

CESR PAPER FOR COMMENTS

CESR Mediation Mechanism (CESR/05-483c)

*Joint response of the
French Association of Investment Firms (AFEI) and the
French Banking Federation (FBF)*

The French Association of Investment Firms (AFEI) represents investment service providers doing business in France. Its members include more than 120 investment firms and credit institutions authorised to provide investment services. The French Banking Federation (FBF) is the industry-wide body that represents all banks doing business in France, or more than 500 commercial, cooperative and mutual banks.

1. AFEI and FBF have paid close attention to European initiatives aimed at assessing the Lamfalussy process, clarifying the role of the Committee of European Securities Regulators (CESR) and proposing improvements. Having submitted responses to several consultations¹, including the first call for evidence related to the mediation mechanism (AFEI/05-33 and FBF), we welcome the opportunity given here to comment this new CESR paper.

2. First of all, we acknowledge the willingness expressed in this new document to take into consideration some of the points AFEI, FBF and others made on the occasion of the previous consultation. Notably, to keep the mechanism flexible and to offer market participants with a means of bringing issues within the mediation mechanism. However, **CESR proposal remains not sufficiently ambitious**, as our answers will show.

3. **AFEI and FBF strongly support the establishment of a mediation mechanism at CESR level**, not only because there may be a substantial increase in possible sources of conflicts, divergences or uncertainties in the years to come, but also because the existing tools are insufficient and sometimes inadequate (see AFEI/05-33).

Recent directives, especially MiFID and MAD, have re-written the rules governing the operation of financial markets and the organisation of oversight. They have also changed the way that supervisory authorities cooperate with each other. For that reason, any shortcomings that may arise must be identified and dealt with quickly, failing which, Europe's markets will be prey to dangerous instability. AFEI and FBF believe the mediation mechanism could help to rapidly dispel the uncertainties arising from the entry into force of new rules and to identify differences of enforcement among Member States. Mediation will **help increasing convergence** between domestic authorities as regards the interpretation and transposition of rules prepared

¹ In particular, AFEI responses 05-09, 05-08, 05-05 and 04-13 to consultations organised by CESR, the European Commission and the Inter-Institutional Monitoring Group. We also refer to AFEI/05-71 answer to the CEBS consultation related to the role and tasks of CESB, in which AFEI expresses its support to the definition of a mediation mechanism in due course. AFEI answers to public consultations are available on www.afei.com.

at Level 1, 2 and 3 of the Lamfalussy procedure. It would efficiently add to the range of tools already available which are often too lengthy and unwieldy.

4. In order for the mechanism to be truly effective, AFEI and FBF believe **market participants should be allowed to have a larger and more concrete access to the mediation mechanism than the current CESR proposal**; furthermore, we think that the list of potential issues which can be dealt with through the mediation mechanism should be reviewed and expanded.

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

➤ **The nature**

5. AFEI and FBF support the nature of the mediation mechanism as described in §19:

- The mechanism should respect the powers and roles that European rules have conferred on the institutions involved (Commission, ECJ).
- It should aim *“to contribute to greater supervisory convergence at Level 3 and fair implementation and application of CESR Level 3 measures and EU law, and might also help to prevent regulatory arbitrage.”*, and *“foster a deepening of CESR network”*.

However, mediation cannot be considered only in the context of Level 3 defined as the common level for interpretation and preparation of rules and standards. Without overlapping with the Commission and ECJ's responsibilities, each domestic regulator has indeed its own significant power of interpreting, controlling and punishing with respect to rules prepared at Level 1 and 2. Mediation could thus foster a greater convergence in the use of these national powers.

6. AFEI and FBF agree that a voluntary approach may be justified in a mediation process, but under the strict condition of the **“accept or explain”** approach described in §23. We also support the views expressed in §26 that *“mediation would better suit disputes involving, in particular, persistent or significant differences of opinion between CESR Members on the criteria applied consistently to support certain decisions”*. However, as expressed in our previous answer (AFEI/05-33), it is important at this stage that the mechanism remains **wide-ranging and flexible enough** to handle the maximum number of possible conflicts.

7. Similarly, the result of the mediation process may have to be non-binding (§24), but we strongly encourage **the publication of the outcome** of the discussions (see also below n°24). Such publication is indeed important to provide guidance and benchmarks for other non-involved supervisory authorities and market participants.

