



Ref: CESR/06-287b

**CESR Mediation Mechanism
Feedback Statement and Protocol**

August 2006



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 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 the ECOFIN conclusions of the 5th May 2006, that invited CESR to establish a mediation mechanism as a pragmatic response to the main challenges the EU faces in financial supervision.
- 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 feedback statement sets out and explains the final CESR Mediation Mechanism “the Mediation Mechanism” taking into account the responses received to the Call for Evidence of 8 April 2005 (Ref. CESR/05-253), the responses to the consultation that CESR carried out last autumn (Ref. CESR/05-483c that closed on the 30th November 2005, to which there were 19 responses (see Annex A for a list of respondents), an open hearing that was held on the 21st of November 2005, and a meeting with mediation experts that was held on the same day (a list of participants in the mediation experts meeting is set out in Annex B).
- 5) Overall, CESR’s proposals were well received, and the responses to the questions asked and the concerns raised by respondents have been taken into consideration by CESR in finalising its Mediation Mechanism.
- 6) In order to make the Mediation Mechanism operational, CESR has created a Mediation Protocol set out in Annex C of this paper which will be attached to CESR’s charter. In addition to which, a list of Mediation panellists is in the process of being established. It is anticipated that the Mediation Mechanism will be up and running in the autumn of 2006.
- 7) The rest of the paper discusses the issues raised by respondents to the consultation paper, and explains how these have been addressed by CESR.

Issues raised through the consultation process and an explanation of how these have been addressed.

- 8) Respondents to the consultation raised a number of issues, as well as answering the specific questions that were asked as follows:
 - a) nature of mediation and key features
 - b) scope of the mediation mechanism
 - c) participation by non CESR members
 - d) gatekeepers
 - e) key features of the facilitative and evaluative mediation procedures
 - f) panel/mediator selection
 - g) size and voting rules for panel
 - h) transparency vis a vis CESR members
 - i) role of the Commission in the mediation mechanism
 - j) role of market participants in the mediation process
 - k) timing
 - l) reporting the outcome of mediation



- m) publication of mediation outcome
- n) review of mediation mechanism

A. Nature of mediation mechanism and key features [Article 5 of the protocol]

- 9) The consultation paper set out the key features of the proposed mediation mechanism and asked consultees whether or not they agreed with them.
- 10) Overall, respondents were very supportive of the both the proposed key features and the reasoning behind them.
- 11) In relation to the nature of mediation, concerns were raised about the voluntary nature of the mechanism in terms of both participation and outcome. It was recommended that strict timelines would need to be introduced into the mechanism, and there was very strong support for the “comply or explain” approach in relation to a CESR members’ reaction to a request to take part in mediation, which will ensure that CESR members take the Mediation Mechanism seriously.
- 12) CESR agrees that it is necessary to introduce strict timelines into the mechanism, and has introduced a number of timeframes into the mechanism as can be seen from the protocol in Annex C.
- 13) Some respondents considered that the outcome of the mechanism should be binding, explaining that doing so, in no way interferes with the European Commission’s right to initiate proceedings under the Treaty establishing the European Community or the European Court of Justice’s competence to finally decide on any matter in EC law.
- 14) On consideration of these arguments, and in light of the fact that the majority of respondents were supportive of the voluntary nature of the proposed mediation mechanism, and the fact that the mechanism itself is to be reviewed after a 2 year period, CESR has decided that it is not necessary to make any changes to the voluntary nature of either participation in, or the non-binding outcome of, the mediation.
- 15) As set out in Article 5.1 of the protocol, it is made clear that despite the voluntary nature of the mechanism, there is an expectation that the CESR members¹ will accept mediation requests and cooperate in good faith with the gatekeeper and the CESR member seeking mediation, with a view to reaching an amicable solution.
- 16) In addition, as explained in the consultation paper, and fully supported by respondents, the use of a “comply or explain” approach as a means of using peer pressure in getting members to both accept a request for mediation as set out in Article 5.2 of the protocol and to follow a mediation recommendation as set out in Article 5.4, should despite the voluntary nature of the use of the mechanism and its outcome, greatly facilitate the effectiveness of the mechanism in achieving supervisory convergence.
- 17) CESR points out that as can be seen from the protocol, it is not necessary to include a description of the procedural principles of the mechanism in itself (namely that it is rapid, efficient, fair and confidential), but only to ensure that the protocol reflects them in setting out how the mechanism will work in practice.

