THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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CESR Mediation Mechanism

PAPER FOR COMMENTS

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A. Introduction

1. At its meeting in Luxembourg on 28/29 January 2005, CESR decided to establish a "Mediation Task Force", chaired by Manuel Conthe (Chairman of the Spanish CNMV), the Task Force was given the specific responsibility of developing a proposal for a CESR mediation mechanism as a tool for resolving disputes between CESR Members.

2. CESR is hereby responding to the requests as to the consideration of a general CESR mediation mechanism as raised, in particular, by the Inter-Institutional Monitoring Group, the European Securities Committee chaired by the European Commission, the European Parliament and other stakeholders.

3. Market participants have expressed support for a CESR mediation mechanism during the course of consultations on the Level 3 Action Plan for 2005 (Ref. CESR/04-527b) and the Himalaya Report (Ref. CESR/04-333f).

4. This Paper for Comments seeks to provide an overview of the preliminary considerations and views of CESR on a possible mediation mechanism. It takes into account the responses received on its Call for Evidence of 8 April 2005 (Ref. CESR/05-253).

5. All interested parties are invited to submit their comments online via CESR's website under the heading "Consultations" at www.cesr-eu.org by 30th November 2005.

B. Background

6. 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 is set out on page 35 of the Second Interim Report of the Inter-Institutional Monitoring Group published on 10 December 2003, which states: *"[t]he 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."*[1] In addition, in the Third Interim Report of the IIMG of 17 November 2004, page 30, it is stated that "[*m*]*ediation between regulators is also very useful and has been applied in the MAD. The Group suggests that the instrument should be worked up more fully and that the principle should be widened beyond the MAD and become of general application.*"[2]

7. The European Securities Committee has also called on CESR to develop a mediation system (ESC Summary Record of the 23rd meeting of the ESC held on 22 September 2004 - Ref. ESC 38/2004[3]).

8. In addition, the European Parliament explicitly refers to mediation by CESR as a way forward in its Resolution on the "Current State of Integration of EU Financial Markets" adopted on 28 April 2005 (Ref. A6-0087/2005, par. 19).[4]

9. Finally, the European Commission Green Paper on Financial Services Policy (2005 – 2010) published on 3 May 2005 (Ref. COM [2005] 177, Annex I, page 7) expresses the view that

[1]http://europa.eu.int/comm/internal_market/securities/docs/monitoring/second-report/2003-12-monitoring_en.pdf.
[2] http://europa.eu.int/comm/internal_market/securities/docs/monitoring/third-report/2004-11-monitoring_en.pdf.
[3] http://europa.eu.int/comm/internal_market/securities/docs/esc/meetings/2004-09-report_en.pdf.
[4]http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=95525&LEVEL=3&MODE=SIP&NAV=X&LSTDOC=N.

mediation would offer considerable potential in the EU's efforts to strengthen its enforcement mechanisms, and refers to CESR's project of creating a mediation mechanism in this respect.[5] This was also the view of the Commission in its preliminary assessment of the Lamfalussy Process of 15 November 2004 (Ref. SEC[2004] 1459). Mediation is to be understood as an effective way for enhancing day-to-day cooperation between CESR Members within the context of Level 3 of the Lamfalussy process.

10. Art. 16 par. 2 and par. 4 of the Market Abuse Directive ("MAD") require CESR to set up internal procedures for the rapid and effective solution of competent authorities' non-compliance with the obligations arising from the MAD related to the exchange of information and joint investigations.[6]

11. Pursuant to Art. 25 par. 3 of the Directive on Markets in Financial Instruments ("MiFID") the competent authority of the most liquid market in a particular financial instrument must receive transaction reports in that instrument from the other competent authorities. For this reason the most liquid market has to be determined for each financial instrument. The general method of determination proposed by CESR is the so-called "proxy approach", so that no actual calculation of liquidity is required. Art. 3a of the draft Commission Working Document ESC/7/2005-rev2 of 13 May 2005[7] on implementing measures of the MiFID provides for a dispute resolution process within CESR in cases where CESR Members cannot agree on the determination of the most liquid market:
"1. Once a year, a competent authority may contest the determination, made in accordance with Article 3, of the most relevant market in terms of liquidity for a particular financial instrument …
2. Without prejudice to article 226 of the Treaty a competent authority whose request is not acted upon within a reasonable time or who does not agree with the calculation made by the notified authority may bring that matter to the attention of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution in accordance with the preceding paragraph."

12. Following public consultation CESR agreed in its "Level 3 Action Plan for 2005" (Ref. CESR/04-527b) that it would develop a "mediation mechanism" to solve conflicts between securities regulators and help foster supervisory convergence. In its "Himalaya Report" (Ref. CESR/04-333f), CESR re-iterated its intention to establish a CESR mediation mechanism as an additional tool to enhance the operational focus of the CESR Network.

13. CESR published a Call for Evidence on the Establishment of a Mediation Mechanism on 8 April 2005 (Ref. CESR/05-253), to which 14 responses from interested parties were received. These comments were taken into account in the drafting of this paper. (A brief summary of responses can be found at Annex 1.)