8. Finally, it may be appropriate that issues of *“wider concern”* could be dealt with *“the appropriate CESR forum/mechanism”* (§27).

9. However, CESR introduces a severe and unjustified limitation by imposing that (§20), *“only CESR members will (...) be able to initiate the mediation process”*. **Greater involvement of market participants should be permitted**, fully respecting the existing prerogatives of the various institutions, and limited by relevant conditions and safeguards which will ensure that the mediation process does not turn into a complaints mechanism. Our views are detailed below.

➤ **Parties involved**

10. AFEI and FBF oppose the vision proposed in §28-30 of CESR paper:

- Market participants cannot always directly bring potential matters to the attention of their national CESR Member which supervises them on a daily basis; they will all the more hesitate to do so if there is no insurance that the issue will be brought to the mediation procedure.
- Yet, market participants can greatly contribute to the convergence process by providing feedback. They are better placed to identify cases they know constitute genuine obstacles to the integration of European markets. They are also able to bring their assessment of the market impacts.
- The mediation mechanism could also benefit from input from external independent experts (e.g. market practitioners with proven independence, acknowledgeable legal experts, etc.).
- Finally, a larger opening of the process to market participants would reinforce the credibility of the mediation mechanism. It would also encourage national authorities to make steady progress towards coordination of Level 3 measures for preventive reasons, i.e. to avoid recourse to the mediation mechanism (see AFEI/05-33).

11. Although the mediation mechanism should not interfere with the competences of the European Commission for enforcement and of the European Court of Justice for interpretation of EU law, there is a strong need for more flexible, rapid and effective means aimed at facilitating the day-to-day application of European legislation and the convergence of implementation. The mediation mechanism could contribute to this objective – if not too restricted. Market participants, as well as their representative professional associations, should be in a position to bring matters to the attention of the home supervisor as well as the host supervisor – which would then submit the case for mediation, or **directly to the Gatekeeper**. The proposed framework fails to provide sufficient room for the private sector to participate in the mechanism.

➤ **Cross-border scope**

12. AFEI and FBF agree with the view that the mediation mechanism should deal with cross-border issues (§31).

➤ **Procedural principles**

13. AFEI and FBF agree with the procedural objectives set by CESR for the mediation mechanism (§32-36), i.e. rapid, efficient, fair, and confidential. We also approve the proposal not to set any qualitative or quantitative thresholds, as was suggested in our first answer to CESR.

As already mentioned, AFEI and FBF support some form of transparency regarding the outcome of the mediation procedure to promote convergence; such transparency should not affect the necessary level of confidentiality.

➤ **Safeguards to the prerogatives of the Commission, the European Court of Justice and national enforcement authorities**

14. AFEI and FBF agree with §37. The mediation process must fully respect the powers and roles that European rules have conferred on the institutions involved. It is also important to ensure proper transparency

with the Commission, for the submission of cases and the reporting of the result (see also below our observations related to Question 8).

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?

15. There are two sets of issues which could be dealt with through the CESR mediation mechanism (see FSC Report³). First, disputes related to cooperation and exchange of information. Second, divergences in implementation and day-to-day application of EU rules. Therefore, the list suggested by CESR in §41 is **too restricted**.

Providing theoretical examples is not an easy task. This is why it is important that the mechanism remains flexible and wide-ranging: in fact, any kind of European regulation could be used as an example. Let us simply mention one example in the Market Abuse Directive: the European regulation defining the conditions for shares buybacks already shows that there are possible different understandings at the national level. In each Member State, market participants work with their competent authority to achieve clarification and certainty but there are margins for interpretation, which will also evolve with future cases and decisions. The specific conditions for the implementation of the rules will probably differ from one country to the other. The mediation mechanism could hence prove helpful, on the basis of information provided by market participants. We also could point potential cases where one authority which is not competent requests unjustified information to market participants.

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?

16. The negative criteria set in CESR proposal (§42) seem justified.

Question 4:

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

17. There are over 50 regulators in Europe and many or all have a role to play in financial markets supervision. Moreover, the powers and role of these regulators, including CESR members, can still vary widely from one country to the other. Within this context, it may be advisable to consider a possible extension of the mediation mechanism to competent authorities of EEA Member States that are not CESR members (§43-44).

³ Financial Services Committee, Report on financial supervision, FSC 4155/1/05, 15 September 2005.

