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Stellungnahme des Deutschen Anwaltvereins

[Statement of the Deutscher Anwaltverein (German Bar Association)]

durch den
Ausschuss Außergerichtliche Konfliktbeilegung

zum

Internen Mediationsmechanismus des
Committee of European Securities Regulators (CESR)
–
CESR Mediation Mechanism

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- Europäische Kommission – Generaldirektion Justiz und Inneres
- Bundesministerium der Justiz
- Rechtsausschuss des Deutschen Bundestages
- Rechtsausschuss des Deutschen Bundesrates
- SPD-Fraktion im Deutschen Bundestag
- CDU/CSU-Fraktion des Deutschen Bundestages, Arbeitsgruppe Recht
- Fraktionen Bündnis 90/Die Grünen im Deutschen Bundestag
- FDP-Fraktion im Deutschen Bundestag
- PDS-Fraktion im Deutschen Bundestag
- Vorstand und Geschäftsführung des Deutschen Anwaltvereins
- Vorsitzende der Gesetzgebungsausschüsse des Deutschen Anwaltvereins
- Vorsitzender des FORUM Junge Anwaltschaft
- Geschäftsführender Ausschuss der Arbeitsgemeinschaft Mediation im Deutschen Anwaltverein
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I. General Remarks

In general, the German Bar Association strongly supports and appreciates the CESR Mediation Mechanism. We are impressed by the quality of the work done by CESR and we are convinced that the possibility to use a mediation process for conflicts between CESR Members will lead to a better understanding and more cooperation between these authorities.

In addition, we have the following comments to the “Paper for Comments”.

II. Question 1: Do you agree with the key features proposed by CESR?

We agree to the content of pars. 19, 20, 22, especially to the examination proposal in par. 23, as well as to pars. 25 up to 28 and 31 up to 35.

Remarks to par. 21:

In par. 21 it is discussed whether the CESR Members have to participate in a mediation process requested by another CESR Member. The result of the proposal is that mandatory participation would be inconsistent with the voluntary nature of the process. However, if the CESR Members adopt and agree on the CESR Mediation Mechanism the agreement is volun-tary. It could be argued that this voluntary agreement includes the – voluntary – agreement to participate in each mediation processes if called for by CESR Members. If you stay with the proposal as outlined in par. 21 there could be a significant danger for the concept in total. The consequence could be that CESR Members refuse continously to participate in mediation proceedings called for by other

CESR Members, undermining by this behaviour all goals and intentions of the CESR Mediation Mechanism.

And experience shows that nearly 80 % of mediation proceedings are successful as soon as the parties are on the table (see: Report on court-annexed mediation in Germany: www.mediation-in-niedersachsen.de). In addition, several examples of mediation concepts exist which are based on mandatory participation in mediation: According to the UK Civil Procedure Rules (e.g. CPR 1.4 and CPR 44.3) a court must have regard to all the circumstances when assessing the costs of a case, including the conduct of all parties or an offer to settle. Refusals to negotiate or mediate a case lead to the assessment of costs (see for example the cases: *Dunnett v Railtrack* [2002] 2 All ER 850, *McMillan Williams v Range* [2004] EWCA Civ 294 or *Hurst v Leeming* [2001] EWHC 1051 Ch). According to Florida law, the Florida courts can order or mandate that a party attend a mediation session, once there the parties are asked only to attempt to reach a "mutually acceptable and voluntary agreement" (see: Alternative Dispute Resolution in Florida, Second Edition, Volume II, 1995). Furthermore, if parties agree in contract clauses to mediation in a case of dispute arising out of this contract, there is also a mandatory element which shifts the voluntary nature of the mediation to the possibility to step out of the mediation session at any time.

Remarks to par. 24:

The content of par. 24 seems to be misleading. Par. 24 says in summary that it should be entirely at the discretion of a Member as to whether or not to follow the outcome of the mediation process because mediation is considered as not-binding. In fact, if the final agreement of a mediation process is a contract or an agreement which is binding by law, the outcome of this mediation process is legally binding. It is not our understanding that each outcome of a mediation is non-binding therefore we propose to check and possibly re-draft par. 24.

Par. 24 is however understandable if Annex 3 is considered which gives the mediator or the mediation panel a power to decide or at least to advise. If you understand the CESR Mediation Mechanism in this – for mediation unusual – way, the content of par. 24 could make sense.

Remarks to pars. 29, 30:

We agree not to transform the CESR Mediation Mechanism into a complaints mechanism. However and considering the proposed EC Mediation Directive (COM(2004) 718 final) it should be considered that also market participants could have access to mediation procedures for their complaints and disputes with CESR Members.

Remark to par. 36:

We – of course – agree to the content of this paragraph. However, there could be a conflict with the content of par. 27.

Remark to par. 37:

It is understood by law that the competence of ECJ and Commission must fully be respected. However, the reference to a "non-binding outcome" of the mediation process could be misleading, as argued for par. 24.

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 agree to pars. 38 up to 40 and we leave it to the comments of the Security Authorities to find further examples of potential disputes or cases which could be considered for mediation.

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 Meber is a party?