B. Scope of the mediation mechanism [Article 1 of the protocol]

- 18) CESR explained its proposed scope of the mediation mechanism setting out a non exhaustive list of areas that may be covered, and asked if there were other areas of potential dispute between competent authorities that should be included.

¹ Please note that for the purposes of the protocol – reference to CESR Members has been replaced with either CESR authority or the parties.

19) Overall, there was strong support for the proposed scope of the mechanism and no additional areas of potential dispute between competent authorities were identified.

20) Concerns were raised about the proposed scope of the mechanism because of the catch all scope included in the following bullet point:

“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).”

21) There was a specific request by one respondent to exclude cases where CESR members have no leeway to act due to their own national laws, and another request not to go any further than the cooperation obligations set out in MiFID and MAD.

22) In relation to mutual recognition, there were some specific requests to clarify the practical application of the mechanism for mutual recognition cases, and some respondents pointed out that a cautious approach needs to be taken in this area. Concern was raised because only the home competent authority is in a position to ascertain the conditions for granting an EU passport to a market participant or product, and that inclusion of mutual recognition in the scope of the mechanism could mean that the host competent authorities could use the mechanism to challenge a decision taken by the home competent authority.

23) Other respondents suggested that CESR should steer clear of the area of mutual recognition all together and reduce the scope of the mechanism accordingly. In contrast, one respondent suggested that CESR was over cautious in its proposals particularly in the investment management field and questioned its use in mutual recognition cases.

24) On consideration of the concerns raised and their reasons, CESR does not find any of the arguments for limiting the scope of the mechanism convincing, particularly given the voluntary nature of the mechanism and its role in facilitating supervisory convergence.

25) The need to retain a general provision in the mechanism’s scope is considered to be of particular importance because, as pointed out by some respondents, it is too early in the implementation phase of the FSAP measures to identify all areas of potential dispute.

26) The scope of the mechanism, is set out in Article 1.2 of the protocol although clarification has been added in the drafting of articles 1.2(a) where there is now a reference to “obligations” and 1.2(d) that makes a reference to other potential disputes or cases where agreement between the competent authorities is required and that arise from EU Directives or Regulations or Commission Recommendations or CESR Standards, Guidelines and Recommendations.

27) In relation to the concerns raised about mutual recognition, CESR agrees with them and reiterates that mutual recognition decisions will not be called into question through the mediation mechanism. There is a distinction that needs to be drawn between the criteria applied to support a mutual recognition decision made by a CESR member, and the mutual recognition decision itself which can not be challenged through the use of the mechanism. This has been specifically articulated as part of the negative criteria in Article 1.3(f) – which states that :

“the action sought by the Party seeking mediation is not the reversal by the requested party of a previous administrative decision recognising individual rights”

28) As an example of the this distinction, a prospectus that has been approved by the home competent authority and is used to issue securities in a host member state, can not be challenged by use of the mechanism, so the issuer can use its approved prospectus. What the mechanism may be used for is cases where the host competent authority disagrees with the method in which the home competent authority is generally approving prospectuses using the



criteria applicable, and may use the mechanism as a way of dealing with differences in applying the same criteria.

Negative criteria for assessing when to accept a case into mediation.

- 29) In order to make the mediation process as efficient and clear as possible, CESR proposed a negative set of criteria that the gatekeeper needs to take into consideration in assessing whether or not a request for mediation is or is not suitable. Consultees were asked whether this list should be expanded to include legal proceedings initiated by a CESR Member in relation to an underlying dispute to which that CESR Member is a party.
- 30) Some respondents explained that in view of the inherent delays in legal proceedings, all amicable out of court settlements to a dispute should be explored, as well as the provision of interim solutions, and as such, even if legal proceedings had been commenced, this should not prohibit the parties going to mediation.
- 31) Although CESR agrees that all interim solutions should be explored, it does not consider this to be a strong enough argument to exclude the commencement of such proceedings from the negative criteria and points out that it has been made clear, that in the event that the parties agree to mediation even if the negative criteria applies, they can do so (see Article 8.1).
- 32) Overall, consultees supported and agreed with the proposed negative criteria, and did not consider it necessary to expand upon it. As such it has not been expanded and is set out in Article 1.3 of the protocol, from which it can be seen the negative set of criteria included in the consultation paper has not been expanded upon, but the other criteria which were set out elsewhere in the consultation paper (namely the cross border nature of the matter and that the member seeking mediation is not trying to reverse a previous administrative decision taken by the other party) has been included in this Article as well.

