



Paris, le 2 décembre 2005

MEDEF

Direction des affaires économiques
financières et fiscales

Direction des affaires juridiques

CESR's Advice on the establishment of a mediation mechanism

Ref: CESR/05-483c

MEDEF comments

MEDEF welcomes the opportunity given to comment this CESR paper related to the mediation mechanism. MEDEF has often called for the establishment of a mediation mechanism at CESR Level, for example in its responses to the consultations concerning the Lamfalussy process and in particular in its response to the consultation launched by the European commission on EU financial services policy for the next five years (Financial Services Action Plan Green Paper). MEDEF believes, as CESR does, that a mediation mechanism is an essential tool to harmonize the noticeable differences of interpretations of the new rules at local level, and will greatly contribute to increase convergence and cooperation between national authorities.

Consequently, MEDEF warmly welcomes CESR initiative to set up a mediation mechanism and strongly supports its establishment.

However, in general, MEDEF strongly believes that the mediation mechanism, as presented in the paper for comments, should be extended. First of all, the mediation should be opened to a wider category of actors allowed to take advantage of the mechanism, i.e. all market participants. Furthermore, MEDEF will empathize on some useful modifications that could be taken into account in order to enhance the efficiency of the mediation mechanism, and to ensure a real level playing field between the market participants of the different member states.

Question 1:

Do you agree with the key features proposed by CESR?

- The nature:

MEDEF believes that, under the condition of the existence of an efficient system of selective admission to mediation mechanism (through the Gatekeepers), the “accept or explain” approach described in § 23 is not suitable to improve the efficiency of the mechanism.

The possibility given to CESR Member to refuse, even for justified reasons, to participate in the mediation process without any judicial consequence which would allow the solving of an issue, could lead to a prejudicial status quo for the market.

The fact that the final decision will not be binding for the parties (§24) already represents a fair security for the parties involved. It thus does not seem necessary to add another constraint at the very beginning of the mediation process.

Let's insist on the final purpose of the mediation mechanism, which is to dispel the uncertainties arising from the entry into force of the new rules and the differences of interpretation between EU members: thus it seems important to allow sufficient issues to be dealt by the mediation process without unnecessary restrictions.

MEDEF agrees that non-binding approach is legally justified, i.e. that it should be entirely at the discretion of a member as to whether or not to follow the outcome of the mediation process. Nevertheless, it insists on the importance of the publication of the outcome, in order to allow all non-involved market participants and national authorities to be aware of the common interpretation of this particular issue and take advantage of EU guidance

- Parties involved

MEDEF considers the limitation expressed in §20 imposing that “only CESR members will (...) be able to initiate the mediation process” too excessive. Market participants, as well as the professional organisations that represent them, should be able to address disputes through the CESR process in order to insure a greater effectiveness of the system. This would permit to mediators to deal with a wider range of current issues, and will facilitate a faster convergence at an EU level, especially in cases where two authorities have diverging interpretations.

Moreover, as assessed in §28-30, it could be problematical for an issuer to bring potential matters to the attention of its national CESR member which supervises it on a daily basis. Actually, there is no guarantee the national authority would bring the issue to the mediation procedure. MEDEF strongly believes that market participants would contribute to the convergence process and encourage national authorities to progress towards coordination of level 3 measure for preventive reasons, i.e. to avoid use to the mediation mechanism.

Anyway, even if the following is far from being the adequate solution for this matter, MEDEF requires at least CESR to allow market participants to bring issues to the attention of their host supervisor as well as their home supervisor.

- Cross-border scope

MEDEF fully agrees with the fact that the CESR mediation mechanism should only deal with issues of cross-border nature.

- Procedural principle

Similarly, MEDEF agrees with the procedural principles. However, MEDEF is wondering about the delimitation of the confidentiality obligation and would like CESR to define more precisely this particular item. MEDEF also remarks that the obligation for an issuer to turn to its domestic authority rather than addressing disputes directly through the CESR process, would, most certainly, extend substantially the global time frame of the process and go against this most important principle.

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?

The proposed categorisation of potential matters seems too limited. MEDEF believes that the scope of intervention should remain flexible and wide-ranging. MEDEF suggests that from now on any new legal text should state which its item could be subject to a mediation mechanism.

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 Member is a party?

MEDEF agrees with the fact that mediation should be excluded if legal proceedings have already been initiated at EU level or at national level before a competent national authority.

Question 4:

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

MEDEF considers that it is important to enable non-CESR competent authorities of EEA member states to opt into the CESR mediation system, which will greatly contribute to a better convergence at Level 3.

Question 5:

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

MEDEF fully supports the principle the introduction of a Gatekeeper, who would consider the merits for escalation to the mediation on the basis of the objective criteria described in the paper.

Nevertheless, in order to maintain independence and coherence in the future decisions to be made, it is necessary to set up a committee composed by CESR member representatives,

independent experts, and market participant representatives, rather than a single person to take charge of this assignment.

Another solution could be to set up such committee for each relevant area.

Question 6:

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

It seems suitable to consider the second option, to allow durability and liability in the corpus of decisions made by this single standing panel established for each relevant area.

As well as for the Gatekeepers, the introduction of external experts in the mediation panels would represent a great opportunity to facilitate the mediation mechanism in solving particular issues.

Question 7:

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?

In your view, if a CESR Member has turned down a mediation request from a market participant, would it be useful to inform CESR?

Concerning the second question, MEDEF already claimed for the suppression of the obligation for market participants to bring their issue before the Gatekeeper only through their national regulator, (i.e. MEDEF wishes to open the mediation mechanism to market participants, for the reasons explained above).

If the proposed system is to be adopted (i.e. the non direct participation of a market participants in the process) despite the above-mentioned remark, it would be absolutely necessary to inform CESR if one of its member has turned down a mediation request from a market participant.

Question 8:

8-1: Do you have any views on the role of the Commission envisaged in paragraphs 66-67?

8-2: 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?

8-1: No further remarks.

8-2: See above mentioned (*Question 2 – Parties involved*): Market participant should be entitled to bring issues directly to the attention of the Gatekeeper.

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?

MEDEF agrees with the timing and outcome as described in §69 to §73. On the other hand MEDEF considers that a and in particular the systematic publication of the outcome is absolutely necessary for the convergence and a increased cooperation between market participant and CESR members.

MEDEF has no further remarks and agrees with the diagram for mediation process as to disputes regarding cooperation and exchange of information as described in Annex 3 of the paper.

However MEDEF strongly suggests that the six months global timeframe limit must be stated not only in he Annex 3 but also in the technical advice text.