Question 5:

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

18. AFEI and FBF approve the introduction of a “**Gatekeeper**”, which could play a similar function than the “Assessment” or “Evaluation” Committee” suggested in our previous answers (AFEI/05-33 and FBF).

19. With regard to the designation of the Gatekeeper, we acknowledge the merits of a system of specialist Gatekeepers. However, we have several comments to make:

- §46 and 49 require clarifications and explanations. Notably, we question the idea that the Gatekeeper should be **one person** only (§46, 49); our previous submission suggested that the evaluation committee would be composed of CESR representatives, a representative of the Commission and experts (e.g. independent practitioners, legal experts).
- We would like to see the list of specialist gatekeepers expanded, notably in order to cover the wider range of topics to be considered by the mediation mechanism. §48 should also be reviewed to cover a wider range of topics to be considered by the mediation mechanism.
- There remains blur areas in §50 which deals with key aspects, such as the appointment of the Gatekeeper and how to handle disputes in which the Gatekeeper has a conflict.
- Another point which deserves further explanation is §59, which states that “disputes would normally be referred to the mediation panel of experts, *without any involvement of CESR Chairs*”. However, §50 explains that the three specialist Gatekeepers, whose role in the mediation mechanism is unavoidable, are three CESR Chairs. How then could disputes be referred directly to the mediation panel without any involvement of CESR Chairs when it is these Chairs which, as Gatekeepers, decide whether the disputes fulfil the conditions for mediation?

20. AFEI and FBF agree with the suggested **differentiated procedures (§51-52)**. In accordance with our previous comments, we believe the important criteria should be the establishment of a flexible and efficient mechanism which can adapt to the different possible cases.

Question 6:

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

21. Similarly, with respect to the **composition of the mediation panels/mediators (§53)**, a combination of the two options proposed could be favoured, allowing greatest flexibility. However, the role of the Gatekeeper may not necessarily encompass the designation of the mediator(s).

22. §54 provides reasonable criteria for the selection of mediators or the composition of panels, although we believe, as just outlined (n°19), that the mediation mechanism could benefit from a greater input of **external experts**, for their knowledge and competences and, possibly, for their capacity to facilitate the mediation process as outsiders. To this extent, §68 must be reviewed in order to allow the participation of external experts outside the Market Participants Consultative Panel or, the Consultative Working Group of the appropriate Expert Group.

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?

23. We have outlined above that it is preferable to open the mediation mechanism to market participants (given to conditions and proper filtering), instead of asking the market participant to turn to its domestic authority. Therefore, we do not believe proceedings in the framework of the EU SOLVIT system could be really efficient (even if some other features may be replicable, such as a target deadline). In any case, if a CESR member turns down a mediation request from a market participant, **CESR must be informed**. It would be paramount that the reasons why the CESR Member decided not to follow the mediation process be disclosed to CESR and to the market participants.

24. With regard to **publication of the outcome (§74)**, and in accordance with the point expressed above (n°7), we support the sharing of information among CESR members and market practitioners as to the work and outcome of the mediation mechanism, with due account of confidentiality issues. Such publication will serve as guidance and will contribute to convergence and best practice. It should include motivation and reasoning. A specific chapter in CESR Annual and semi-annual reports may be appropriate, but systematic and specific publication processes should also be implemented to favour more efficient and rapid sharing of information.

Question 8:

Do you have any views on the role of the Commission envisaged in paragraphs 66 and 67?

25. AFEI and FBF support the views expressed in **§66-68** on the role of the Commission. The Commission must have a clear vision of the cases submitted to mediation, with the possibility to comment and provide input. However, the process should not be delayed significantly; a deadline for receiving comments from the Commission may therefore be advisable.

Question 8 (cont'd):

Is there any further input to the CESR mediation process, in addition to the mechanisms mentioned in paragraphs 30 and 68 that could be usefully provided by market participants?

26. Opening more directly the mechanism to market participants could greatly contribute to make the mediation mechanism an efficient tool to foster convergence. As outlined previously (notably n° 10, n°22), market participants should be entitled to bring issues directly to the attention of the Gatekeeper and provide input when necessary. Recourse to external independent experts, whenever possible, would also highly advisable.

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?

27. AFEI and FBF support the principles described in §69-74, **taking into account the comments made above.**

Finally, we agree that a review of the process should take place no later than 2008, with an open consultation.



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