14. The CESR Mediation Task Force was established following agreement at the CESR meeting in January 2005. The Task Force assumed responsibility for developing proposals for a CESR mediation mechanism. The mandate provides that the 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).*"

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[5] http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/green_a1_en.pdf.
[6] Art. 16 par. 2 reads: "… Without prejudice to Article 226 of the Treaty, a competent authority whose request for information is not acted upon within a reasonable time or whose request for information is rejected may bring that non-compliance to the attention of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution. …"
Art. 16 par. 4 provides: "… Without prejudice to the provisions of Article 226 of the Treaty, a competent authority whose application to open an inquiry or whose request for authorisation for its officials to accompany those of the other Member State's competent authority is not acted upon within a reasonable time or is rejected may bring that non-compliance to the attention of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution."
[7] http://www.europa.eu.int/comm/internal_market/securities/docs/isd/dir-2004-39-implement/esc-7-2005-rev2_en.pdf.

C. Examples of Mediation Mechanisms

15. Mediation is a form of "Alternative Dispute Resolution (ADR)". A definition of mediation commonly used reads as follows: "*A procedure in which a neutral intermediary, the mediator, endeavours, at the request of the parties to a dispute, to assist them in reaching a mutually satisfactory settlement of the dispute.*[8]"

16. The Mediation Task Force has had due regard to other ADR procedures as contemplated by its mandate. Relevant examples of ADR which might be of interest are set out in Annex 2. Although many of these mediation models may not be suited to resolve the particular issues that arise between CESR Members they are instructive particularly as regards general procedural principles which ensure a fair and effective process.

17. As required by its mandate the Mediation Task Force has also taken account of the work done by CESR to date on a mediation mechanism for the MAD, namely the CESR-Pol mediation mechanism specifically introduced for mediation under Art. 16 par. 2 and par. 4 of the MAD. It is to be noted that the model is more of an evaluative model based on a panel of experts recommending a solution rather than a facilitative model where a mediator assists parties to reach a negotiated solution. The question arises, therefore, in the context of a wider mediation mechanism as to the most appropriate model to use, i.e. the facilitative model set out in paragraph 15 above or the evaluative model described in more detail below.

D. Key Features of the proposed CESR Mediation Mechanism

18. The Mediation Task Force has addressed possible key features for the proposed mediation mechanism in line with its mandate and taking due account of responses to the Call for Evidence. The following key features are set out in detail, providing options where appropriate:

1. The nature:

19. As mentioned, some form of dialogue aimed at reaching a solution to issues of non-compliance under the MAD (and under the MiFID implementing measures if adopted as currently proposed by the Commission) is required under EU law. The CESR mediation mechanism will be established as a response to these requirements to aid the resolution of disputes between securities regulators. It is abundantly clear that the outcome of any mediation process will not be legally binding in the sense that it would be enforceable and consequently will not prejudice infringement proceedings of the European Commission ("Commission") or the European Court of Justice ("ECJ") and this is reflected in Art. 16 of the MAD and the draft MiFID Regulations referred to above. This will also be true as regards mediation in other areas where agreed on by CESR at Level 3. As stated previously, any proposed mechanism will not pre-empt or call into question the general European system for monitoring and interpreting EU law. In this regard, the CESR mediation mechanism aims to contribute to greater supervisory convergence at Level 3 and fair implementation and application of CESR Level 3 measures[9] and EU law, and might also help to prevent regulatory arbitrage. Equally, the mediation mechanism, being a measure expected to be resorted to exceptionally, should foster a deepening of the CESR network.

20. The relevant MAD provisions enabling CESR Members to address disputes on cooperation issues through a CESR process and the very concept of mediation dictate that activation of mediation has to be at the discretion of a CESR Member. Only CESR members will, therefore,

[8] Cf. Arbitration and Mediation Center of the World Intellectual Property Organisation.
[9] CESR Level 3 measures include Standards, Guidelines and Recommendations.

be able to initiate the mediation process. However, market participants may well have a role in requesting mediation as envisaged below in par. 29.

21. The question arises whether a CESR Member has to participate in a mediation process requested by another CESR Member. While such a general commitment of CESR Members in particular types of cases might render the mechanism more effective - a full and appropriate assessment of an issue through mediation requires the input by all parties involved- mandatory participation would be inconsistent with the voluntary nature of the process.

22. In the case of the MAD, the wording in Art. 16 par. 2 and 4 may suggest that, as soon as an issue has been brought to the attention of CESR, the mediation process should be activated with the participation of the other competent authority(ies) that did not provide the information or cooperation requested. Thus, in the case of the MAD there could be a greater expectation that the requested CESR Member would participate in the mediation process. Since Art. 16 par. 2 and 4 of the MAD cover exchange of information and cooperation, a similar expectation of CESR Members could be made with respect to exchange of information and cooperation under other relevant EU legislation or CESR Level 3 measures. This would, of course, be without prejudice to the provisions of Art. 226 of the EC Treaty.

23. This prompts a further question as to whether the same expectation that a requested CESR Member will accept the mediation process may be reasonable in mediation cases concerning issues other than cooperation or exchange of information. Given the open-ended and still unexplored scope of those new areas to be encompassed by the mediation mechanism, it might be realistic to start with a less ambitious approach and leave the requested CESR Member with more flexibility in reacting to the request for mediation. One such possibility might be for CESR Members to commit reciprocally to an "accept or explain" approach, so that a CESR Member would either opt to participate in the mediation process initiated by another Member or explain the reasons for its refusal to participate. So as to encourage CESR Members not to reject proper requests for mediation systematically or lightly, unaccepted mediation requests would be reported to CESR. As suggested in para. 75, a thorough examination of the mediation process could be undertaken after two years to review how it has operated in practice and to suggest further changes if necessary.

