcement of EU law.
5. The mandate of the CESR Task Force is set out in pages 5 to 6 for reference.

### **Call for evidence**

6. CESR is therefore inviting all interested parties to submit their views regarding the establishment of a general mediation mechanism which goes beyond that proposed by the Market Abuse Directive. In particular, views on the following areas would be especially welcome:

- **key features of a mediation mechanism:**

For example, comments would be especially welcome regarding:



- how such a mechanism might work, given that it must abide by the principles described earlier and, at the same time, have the following three characteristics:
  - o be legally non-binding
  - o be a mediation mechanism between authorities, with no automatic right of referral by market participants;
  - o deal only with cross-border cases;
- techniques that might be incorporated in the mechanism to ensure input from market participants whilst maintaining rapid decision-making.

- **scope for mediation:**

It would be helpful to receive comments on, and concrete examples of, the types of disputes most likely to benefit from the new mediation mechanism.

In addition, it would be helpful to gather views on:

- whether the referral of an issue to the mediation mechanism should wait until the supervisor has adopted the decision (ex-post mediation) or can take place before the decision is made (ex-ante mediation)?
- which areas beyond the scope of the MAD (i.e. failure to exchange information) could helpfully be addressed by this type of mediation mechanism?
- whether the mediation mechanism should be limited to operational disputes regarding mutual recognition of decisions (in areas such as authorisations, prospectus approval, etc.) or whether it should encompass other categories of disputes as well (and if so, which ones)?

- **mediation procedure:**

Views would especially be welcome on:

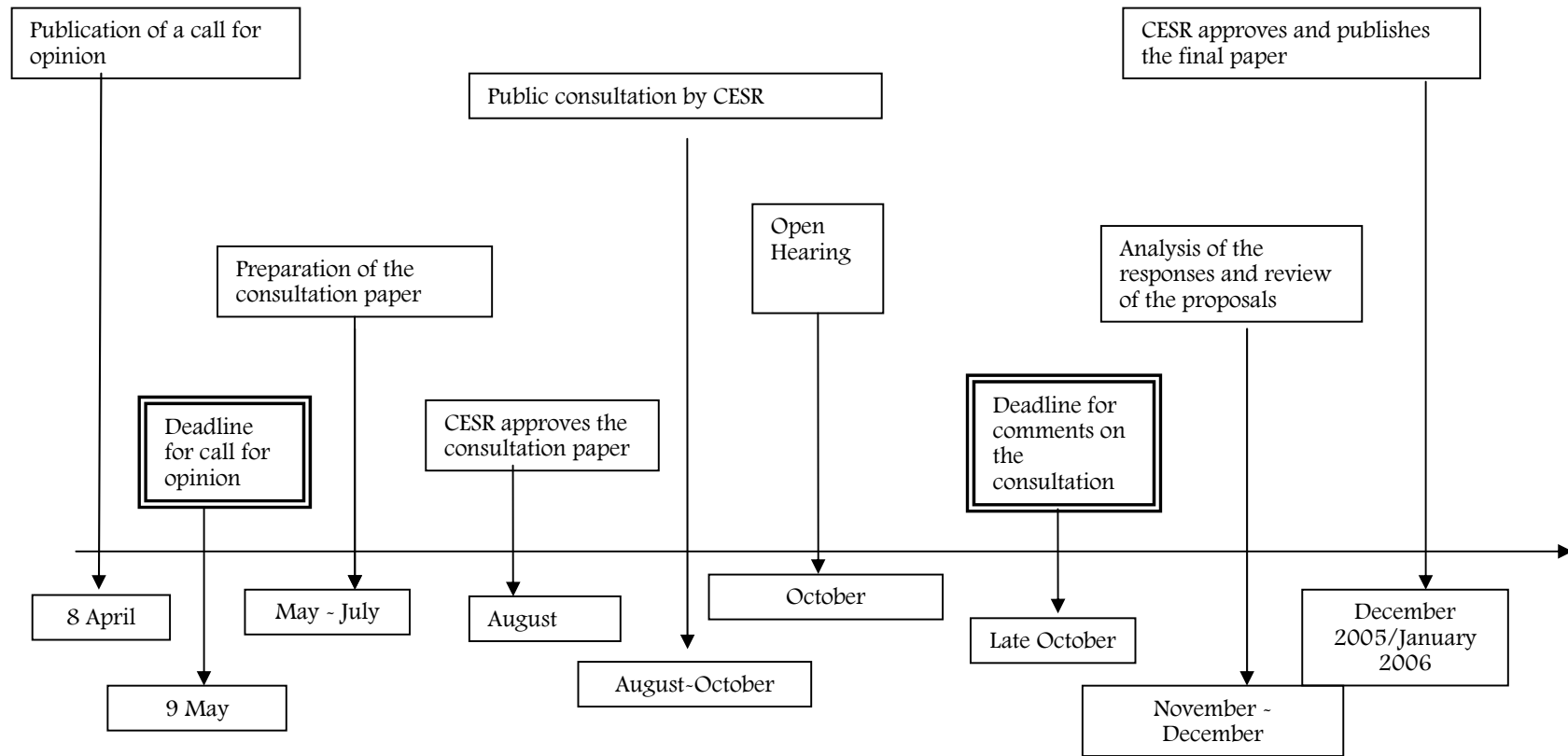
- whether a single procedural framework should be adopted for all issues or whether specialised procedures should be envisaged, depending on the nature of the case (for instance, should the mediation procedure for disputes related to the exchange of information differ from the one applicable to authorisations?)
- whether it should be optional or mandatory for CESR members to refer a case to the CESR mediation mechanism before initiating legal action at EU level?
- whether access of a dispute to the mediation mechanism should be subject to certain quantitative or qualitative conditions or thresholds?
- 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 ?
- to what extent or until what stage proceedings or information concerning a case should remain confidential?

