



Date: August 2006  
Ref: CESR/06-286b

**PROTOCOL ON MEDIATION MECHANISM OF THE COMMITTEE OF EUROPEAN  
SECURITIES REGULATORS**

Having regard to:

- (1) The EU law in the area of financial markets and in particular article 16, par. 2 and 4 of the Directive 2003/6/EC on insider dealing and market manipulation (market abuse)..
- (2) The Charter of the Committee of European Securities' Regulators.
- (3) The second Interim Report of the Inter-Institutional Monitoring Group following which the Committee of European Securities' Regulators was encouraged to set up an internal mediation mechanism in order to solve conflicts between national securities' regulators
- (4) The ECOFIN Conclusions of the 5<sup>th</sup> of May 2006.
- (5) The European Parliament's Resolution on the "Current State of Integration of the EU Financial Markets" adopted on 28 April 2005 (Ref. A6-0087/2005).
- (6) The Green Paper of the European commission on Financial Services Policy (2005-2010) published on 3 May 2005 (Ref. COM {2005} 177, Annex I, page 7).
- (7) The White Paper on Financial Services of the European Commission, published on 5 December 2005 (page 10, footnote 30)
- (8) The "CESR Mediation Mechanism" of the Committee of European Securities' Regulators (Ref: CESR/ 05-483d).

Considering the need to put in place an effective mediation mechanism for solving the potential disputes between supervisory authorities, enhancing day-to-day cooperation between supervisors and strengthening supervisory convergence.

Considering that market participants, besides the possibility envisaged in article 3 of this Protocol, have also the possibility to bring potential matters to the attention of the Markets Participants Consultative Panel.

Considering that the effectiveness of the new mediation mechanism established under this Protocol will be reviewed after two years.

The members of the Committee of European Securities Regulators (CESR) have agreed:

**SECTION I**

**GENERAL PROVISIONS**

**Article 1  
Scope**

1. This Protocol regulates the Mediation Mechanism provided for in Article 4.4 of the Charter of the Committee of European Securities' Regulators ("CESR Charter").
2. The Mediation Mechanism will be used to settle disputes between the parties as set out in articles 2, par. 1 and 2 par. 2, concerning:



- a) Obligations to exchange information or cooperate, as envisaged in EU Directives or Regulations related to the securities markets.
- b) Enforcement of financial information requirements applicable to issuers or listed companies in EU markets.
- c) Mutual recognition, as envisaged in EU Directives or Regulations related to the securities markets.
- d) Other potential disputes or cases where agreement between competent authorities is required and that arise from EU Directives, Regulations or Commission's Recommendations, or CESR Standards, Guidelines and Recommendations.

3. Disputes eligible for mediation will have to meet all of the following conditions:

- a) The issue under dispute has a cross border nature.
- b) All reasonable bilateral efforts to settle the dispute have been exhausted or, alternatively, both parties agree to submit their dispute to mediation.
- c) Legal proceedings concerning the issue underlying the dispute have not already been initiated at EU or national level.
- d) The specific issue under dispute is not being dealt by, or has not been referred to, CESR or any of its groups.
- e) There is no legal constraint which falls outside the regulatory competence of the requested party that prevents it from accommodating the demands from the party seeking mediation.
- f) The action sought by the party seeking mediation is not the reversal by the requested party of a previous administrative decision recognising individual rights.

## **Article 2 Parties**

1. Only authorities represented at CESR ("CESR authorities")<sup>1</sup> will be parties to mediation procedures regulated by this Protocol.

2. By way of exception, when the issue under dispute falls within the scope of article 1.2 but the CESR authority seeking or being requested mediation is not, or is only partially, the national competent authority to deal with it, CESR authorities may act in the mediation procedure on behalf of those other national competent authorities, or the non-CESR competent authority may join the mediation mechanism directly by signing a joinder agreement. Appropriate arrangements will be made in such cases to associate the relevant non-CESR authorities in the mediation process.