24. Finally, it should be entirely at the discretion of a Member as to whether or not to follow the outcome of the mediation process, as this would be in line with the common understanding of mediation being non-binding and will accord with the requirement that the mechanism does not interfere with the respective competences of the Commission or the ECJ. Of course, any outcome of mediation will not have any effect of law.

25. In principle, mediation is a process for disputes that have already arisen. This is reflected in the context of the MAD by Art. 16 par. 2 and 4, where mediation is envisaged when information or cooperation requested by another competent authority has not been provided to the requesting authority. Therefore, it could be concluded that for the issues of cooperation and exchange of information only the actual non-compliance of a CESR Member with such requirements in a particular instance can trigger the mediation process.

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. This might pose difficult legal issues: for example, in many Member States administrative decisions recognising individual rights are hard to revoke or withdraw save under very special circumstances and after due process under national laws; rulings by national courts that do not accord with the outcome of mediation cannot be overruled by a CESR Member. Furthermore, it might question the fundamental principle of mutual recognition of decisions, thereby undermining the proper allocation of legal responsibilities under the Directives. Consequently, 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. It would be a way of agreeing on common criteria or practise for disputes that are frequent or sufficiently relevant. In these instances, the purpose of mediation would not be to reverse and reconsider a specific decision, but to settle acceptable terms for those issues for the future. 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.

27. It will be necessary to ensure that if the mediation mechanism identifies issues that are of wider concern, these should be properly dealt with by the appropriate CESR forum/mechanism (e.g. CESR-Pol, the European Enforcers Coordination Sessions).

2. Parties involved

28. If the mediation mechanism is to be designed as a "peer mechanism" to sort out disputes in an expeditious manner between CESR Members, they are to be the only participants in the mediation process. This could actually work in the interest of market participants, which may welcome a mechanism providing rapid solutions to disputes between competent authorities which affect the provision of investment services on a cross-border basis.

29. Market participants will always be able to bring potential matters to the attention of their national CESR Member, which will have the possibility to request mediation having due regard to any allegations made by market participants. Whilst CESR would welcome input from market participants in identifying potential matters suited to mediation, it is not intended to transform the CESR mediation mechanism into a complaints mechanism.

30. Additionally, the CESR Market Participants Consultative Panel[10] ("MPCP") – comprised of high-level representatives of market participants – meets with CESR Members on a regular basis. These meetings could afford market participants the opportunity to discuss amongst other things regulatory inconsistencies across the EU, areas where CESR should undertake further work to improve supervisory convergence.[11]

3. Cross-border scope

31. The CESR mediation mechanism would only deal with issues of cross-border nature, so that purely domestic disputes (e.g. cooperation between national authorities from the same jurisdiction under the MiFID) fall outside the scope of the mechanism. The definition of "cross border" should be functional rather than legalistic.

4. Procedural principles

32. Rapid: The main objective of mediation is for the parties to reach rapid and effective solutions. The CESR mediation mechanism aims to achieve rapid effective and balanced solutions whilst also building in appropriate safeguards to ensure the high quality of the process. Accordingly, due regard must be had to an efficient and fair procedure and to the suitability of issues brought to mediation.

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[10] The Market Participants Consultative Panel was established by CESR in June 2002, following a suggestion of the European Parliament and the Committee on Wise Men chaired by Alexandre Lamfalussy. The role of the Panel is to:
• Assist CESR in the definition of priorities and work programme;
• Provide comments on the way in which CESR is exercising its role and, in particular, implementing its Public Statement of Consultation Practices;
• Alert CESR on regulatory inconsistencies in the Single Market, identify and suggest areas where CESR should undertake further work to improve supervisory co-ordination (e.g. launch a Level 3 initiative such as providing guidance, development of a common supervisory standard);
• Inform CESR on major developments in financial markets and to identify new elements for preliminary discussion by CESR.

[11] Please, see also par. 68 further below.

33. Efficient: CESR Members would be expected to use all efforts to solve issues bilaterally, so that mediation proceedings are regarded as a measure of last resort. The procedural framework must be unambiguous, and provide strict deadlines to be adhered to, so that the scarce resources of CESR Members are used in the most efficient way.

34. Regarding the suitability of issues, the introduction of qualitative or quantitative thresholds does not, at least at this initial stage of such a new process within CESR, appear useful and could on the contrary lead to unnecessary uncertainty and complexity. It will be the responsibility of CESR Members to assess thoroughly the merits of any particular issue/s before initiating mediation proceedings at CESR.

35. Fair: The mediation process has to guarantee an unbiased process respecting the basic principles of fairness and impartiality, which will be of particular importance in the selection process of the "mediators". These guarantees will be crucial for the acceptance and credibility of the mediation process.

36. Confidential: Confidential information will frequently be part of the mediation process. Therefore, parties to the process must respect these obligations, which reinforces the case to limit participation in the mediation process to the parties and mediators concerned or alternatively to CESR Members at most, since all of them fall under the strict confidentiality and professional secrecy obligations under EU legislation. Confidentiality will also encourage a climate of openness and willingness amongst CESR Members to settle their disputes.

5. Safeguards to the prerogatives of the Commission, the European Court of Justice and national enforcement authorities

37. Since any outcome of the mediation process will not be binding on the CESR Members involved, the sole competence of the ECJ to give a legally binding ruling in cases concerning EU law will be fully respected. Furthermore, the mediation mechanism is unlikely to be used where legal proceedings have already been initiated by the Commission or before the ECJ, or before competent national authorities. Finally, the resolution of a dispute between CESR Members through the mediation mechanism will not prevent the Commission from taking legal action against the Member States involved under the EC Treaty.