In our opinion, this question must be answered with "No". The first bullet point in par. 42 excludes mediation in the case that a legal proceeding have already been initiated at EU or national level. If the CESR Member is a party, it should be obliged to use the

mediation proceeding in a first instance for settling the dispute. If the pure initiative of a court proceeding at EU or national level leads to the exclusion of the mediation proceeding, the CESR mediation mechansim could be by-passed by initiating such kind of court proceedings. And in addition, there are several possibilities to mediate besides or in the course of a court proceeding.

Question 4: Should the mediation mechanism be made available to competent authorities that are not CESR Members.

The answer is “Yes”. Therefore, we agree on par. 44 which allows non-CESR competent authorities of EEA Members States to opt into the CESR mediation system. This option should be extended for all competent and for the area of CESR relevant authorities being not CESR Members.

Question 5: Do you have any comments on the proposed role of a Gatekeeper?

We agree on the idea of a two-step process: Firstly to exhause all bilateral efforts for a mutual agreement and secondly to transfer the dispute to mediation if all negotiations failed. We also support the idea of a Gatekeeper as described in pars. 45 up to 48. Crucial in our point of view is the independence of this Gatekeeper and his/her clear role not to mediate the cases but only to analyse and to moderate bilateral negotiations as described in par. 47. Especially the content of par. 47 and the idea that the Gatekeeper should support the parties involved for an amicable solution could lead to a kind of pre-mediation by the Gatekeeper. Therefore, his/her role must be described in detail insofar.

Question 6: Which of the options in par. 53 is most appropriate in your view, or could there be a combination of them?

The first approach to appoint mediators or pannellists from the CESR Members seems to be more appropriate than the second proposal of a Standing Panel for each relevant area. The first approach has several advantages:

(1) The Gatekeeper could appoint specialists for the dispute.

(2) The CESR Member have to encourage and educate persons from their own country in the techniques of mediation and the CESR Mediation Mechanism.

(3) Therefore, the CESR Members are more involved in the CESR Mediation Mechanism.

(4) New interested persons could be listed as potential mediators/panellists.

As a default option and especially if the parties of the concrete mediation agrees, one or more Standing Panels could be established. In any case, the Gatekeeper should have the possibility to propose either a specialized mediator or panel from an according mediator's list or the use of the Standing Panel.

Question 7: (1) Could proceedings on similar issues in the framework of the EU SOLVIT system (see Annex 2 for a description of that system) be relevant for disputes subject to mediation? (2) In your view, if a CESR Member has turned down a mediation request from a market participant would it be useful to inform CESR?

Answer to Question 7 (1):

We leave the answer to this question to the competent authorities.

Answer to Question 7 (2):

In our point of view, it would be useful and necessary to inform the CESR if a CESR Member has turned down a mediation request from a market participant. Otherwise, the possibility for market participants to request a mediation proceeding (see par. 29) would be of less power. In the case of such kind of mediation the Gatekeeper should receive the power to contact the CESR Member which has turned down the mediation request for discussing the reasons for this decision. Because of the basic decision that only CESR Members can initiate a mediation proceeding under the CESR Mediation

Mechanism (see par. 20), the Gatekeeper must have – at least – the possibility to contact the CESR Member which has turned down the mediation request.

Question 8: (1) Do you have any views on the role of the Commission envisaged in paragraphs 66 and 67? (2) 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?

Answer to Question 8 (1):

We agree on the role of the Commission as described in pars. 66 and 67.

Answer to Question 8 (2):

We leave the answer to this question to the competent authorities.

Question 9: (1) Do you agree with the proposed procedural framework of the mediation mechanism? (2) Do you agree with the mediation process outlined in Annex 3 for cooperation and information exchange cases?

Answer to Question 9 (1):

Basically, we agree with the proposed procedural framework. However, we think that the possibility to publish the outcome of a mediation – even on a confidential basis – could influence the process and is contrary to the common understanding that mediation keeps confidential even after having reached an agreement.

Answer to Question 9 (2)

Basically, we agree on the outlined process. However, the Mediation part considers strongly a “Decision of Panel” or a “Panel’s advice” which is in contrary to our understanding of mediation and which is in contrary to the definition of mediation in par. 15. It is also in contrary to par. 58 which says: *“If no agreement can be reached between*

the parties following the deliberations of the panel, the matter could be referred to a panel of CESR Chairs at request of one of the parties to the dispute." Reading pars. 15 and 58 and comparing these paragraphs with the outline of Annex 3 result in different views of the mediation process. Par. 58 reads like a Med-Arb-procedure, first mediation without a decision by the mediator/mediation panel and in a second step the arbitration including a possible decision by a panel of the CESR Chairs. The outline of the Mediation procedure in Annex 3 creates the impression that either there is an "advice" of a Panel or – if no resolution (by or between whom?) is reached – there is a decision of the Panel of Chairs.

In our opinion as well the outline as the description of the Mediation proceeding needs more clearness regarding the process and the question whether it is a pure mediation without any decision power of the mediator or the mediators' panel in the first instance and whether this mediation process is combined with a kind of arbitration by the Panel of Chairs.