7. All contributions, including concrete examples, can be submitted online via CESR’s website under the heading Consultations at [www.cesr-eu.org](http://www.cesr-eu.org) by 9 May 2005.

8. **Timetable:** A detailed timeline of the work of the Task Force is included below.



Indicative timetable for CESR's work on a general mediation mechanism





## **Mandate establishing a CESR Task Force to develop a Mediation Mechanism**

**MANDATE to Manuel Conthe, Chairman of the Spanish Comisión Nacional del Mercado de Valores**, concerning the initiation of a proposal for a CESR mediation mechanism to be developed by a “Mediation Task Force” under his chairmanship.

(Extract from draft mandate approved on 17 March 2005 {Ref: CESR/05-176})

### **Background**

1. CESR was encouraged by the Inter-Institutional Monitoring Group to set up an internal mediation system under its Charter in order to solve conflicts between national securities regulators.
2. The European Securities Committee asked CESR to consider the creation of a CESR mediation system in the course of the Level 3 work to be undertaken by CESR (Ref. ESC 38/2004).
3. CESR announced in its “Level 3 Action Plan for 2005” (Ref. CESR/04-527b) that it will develop a ‘mediation mechanism’ by peers when two competent authorities disagree or where regulators fail to cooperate.
4. In the “Himalaya Report” (Ref. CESR/04-333f) CESR presented its proposals for improvements of the CESR Network, including the tool of more automatic mediation by CESR in case of lack of cooperation in order to improve convergence at Level 3, as well as a mediation mechanism aiming at resolving conflicts of interpretations of Directives between Home/Host competent authorities as a means for advancing the fair implementation and application of Directives.
5. Market participants and other interested parties that responded to the consultation process of the Level 3 Action Plan for 2005 and the Himalaya Report expressed support for a wider scope of a CESR mediation solution than the one foreseen under the MAD, in particular as it was regarded as an efficient arrangement for solving conflicts between competent authorities.
6. CESR has repeatedly clarified that any CESR mediation mechanism should be elaborated in full respect of competence of the European Commission at Level 4 and should not interfere with the respective roles of the European Commission and the ECJ in the interpretation and the enforcement of EU law.

### **Scope**

7. As to the content of the work, the following issues have to be considered in the work under this Mandate.
8. A general CESR mediation mechanism should facilitate a rapid, effective and balanced solution to disputes between CESR Members, and should facilitate convergence at Level 3 and the fair implementation and application of CESR measures and EU law.
9. Such a mediation mechanism should not be limited to the MAD, but should be of a more general scope. Such a mediation mechanism should apply in a general way to cooperation



and exchange of information under all EU Directives and Regulations applicable in the securities field, as well as to operational disputes arising under relevant EU laws providing for mutual recognition of decisions (e.g. authorisations, approvals).

10. In establishing a general CESR mediation mechanism, the basic principles to be applied should include the following:
  - a mechanism of peers (i.e. CESR Members) committed to ensuring the success of mediation;
  - safeguards to ensure an unbiased process;
  - geared to produce rapid and efficient decisions;
  - avoidance of any systematic questioning of the automaticity of mutual recognition;
  - a process to identify suitable cases for mediation (including a system to receive complains on cross-border cases);
  - finding a way of getting input from market participants;
  - no impingement on the prerogatives of the Commission and the ECJ;
  - enough flexibility to cater for different purposes (e.g. MAD, MiFID, Prospectus Directive);
  - publication of outcomes in a manner that protects business confidentiality.
11. The work conducted within CESR-Pol on the mediation mechanism under the specific provision of the MAD should be taken into account in the development of a general CESR mediation mechanism.
12. Further input could be gained from mediation mechanisms in place in other areas (e.g. the ECB target, WTO).
13. Since the creation of a general CESR mediation mechanism might necessitate an amendment to the CESR Charter, this Mandate covers also the development of a proposal for an amendment of the Charter, if necessary.

### **Organisation**

14. The work on the general CESR mediation mechanism has to start as soon as possible, so that swift progress can be made. Therefore, a specific CESR Task Force (“Mediation Task Force”) shall be established.
15. The Mediation Task Force shall be composed of a limited number of experts from CESR Members and the European Commission bringing together the necessary legal expertise.
16. In line with CESR’s commitment to transparent working methods and due to considerable interest of the relevant stakeholders in the work of CESR for the creation of a general CESR mediation mechanism, the Mediation Task Force has to fully comply with its consultation practices, including public consultation and open hearing.
17. The Commission will be invited to actively participate in the meetings of the Task Force.
18. The Task Force will be supported by the CESR Secretariat. A final report to CESR chairmen is expected no later than early 2006.