Question 1:

Do you agree with the key features proposed by CESR?

E. Scope of the Mediation Mechanism

1. General

38. The Mediation Task Force was mandated by CESR to develop a mechanism that could be applied to cooperation and exchange of information under EU law and operational disputes arising under relevant EU legislation, especially where providing for mutual recognition of decisions. Since this implies a broad scope, it is necessary to find a sound approach in identifying the areas covered and/or those not covered, respectively.

39. It is to be emphasised that the mediation mechanism cannot be regarded as a tool for providing interpretations of EU legislation, but will be used to aid in the day-to-day application of CESR Level 3 measures and EU law in order to facilitate supervisory convergence between CESR Members at Level 3.

40. As regards the work of CESR at Level 3, the mediation mechanism must not take on a role either in the development of CESR Level 3 measures (even though the mediation process could have, as a "by-product", the identification of issues that could necessitate Level 3 measures by CESR) or Level 2 (i.e. CESR's working under a mandate from the Commission), or in the review process by the CESR Review Panel.

2. Scope

41. A basic categorisation of potential disputes, which follows a horizontal approach across the relevant CESR Level 3 measures and EU legislation, could potentially be:

- exchange of information and cooperation (e.g. investigation and consultation);
- enforcement of financial information (i.e. issues covered by the European Enforcers Coordination Sessions[12] ["EECS"]);
- mutual recognition (e.g. notification under Prospectus Directive, UCITS Directive or MiFID), subject to the considerations made in paragraph 26;
- other potential disputes or cases where agreement between competent authorities is required (e.g. determination of the competent authority of the most liquid market pursuant to Art. 25 par. 3 of the MiFID; or determination of the supervisory authority in case of simultaneous admission to trading of the offeree company's securities in relation to takeover bids pursuant to Art. 4 par. 2(c) of the Takeover Bids Directive).

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?

42. Negative criteria or restrictions could be applied to render disputes unsuitable for mediation. More specifically, mediation would be excluded in the following cases:

- Legal proceedings have already been initiated at EU level or at national level before a competent national authority;

[12] The EECS acts as a forum in which all EU National Enforcers, whether or not CESR Members, may exchange views and discuss experiences on enforcement, mainly on national ex-post and ex-ante decisions but also on general matters such as use of selection methods and enforcement methodology. In this regard, EECS could also help to highlight issues that need to be dealt with in the enforcement standard setting process to be carried out by CESR. The main functions of the EECS are to:
• Analyse and discuss decisions taken or to be taken by EU National Enforcers on the enforcement of financial information requirements to achieve harmonisation and coordination of future decisions.
• Identify issues which are not covered by financial reporting standards or which may be affected by conflicting interpretations for referral to standard setting or interpretive bodies such as IASB or IFRIC.
• Share and compare practical experiences in the field of enforcement on issues such as selection, risk assessment and enforcement methodology.
• Help identify and provide advice on enforcement issues that may require future CESR standards and guidelines.
• Advise CESR-Fin on public disclosure of information on selected decisions.
• Advise CESR-Fin on database management issues.

- The issue underlying the dispute is being dealt with by, or has been referred to, CESR for work at Level 2 or Level 3;

- National legislation, which is not within the regulatory competence of the requested CESR Member, does not allow the latter any leeway in accommodating the demands from the CESR Member seeking 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 Member is a party?

3. Decisions by non-CESR Member authorities

43. As has been mentioned the CESR mediation mechanism would be exclusively for the use of CESR Members. This means that only CESR Members can refer issues to CESR mediation, which must necessarily address only issues that are within the competence of those CESR Members. Where competences in a jurisdiction are shared in a particular instance, the mediation mechanism could be initiated, provided that the CESR Member has the main competences for the issue under discussion in its jurisdiction.

44. Given that the mediation mechanism cannot be triggered in cases where a CESR Member does not have competence (e.g. powers of some CESR Members may be limited in the area of financial information), it may be useful to consider the benefits of enabling non-CESR competent authorities of EEA Member States to opt into the CESR mediation system. This could benefit greater convergence at Level 3. Even if such option is to be made available, the decision to participate will ultimately be a matter for the non-CESR Member concerned. The terms and conditions of any possible opt-in will require further consideration. It could be an option to provide for non-CESR Members to sign a joinder agreement, as is already possible for the CESR Multilateral Memorandum of Understanding (see CESR/05-335 Annex A).

Question 4:

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

F. A Procedural Framework for a CESR Mediation Mechanism

1. The need for a Gatekeeper

45. CESR Members will be expected to escalate a dispute to the mediation mechanism only after all bilateral efforts to resolve differences have been exhausted. Besides, it will be beneficial to allow for an appropriate assessment of the merits of escalation to mediation.

46. Such an assessment could be undertaken by a CESR "Gatekeeper". The Gatekeeper would not express views on the issues, but would consider the merits for escalation to the mediation (whether mediation is by a Panel of mediators or otherwise) on the basis of objective criteria. This role would especially require sufficient experience in the matters covered by the

mediation mechanism, and the appointment by CESR to this position should be for a sufficient period of time to guarantee some degree of continuity in the process. The full support of the Gatekeeper from the CESR Secretariat would be useful in this respect.