3. Mediation requests shall normally be addressed to one single party and shall normally be requested by one single party.

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<sup>1</sup> i.e. National authorities being represented in CESR as envisaged in the European Commission's Decision (2001/527/EC). Please note that in some countries there may be more than one.



### **Article 3 Market Participants**

Parties may request mediation either on their own initiative or after a market participant has prompted them to do so. It is at the discretion of each authority to admit the request of a market participant and initiate the mediation or turn the request down. In the latter case the authority may communicate the existence of such initial request to CESR.

### **Article 4 Gatekeepers**

1. Subject to the procedural provisions contained in Section II, each mediation request and procedure shall be organized, managed and supervised by a CESR Gatekeeper.

2. The following persons will act as Gatekeepers:

- a) The Chair of CESR-Pol, for disputes under article 1.2. a;
- b) The Chair of CESR-Fin, for disputes under article 1.2. b; and
- c) For all other disputes, the Vice-Chair of CESR or a third CESR Chair designated by the Vice-Chair of CESR, in consultation with the parties involved in the mediation request.

### **Article 5 Legal nature**

1. Once a dispute has been admitted by the Gatekeeper in keeping with the procedure described in articles 7 and 8, parties shall be expected to accept mediation requests and cooperate in good faith with the Gatekeeper and the party seeking mediation, with a view to reaching an amicable solution.

2. If, exceptionally, a party refuses to accept mediation request once it has been admitted by the Gatekeeper, such party shall explain in writing the reasons to the Gatekeeper, who will report the event to CESR in accordance with article 12.

3. Mediation outcomes shall not have any legal effect, be legally binding or be enforceable. Furthermore, they will not prejudice the initiation of infringement proceedings of the European Commission or the European Court of Justice or national authorities. Moreover, they will not pre-empt or call into question the general European system for monitoring and interpreting EU law.

4. If a party decides not to follow the recommendation stemming from the mediation procedure, it shall explain in writing the reasons to CESR.

### **Article 6 Duty of confidentiality**

In accordance with Articles 5.2 and 7.4 of the CESR Charter, mediators, panellists, Gatekeepers and members of the Secretariat involved in mediation cases will keep strict confidentiality in respect to the data, documents, findings, discussions and results pertaining to the mediation process, without prejudice to the reporting and information provisions of this Protocol.



## SECTION II

### PROCEDURAL RULES

#### Article 7 Mediation Requests

1. The party requesting mediation will provide the Gatekeeper and the requested party with a preliminary statement describing the case.
2. The requested party will provide a response in writing within 2 weeks, for the dispute to be assessed by the Gatekeeper in accordance with article 8.

#### Article 8 Preliminary assessment

1. Unless the parties agree for the dispute to be mediated, the Gatekeeper will check that the case is covered by the scope defined in article 1.2 and that the conditions set out in article 1.3 are met. Furthermore, to determine whether the dispute is eligible for mediation, the Gatekeeper will also assess the following issues:

a) For disputes mentioned in article 1.2.a:

- i) Whether the request for information or cooperation was made within the scope of, and was articulated in accordance with, the relevant EU Directives, Regulations or Commission's Recommendations, CESR Standards, Guidelines and Recommendations or the CESR Memorandum of Understanding.
- ii) Whether the reasons for refusal of cooperation envisaged in the provision invoked by the requesting party do apply and have been clearly communicated to the latter.

b) For disputes mentioned in article 1.2.b, whether the matter has been discussed in the European Enforcers Coordination Sessions (EECS) in a comprehensive way with clear outcomes that could serve as standards.

c) For disputes mentioned in article 1.2.c, whether the dispute does not question the fundamental principle of mutual recognition in a systematic way.

2. The Gatekeeper shall make a decision on the eligibility of the case for mediation within 2 weeks from the response of the requested party and shall communicate his/her decision to the parties and the Chair of CESR.

