

**EFAMA'S RESPONSE TO
CESR'S CONSULTATION ON THE**

ESTABLISHMENT OF A MEDIATION MECHANISM (CESR/05-483c)

EFAMA¹ welcomes the possibility to comment on CESR's Mediation Mechanism Paper, which lays out a blueprint for an internal mechanism to solve conflicts between national securities regulators.

EFAMA has stressed for a long time the importance of developing supervisory convergence and enforcement coordination as a prerequisite for the true achievement of the Single Market, therefore we wish to express our full support for the creation of such a Mediation Mechanism. We are aware of the legal limitations due to EU and national regulation, but hope nonetheless that CESR's initiative will lead to the creation of an effective mechanism to achieve consistent implementation of EU legislation and, in particular, will provide a solution to mutual recognition problems related to the UCITS passport.² On behalf of the investment management industry we can only underline that many of the problems we are currently experiencing could have been solved already if an adequate mediation mechanism existed.

We are, however, concerned by the non-binding character of the Mechanism and by the possibility for CESR members to reject a mediation request altogether. Furthermore, EFAMA wonders— in view of the cautious comments in the paper regarding the applicability of the Mediation Mechanism to the resolution of disputes involving mutual recognition³ – how likely the recourse to mediation in such cases will be. In this respect,

¹ EFAMA is the representative association for the European investment management industry. Formerly known as FEFSI, EFAMA represents through its member associations and corporate members about EUR12 trillion in assets under management of which EUR5.9 trillion managed through around 43 000 investment funds. For more information, please visit <http://www.efama.org/>

² CESR itself refers to the Mediation Mechanism proposal in its current Consultation Paper on guidelines for supervisors regarding the notification procedure (CESR/05-484 of 27 October 2005 – Para. 5).

³ Para. 26 : “In the case of certain disputes regarding mutual recognition decisions (such as prospectus approval or authorisation of investment firms) or financial information, it might not be appropriate to expect a CESR Member to revisit, through the mediation process, an individual regulatory decision already taken.” That “... might question the fundamental principle of mutual recognition of decisions, thereby undermining the proper allocation of legal responsibilities under the Directives.” “Of course often such cases will have wider implications for CESR Members outside the parties to the dispute and would therefore be more suitable for consideration by CESR Experts Groups, which is consistent with the expectation that referrals to mediation will only actually be made in limited circumstances.”

the Hearing on 21 November did not shed sufficient light and we therefore encourage CESR to give more details in the next paper, as well as regarding the alternative procedure involving CESR Expert Groups.

The fact that participation in the Mediation Mechanism is limited to CESR Members and that the mediation is not intended as a complaints mechanism might be understandable, but it leads us to ask how else the industry can lodge a complaint. Currently, the only formal alternative is filing a complaint with the Commission, a last resort step. We believe therefore that some other type of dispute resolution framework should be created to enable the investment management industry to bring its complaints to CESR's attention.

Finally, we believe that transparency of the mediation outcome is important, for market participants involved, other CESR members and the industry as a whole. An appropriate but timely way to communicate the result of the proceedings should be developed, taking into account the confidentiality of the cases. Alternatively, as suggested in Para. 74, guidance should be issued for other CESR members and market participants.

We look forward to the further development of the Mediation Mechanism concept, and hope that our comments will be helpful in your further considerations.

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Secretary General

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