47. If the Gatekeeper has good reasons to believe that either bilateral efforts between the CESR Members concerned have not been exhausted and further bilateral discussions may be productive or an easy and rapid resolution of the dispute is feasible, she/he may offer her/his aid to the authorities involved before any escalation of a dispute to the mediators.

48. The Gatekeeper would assess preliminary statements provided by the CESR Members involved in a dispute and determine whether any of the negative criteria set out in par. 42 apply. Assuming they do not, the following additional questions would have to be analysed:

As to disputes concerning cooperation and exchange of information:

- The request has been properly articulated, in accordance with the requirements of the applicable CESR Level 3 measures or EU legislation.

- The grounds for refusal of cooperation envisaged in the provision invoked by the requesting authority do apply and have been clearly communicated to the latter.

As to disputes concerning enforcement of financial information:

- The matter has been discussed in the EECS in a comprehensive way with clear outcomes that could serve as standards.

As to disputes concerning mutual recognition and disputes concerning other matters:

- The dispute does not question the fundamental principle of the principle of mutual recognition in a systematic way.

- All procedural steps to come to an amicable solution under the relevant provisions have been taken.

Question 5:

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

2. Organisational choices

Specialist Gatekeepers

49. The CESR mediation mechanism could be based on a system of specialist Gatekeepers, each one in charge of some specific types of disputes. Specialist Gatekeepers would have the requisite knowledge in their respective areas, which might enhance the quality, credibility and speed of the process.

50. Three specialist Gatekeepers could be envisaged:

- The CESR-Pol Chair, as Gatekeeper for all disputes concerning cooperation or exchange of information, not only under MAD, but also under MIFID or any other EU law or CESR Level 3 measure requiring CESR Members to cooperate and exchange information;

- The CESR-Fin Chair, as Gatekeeper for all disputes concerning financial information;

- A third CESR Chair to act as Gatekeeper in all other disputes (i.e. disputes concerning mutual recognition or any other disputes), which could either be the Vice-Chair of CESR, or a CESR Chair appointed to this position for a certain period of time, either specifically or on a rotating basis, so as to ensure appropriate representation from all Member States and avoid any one particular legal or cultural view from influencing outcomes.

Needless to say, appropriate arrangements – e.g. appointment of one or more alternates - would have to be made to deal with disputes in which the Gatekeeper is conflicted.

Differentiated procedures

51. The Mediation Task Force considers that an "evaluative model" (i.e. mediation by "expert evaluators") will be most appropriate for disputes between CESR Members regarding cooperation and exchange of information. However, this approach is not considered appropriate for all cases. Accordingly, there must be some degree of flexibility built into the mediation process.

52. Potential disputes concerning mutual recognition, enforcement of financial regulations or other issues might be more complex than those stemming from disputes between CESR Members on requests for cooperation or exchange of information. Accordingly, the evaluative mediation mechanism for disputes concerning cooperation and exchange of information will not necessarily cater for such disputes. For instance, it may be more appropriate to establish procedures which slightly depart from that mediation mechanism in the following regard:

    - A more facilitative approach where the parties are aided in their negotiations to reach a solution, rather than handed down a "recommendation" approved by a panel.

    - Departing from a predominantly written nature.

    - More flexibility as to the division of the time available in the process for the resolution of the dispute which takes account of the potential complexity of the issues at stake.

    - The need to involve the Commission in the process, to the extent that the dispute is related to alternative or conflicting interpretations of EU legislation.

Composition of mediation panels/selecting mediators

53. It is necessary to determine how panellists/mediators will be selected. There are two basic possibilities:

    - The Gatekeeper could be given a role in appointing mediators or panellists from the CESR Members that have volunteered. Mediators/Panellists could be appointed specifically for each dispute, having due regard to the nature of the dispute and the expertise required, as envisaged, for instance, in the CESR-Pol mediation mechanism, where panellists are expected to be volunteers from the CESR-Pol membership.

    - Alternatively, where a panel approach is adopted a single Standing Panel could be established for each relevant area. Such Standing Panel would operate as a default option, with the Gatekeeper being given the flexibility to call for a special ad-hoc

mediation panel with the appropriate expertise needed to take on complex or delicate cases.

Question 6:

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

54. Whatever the alternative retained concerning the selection of mediators or the composition of panels, the following requirements would apply:

- Mediators/Panellists would have to be experts from CESR Members, which could comprise persons with the requisite expertise for any of the different issues within the scope of the mediation mechanism (for example, members of CESR-Pol would have great expertise in issues related to cooperation and exchange of information).

- Mediators/Panellists would be expected to have appropriate seniority, so as to enhance the credibility of the mediation process.

- Any list of CESR Members volunteering to be nominated as mediators/panellists or as members of any Standing Panel would be reviewed on an annual basis, taking into account the need for a balanced representation from the membership and to provide a sufficient number of alternates for panellists.

- The number of mediators/panellists should be such as to provide for a sufficiently wide range of opinions, however too large a number could be an impediment to the rapid establishment and decision-making process of the panel.

3. Procedure: general rules

55. In light of the foregoing, the following paragraphs describing the mediation procedure should be understood as general in nature and focusing mostly on disputes concerning cooperation and exchange of information.

56. The CESR Member requesting mediation would provide a preliminary statement. In case of a dispute concerning cooperation or exchange of information, the requested CESR Member would be required to provide a response to the statement of the requesting authority, so that the Gatekeeper can assess whether the dispute should be escalated to mediation. Regarding all other issues, the other party to the dispute would be expected to make a submission and to enter into mediation, or would explain the reasons for not accepting to become party in the mediation process.