If the Gatekeeper concludes that an issue is not eligible for mediation, the requesting party may appeal the Gatekeeper's decision not to admit a mediation request and ask the CESR Chairs to review the Gatekeeper's decision. The CESR Chairs will analyze the request and communicate their decision to the Gatekeeper within 2 weeks, who will inform the parties accordingly. If the Gatekeeper's decision is upheld, the procedure will come to an end. If the Gatekeeper's decision is not upheld, the mediation procedure will resume.

3. If the Gatekeeper considers that the dispute accepted to mediation hinges mainly on conflicting interpretations of applicable EU legislation, immediately after admitting the case he/ she will inform the parties and, on an anonymous basis, consult the Commission on the conflicting interpretation of the issue at stake. Any views of the Commission, if provided within 3 weeks, shall be taken into consideration in the mediation.



## **Article 9**

### **Selection of mediation procedures, mediators and panellists**

1. If, in accordance with article 8, a dispute is admitted to mediation, the Gatekeeper will ask the parties to choose, within 3 working days, between the following mediation procedures:
  - a. An evaluative procedure, involving a Mediation Panel that evaluates the issue and recommends in writing a solution to the parties.
  - b. A facilitative procedure, involving one single mediator to help the parties to reach a satisfactory solution to the dispute.
2. If no agreement can be reached between the parties on which procedure to follow, the Gatekeeper shall make the final decision.
3. In the evaluative procedure, the panel will consist of an odd number of at least three panellists, who will be selected from an expert's list containing experts from CESR authorities who volunteer to be involved in the Mediation Mechanism, have the requisite expertise for any of the different issues within the scope of the Mediation Mechanism and appropriate seniority. Volunteers should be proposed by CESR members.
4. The list of experts will be agreed by CESR and reviewed at least on an annual basis. Each Gatekeeper will ensure that the respective list of experts is regularly reviewed and updated.
5. In the facilitative procedure, the mediator can be:
  - a) An expert included in the list described in the previous paragraph;
  - b) A CESR member or, subject to his/her consent, any other officer or employee from a CESR authority; or
  - c) The Gatekeeper, if the parties so agree.
6. The Gatekeeper will appoint the panellists or the mediator, in consultation with the parties, within one week from the selection of the procedure.
7. When selecting mediators and panellists, the Gatekeeper shall ensure an appropriate representation from CESR authorities in order to avoid any bias in legal or cultural views that could influence the discussion and the mediation outcome.
8. CESR may establish for a certain period standing mediation panels formed by an odd number of at least three panellists to deal with similar issues of mediation which frequently arise in principle in the areas covered in articles 1.2. a and b. Even if such panels are established, the Gatekeeper and the parties may agree not to use them, but appoint an ad-hoc one.

## **Article 10**

### **Evaluative procedure**

1. The Mediation Panel will generally decide cases on the basis of documents submitted by the parties to the Gatekeeper. Oral submissions may be accepted or required 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 consideration of the issue.
2. The Mediation Panel may request any additional information and/or clarification from the parties that is necessary for a sound assessment of the issue.



3. Subject to the parties' consent, if it is understood that the issue would benefit from their views, the Mediation Panel could consult on an anonymous basis the Market Participants Consultative Panel or, as the case may be, the Consultative Working Group of the appropriate Expert Group.

4. When during the course of the mediation it appears that CESR authorities which are not parties to a procedure could have an interest in the issue being mediated, the Gatekeeper, subject to the parties' consent, will ensure that they are informed on its progress and are able to provide input into the process. Such CESR authorities, however, will not be able to intervene during the mediation process.

5. After assessing the dispute, within one month from its appointment, the panel shall seek to come to an agreed view on its recommendation. If agreement is not possible, the panel will adopt its recommendation by simple majority voting. Panellists will not be allowed to abstain or make dissenting recommendations. Only the final recommendation, but not the voting results or deliberations, will be disclosed to the parties and the Gatekeeper. The Gatekeeper shall communicate the recommendation in writing to the parties.