57. If the assessment of the Gatekeeper according to the criteria comes to the conclusion that an issue merits escalation to a mediation panel, the Gatekeeper would refer it to a mediation panel.

58. The mediation panel of experts would generally consider the matter on the basis of the documents submitted to the Gatekeeper by the parties to the dispute; however oral submissions could be more practical in specific cases. The panel of experts might request additional information from the parties that is necessary for a sound assessment of the issue. 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 the request of one of the parties to the dispute.

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?

59. Bearing in mind that resources of CESR Chairs are limited and issues could be rather technical and thus require a comprehensive and time-consuming analysis, the general assumption is, as already laid out in the CESR-Pol mediation mechanism, that disputes would normally be referred to the mediation panel of experts, without any involvement of CESR Chairs. At the request of one of the parties the Gatekeeper will make a referral directly to CESR Chairs. It is expected that this will only occur in exceptional cases.

60. If a Gatekeeper comes to the conclusion that a mediation request does not fulfil the conditions for mediation, the party seeking mediation may ask the CESR Chairman that the decision of the Gatekeeper be reviewed by the CESR plenary. In case the decision of the Gatekeeper is not upheld, the issue would be referred to a mediation panel.

61. The panel of CESR Chairs would comprise members who could be appointed either by CESR or the CESR Chairman on a case-by-case basis or for a specific period of time (in this case including alternates). Members serving on a panel will not be representatives of either CESR Member that is party to the issue under discussion. Any member elected will not serve as a member of the panel if she/he is otherwise conflicted. The advice of the panel will be in accordance with the views of the majority of panel members. The number of Chairs on the panel should be such as to provide for a sufficiently wide range, however without having too large a number which could be an impediment to the rapid establishment and decision-making process of the panel.

62. The panel of Chairs considering a matter will agree upon a procedure suitable to the matter in dispute. Generally, the parties to the dispute will be given an opportunity to present their positions through written submissions. Written submissions will be exchanged between parties, copied to panel members and to the CESR Secretariat, but shall otherwise be treated as confidential. The need for oral submissions will be considered on a case-by-case basis having regard to the complexity of the issues, the urgency of the matter and what is necessary to ensure the fair disposition of the matter.

4. Transparency vis-à-vis CESR Members

63. The issues dealt with in the mediation mechanism will generally be of confidential nature and the utilisation of the process will be greater if proceedings are restricted to the parties and the panellists/mediators unless the parties concerned agree otherwise. However, given the objective of increasing supervisory convergence at Level 3 it would be helpful to share information with other CESR Members as to the type of issue being escalated to mediation and to furnish a report of mediated outcomes. As mentioned previously, where issues requested to be mediated have wider implications, it may well be that the matter is more appropriately dealt with elsewhere within CESR, e.g. the Review Panel or a relevant Expert Group, to allow for greater cross-CESR transparency.

64. Where CESR Members not directly involved in a dispute could have an interest in a matter that is being mediated, the Gatekeeper, subject to the parties' consent, would have a role in ensuring how they will be kept informed on its progress and be able to provide input in the

process. However, as the outcome of the mediation process would only apply to the parties, it would not be appropriate for other CESR Members to intervene or dissent until the mediation process is complete.

5. Role of the Commission

65. Mediation between CESR Members cannot impinge on the role of the Commission and the ECJ in the interpretation and enforcement of EU law. As mediation will be a CESR Level 3 tool and outcomes will be non-binding, there is no danger of interference with the prerogatives and competences of the Commission or the ECJ.

66. Gatekeepers will inform the Commission, at the same time as CESR Members, on an anonymous basis (i.e. without the names of the competent authorities -and market participants, if any- involved in the case), of all the cases that go into mediation.

67. Furthermore, if the Gatekeeper understands that the dispute brought to mediation hinges mainly on conflicting interpretations of applicable legislation –particularly if any of them might represent an infringement of EU laws-, he/she will inform the parties and consult the Commission immediately after accepting the case into mediation. This consultation would be in anonymous format. Taking into account the need for a rapid procedure, the Commission will express expeditiously any views it may have on the topic, which should then be taken into consideration by the mediation panel. If the Commission does not express any opinion within the appropriate time-frame, the mediation process will resume.

68. Subject in this case to the parties´ consent, if it is understood that the issue would benefit from their views, the Gatekeeper could consult the Market Participants Consultative Panel or, as the case may be, the Consultative Working Group of the appropriate Expert Group.

Question 8:

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

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?

6. Timing

69. The efficiency and effectiveness of the mediation mechanism will be measured by the speed of the mediation process. Even if the provision of timeframes for the process is not appropriate in all instances, since the complexity of issues referred to the mediation mechanism will diverge considerably, deadlines will aid the timely functioning of the process (e.g. establishment of panels, etc.). See Annex 3 for a diagram including deadlines, where appropriate, regarding the mediation process in case of disputes concerning cooperation and exchange of information.

70. In cases of particular urgency, the mechanism provides for the flexibility to come to rapid solutions, such as by the possibility to make only oral submissions to the panel. Any such fast-track procedure would require the agreement between the parties to the dispute. For complex disputes being mediated, with respect to the estimated time frame, six months are expected to be the maximum period from the activation until the finalisation of a mediation process.

7. Outcome

71. All CESR Members and the Commission will be informed about the outcome of the issues having been mediated in anonymous form, respecting the confidentiality and professional secrecy obligations under EU law.

72. The objective of the mediation process is to further convergence at Level 3. Therefore, the mediation process is intended to assist CESR Members in achieving this objective in a constructive way. As discussed in detail above, it is not possible to give binding force to the outcome of a mediation procedure. Therefore, parties to a dispute will not be required to do so and may chose to ignore the views expressed by the mediation panel. However, the expectation will be that they would generally act in accordance with the outcome of the mediation procedure, with particularly high expectations in the case of exchange of information and cooperation. The reasons provided by a party not complying with the outcome of the mediation would be reported to CESR Chairs .

73. Where mediation does not solve a dispute, an issue that requires resolution by other Level 3 tools (e.g. by the adoption of guidance) may well have emerged or could even be of relevance for the Commission for Level 1 or Level 2. Any such issues identified during the process of mediation should be brought to the attention of the CESR Chairs and the Commission via the Gatekeeper, during or after the mediation process.

8. Publication of the outcome

74. As mediated outcomes only apply to the parties concerned, any publication of the outcome could run the risk of it being viewed as going beyond this limited scope. However, given Level 3's objective of encouraging supervisory convergence, it might be helpful for CESR to publish or report a particular mediated outcome - appropriately anonymised to comply with confidentiality and professional secrecy requirements under EU legislation - and/or to issue guidance for other competent authorities or market participants where appropriate. Additionally, summary reports (e.g. in CESR's Annual Report) could be provided for. As regards market participants that are directly concerned by a specific mediation process, appropriate transparency of the outcome of the process would be provided by the respective party to the dispute.

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?

G. Review of the Mediation Mechanism

75. CESR is aware of the fact that the establishment of a mediation mechanism is a new procedure for dealing with disputes in respect of which experience is rather limited. In order to assess the functioning of the mechanism and to adapt it where necessary after having gained sufficient experience, CESR will review the mechanism no later than two years after approval of the mediation process.

ANNEX 1

Summary of Comments to CESR's Call for Evidence (Ref. CESR/05-253)

CESR published its Call for Evidence on the Establishment of a Mediation Mechanism on 8 April 2005. CESR received 14 responses in total. The detailed responses can be found under "Consultations" on the CESR website. The following is a brief summary of the main comments received.

As already stated in the consultations on the CESR Level 3 Action Plan for 2005 and the Himalaya Report, there was general support for CESR taking on a mediation role at Level 3, with the caveat that any such process would be without prejudice to the competences of the Commission and the ECJ.

Almost all respondents were in favour of the non-binding nature of a future CESR mediation process.

A number of respondents asked CESR to provide market participants with a means of bringing issues within the mediation mechanism or of providing expert input in the mediation process itself.

Consultees were of the opinion that confidentiality requirements have to be fully respected. Nevertheless, many of them supported some transparency, in particular, in relation to the outcome of a mediation procedure.

Most of the responses expressed their support for extending the scope of the CESR mediation mechanism beyond the provisions of Art. 16 par. 2 and 4 of the MAD.

Regarding the issue whether mediation should take place before or after a decision has been taken, views were rather mixed, but there was a clear preference for a flexible approach allowing for mediation in both cases, without being too complex or legalistic.

Many of the responses saw merits in allowing for a fast-track procedure in specific cases of mediation.

Finally, all respondents did not support the introduction of either qualitative or quantitative thresholds, at least at this stage, when no experience with mediation has been gathered.

Responses to the Call for Evidence were received from the following entities:

Banking

British Banker's Association
Deutsche Bank AG
EAPB
European Banking Federation
European Savings Banks Group
Fédération Bancaire Française
Zentraler Kreditausschuss

Insurance, Pension and Asset Management

Fidelity Investments

Investment Services

AFEI

Futures and Options Association
Joint response by ISDA, ISMA, IPMA, ANSC, BSDAI, BMA, DSDA, FASD, LIBA, SSDA

Regulated markets, exchanges and trading systems

Euronext
London Stock Exchange

Others

Centre for Effective Dispute Resolution (CEDR)

ANNEX 2

Examples of Alternative Dispute Resolution ("ADR") Mechanisms

National Level

Art. 33 and 34 of the Portuguese Securities Code, and Regulation No. 23/2003 issued by the Portuguese Securities Market Commission (CMVM), provide for a mediation service regarding conflicts between non-institutional investors and investment firms. The service is provided by the CMVM, which may also choose mediators from outside its own organisation. The mediator is bound by the principles of confidentiality and impartiality. As it is a voluntary procedure, investment firms are not obliged to take part in the mediation proceedings, and any party may withdraw from the proceedings at any time. If, however, a final agreement is reached between the parties, it has the nature of an extra-judicial settlement, exempting the parties involved from civil liability.

Similar public/private schemes, albeit not having the same legal force as it is the case in Portugal, can be found in other Member States.

In the US, the National Association of Securities Dealers (NASD) has also established a mediation programme which is not only aimed at solving disputes between investors and members of NASD, but also disputes amongst NASD members. The rules governing this mediation programme are basically the same as those for other mediation schemes, apart from the fact that parties have to pay fees for the filing of a case and expenses incurred by the mediator.

EU Level

At EU level, a number of networks for ADR systems have been established, in particular the European Extra-Judicial Network ("EEJ-NET"), the Cross-Border Out-of-Court Complaints Network for Financial Services in the EEA ("FIN-NET"), and the Network for Effective Problem Solving in the Internal Market ("SOLVIT").