6. If exceptionally, following the recommendation by the Mediation Panel, no agreement can be reached between the parties, any of the parties may instruct the Gatekeeper to refer the case to CESR Chairs. This shall be done within 2 weeks of the communication of the recommendation to the parties.

7. The CESR Chairs considering a matter will agree upon a procedure suitable to the matter in dispute and will draw mainly from the submissions and evidence already gathered in the primary evaluation by the Mediation Panel. If more information or clarification is needed, the CESR Chairs will request such information from the parties. After assessing the dispute, the CESR Chairs will seek to come to an agreed view on its recommendation. If agreement is not possible, the CESR Chairs will adopt its recommendation by simple majority voting, with no right to abstain or dissent from the result.

8. If any party does not intend to comply with the outcome of mediation, it shall explain in writing the reasons for non-compliance to CESR within 2 weeks of the communication of the recommendation to the parties.

If any party does not effectively follow the recommendation within a reasonable period of time, it shall explain, at the request of the other party, its reasons to CESR.

#### **Article 11 Facilitative procedure**

1. The mediator in the facilitative procedure will have all the necessary leeway and flexibility to help the parties to come to an agreement. In doing so, the mediator will respect the equal treatment of both parties.

2. The mediator will inform the Gatekeeper of the result of the mediation.

#### **Article 12 Reporting and publication**

1. Gatekeepers will report to CESR and to the Commission, in an anonymous form:

- a. Outcomes of mediation procedures, as soon as possible;
- b. Mediation requests, accepted or rejected, at least at every CESR plenary.

2. The market participants directly concerned by the outcome of a mediation procedure will be informed about its outcome by the respective CESR authority in due time.

3. In cases where CESR considers that such publication could encourage supervisory convergence or provide guidance to authorities or market participants, reports or summaries of mediated outcomes



will be made public on an anonymous basis. Additionally, at CESR's discretion, such reports or summaries may be made public, in an anonymous form, through CESR's Annual Report.

### **SECTION III**

#### **OTHER PROVISIONS**

##### **Article 13 Conflicts of interest**

1. The Gatekeeper will not be the Chair of either party and will not be otherwise conflicted. Whenever a Gatekeeper is conflicted, he/she shall notify as soon as possible such circumstance to the Chair of CESR, who, in consultation with the parties, will appoint a CESR-Chair as specific Gatekeeper for that case as soon as possible.

2. Mediators, panellists and Chairs serving on the Panel of CESR Chairs will not be representatives of either party and will not be otherwise conflicted.

##### **Article 14 Referral to CESR Chairs**

In considering referrals to CESR Chairs under articles 8, par. 2 and 10, par. 6, CESR Chairs will normally act through a panel of an odd number of at least three CESR Chairs, appointed by the Chair of CESR for each dispute.

However, in the case of mediation requests envisaged in article 16, par. 2 and 4 of Directive 2003/6/EC on insider dealing and market manipulation (market abuse), the party requesting mediation will have the right to bring such referrals to the attention of CESR.

##### **Article 15 Time frames**

Bearing in mind the overriding need for mediation to be completed expeditiously, and in all cases within 6 months, Gatekeepers, at their own initiative or at the request of mediators or mediation panels, will be allowed, except for the timeframe foreseen in article 8.3, to shorten or, when appropriate, extend the time frames set out in this Protocol.

##### **Article 16 Administrative Support**

The mediation procedure will be fully supported by CESR Secretariat which will provide any necessary assistance to the Gatekeeper, the mediators and panellists and the Panel of CESR Chairs with the view of facilitating the role of those bodies throughout the mediation process and the proper reporting to CESR in accordance with article 12.

##### **Article 17 Entry into force of the Protocol**

This Protocol shall enter into force immediately.

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