EEJ-NET was set up by the EU and EEA Member States (with the exception of Liechtenstein). It is made up of national contact points which assist consumers who have a dispute with a business in another country to try and resolve it. The consumer's contact point ("clearing house") enables them to seek advice and receive support and help in formulating and forwarding their complaint to an ADR system in the country where the business is located. The purpose of this network is to address the practical obstacles consumers face if using an ADR system in a country other than their own, such as lack of information about foreign ADR systems as well as linguistic and geographical barriers.

The **FIN-NET** is based on a Memorandum of Understanding whose parties are schemes responsible for out-of-court settlement of disputes between consumers and financial services providers in the EU and EEA Member States (with the exception of Liechtenstein); it became fully operative in 2001. The objective of this EU-wide complaints network is to facilitate consumers' access to out-of-court settlement procedures of cross-border disputes when the consumer and the financial services provider come from different Member States. It is basically built on mutual recognition between the national redress bodies and on exchange of information, so that the consumer has access to the alternative dispute settlement body to which her/his service supplier adheres to via the redress body in her/his own country of residence.[13]

In 2001, the Commission published a communication on **SOLVIT**[14]. Whereas EEJ-NET and FIN-NET focus on consumer-to-business transactions, this mechanism deals with problems of citizens or businesses deriving from the possible misapplication of Internal Market rules by public administrations. SOLVIT constitutes an ADR system, and proposed solutions are non-binding on

[13] As to the progress made in FIN-NET reference can be made to the dedicated website http://finnet.jrc.it/en/
[14] COM(2001)702 of 27 November 2001.

the applicant and cannot be challenged. If a problem goes unresolved, or if an applicant considers a proposed solution to be unacceptable, more formal proceedings can still be initiated.

The system operates through a network of SOLVIT centres based in the national administration of each Member State. If an individual or business runs into a problem resulting from possible misapplication of Internal Market Rules by a public administration in another Member State, it can make use of the services of SOLVIT. The applicant may turn to its local SOLVIT centre ("home SOLVIT centre"), which first checks the details of the application. It then enters the case into an on-line database system, allowing it to be forwarded automatically to the SOLVIT centre in the other Member State where the problem has occurred ("lead SOLVIT centre"). The lead SOLVIT centre confirms within one week whether or not it will take on the case. The target deadline for finding a solution to the problem is ten weeks. The two SOLVIT centres liaise with each other during the period of investigation and should find a solution to the cross-border problem within the deadline, which can either be that the misapplication will be changed or that the case is considered unfounded. In both instances, the applicant may pursue the case through more formal proceedings.

It has to be noted that the Commission has still the right to take action against MSs for breach of EC law, even if a case has been settled through SOLVIT proceedings.[15]

International Level

At the international level, many profit and non-profit organisations offer ADR/mediation services to settle disputes between non-state entities.[16] The following example refers to a mechanism which applies to disputes between state entities.

The **WTO** Agreements include an "Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)"[17] creating a formalised integrated dispute settlement mechanism which is considered to be of major importance to the effectiveness of the WTO rules.

The first step in solving a dispute between WTO members is to start consultations between the parties to the dispute complying with strict deadlines set out in the DSU. The parties to the dispute may also agree to initiate procedures of good offices, conciliation or mediation, using the services of the Director General. If the parties cannot reach an agreement, the complaining party may request the establishment of a panel by the Dispute Settlement Body (DSB). Such a panel normally consists of three persons, which are chosen by agreement between the disputing parties, or, if they cannot agree, by the Director General. Usually, standard terms of reference apply, unless the parties agree to special terms. In addition, the DSU sets out working procedures, which a panel typically has to follow. The panel may also seek advice from external experts or may request an advisory report by an expert review group in scientific or technical matters.

The panel should normally complete its work within six months (in urgent cases: three months). The panel issues an interim report to the parties concerned for comments, the final report is issued to the parties and to WTO members. The final report has then to be adopted by the DSB. Parties to the dispute may appeal the panel report at the standing Appellate Body, which is composed of seven persons. If the panel or the Appellate Body finds that a member has breached the WTO Agreements, the report shall recommend to the party concerned measures how to act in conformity with them. The party concerned must then notify its intentions with respect to the implementation of these recommendations. (To note that Panel reports or appellate reports are automatically adopted subject to negative consensus) The implementation is kept under regular surveillance by the DSB until the issue is resolved. In the event of non implementation the parties negotiate compensation.

[15] As to the progress made in the SOLVIT network reference can be made to the dedicated website http://europa.eu.int/solvit/.
[16] E.g. the World Intellectual Property Organization or the International Chamber of Commerce.
[17] The DSU provides for the possibility of arbitration proceedings between WTO members, as well.

Another example at international level is the International Centre for Settlement of Investment Disputes (ICSID) founded by the World Bank in 1966. The intention was to facilitate the settlement of investment disputes between governments and foreign investors in order to promote increased flows of international investment. ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State which has ratified the Convention.

ICSID is an autonomous international organisation. However, it has close links with the World Bank. All of ICSID's members are also members of the Bank. Unless a government makes a contrary designation, its Governor for the Bank sits ex officio on ICSID's Administrative Council.

Pursuant to the Convention, ICSID provides facilities for the conciliation of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation is entirely voluntary. The Rules of Procedure for Conciliation Proceedings provide for a procedural framework for conciliation cases in the ICSID.[18]

[18] For further details please refer to http://www.worldbank.org/icsid/.

ANNEX 3
Diagram for Mediation Process as to Disputes regarding Cooperation and Exchange of Information