Solvit

- 33) In the consultation paper, CESR set out a description of the EU Solvit system in Annex 2, and asked consultees whether or not the outcome of such proceedings should be taken into account.
- 34) Overall, it is clear from the responses to this question that consultees misunderstood the question in the manner intended and thought that the question was asking whether or not the SOVLIT general methodology and procedures were of relevance for the purposes of the proposed mediation mechanism.
- 35) Although the original question was not answered by consultees, CESR does not consider it necessary to either reconsult on this point or to make changes to the original drafting in relation to this point.
- 36) CESR points out that even if the issue in question is being considered by Solvit, it should still be up to the parties to seek swift resolution through the Mediation Mechanism, and has therefore not included the use of this mechanism as part of its negative criteria in determining whether or not a case is suitable for mediation

Definition of cross border

- 37) Some of the written consultation responses requested that a better definition of “cross border” when referring to the nature of cases suitable for mediation (see for example paragraph 31 of the consultation paper) should be given.
- 38) On consideration of this issue, CESR does not consider it necessary to make any changes to either the use of “cross border” or to define what this means, and reiterates that it is not taking a



legalistic approach to its meaning and considers that it should be left open, and has included the need for the issue to be cross border in nature in Article 1.3(a) of the protocol.

C. Participation by non CESR members [Article 2 of the protocol]

- 39) The consultation paper explored expanding the nature of those who could participate in the mechanism to those outside the CESR Membership in order to cater for member states where the relevant competence (for example in relation to the supervision of financial information requirements) may be either shared with a non CESR member, or a non CESR member is appointed as being the relevant competent authority for it.
- 40) It was proposed that non CESR members could opt into the mechanism.
- 41) Overall, respondents were very supportive of this proposal explaining that in order to be able to facilitate supervisory convergence and maximise the scope for mediated resolutions, it makes sense that the mechanism includes the possibility for non CESR members to opt into it.
- 42) Some consultees raised concerns about prematurely expanding the nature of those who could use the mechanism before it had been used by the membership.
- 43) Taking these concerns and the overall support into consideration, CESR has decided to allow for non CESR Members to opt into the mechanism, which is included in Article 2.2 of the protocol as an exception to the general rule set out in Article 2.1 of the protocol that only CESR members will be parties to the mediation process. However, such opt in will be subject to signing of a joinder agreement which will by definition limit the scope of the issues that it can be used for so as to prevent any premature expansion of the mechanism.
- 44) It is not considered necessary at this stage to stipulate in the protocol the method by which a non CESR member can opt into the mediation mechanism, which has therefore been left open in the protocol and been referred to as “appropriate arrangements” which will need to be made. There are however two methods through which a non CESR member can opt in, either by executing a joinder agreement, or by using a CESR member to represent them as set out in Article 2.2.
- 45) CESR Points out that this will be of particular importance for those members where the CESR member has not been appointed as the relevant competent authority for the supervision of a particular aspect of a directive.

D. Gatekeepers [Article 4 of the protocol]

- 46) The need for a gatekeeper in the mechanism, its proposed role in the process, and selection method were explained in the consultation paper.
- 47) Overall, respondents supported both the need for a gatekeeper and its proposed role in the process, although some respondents did not, and explicitly requested that this proposal be dropped because there was no need for a gatekeeper, and in light of the voluntary nature of the mechanism which is based on the mutual trust of CESR Members, the role of the gatekeeper was contradictory to the mechanism’s cooperative spirit.
- 48) CESR is not convinced by the suggestion that there is no need for a gatekeeper and points out that it is clear from the open hearing, the discussion with experts, and the responses to the consultation paper, that there has been some confusion regarding both the role and the proposed number of gatekeepers, highlighting the need to add clarity to the original proposals.
- 49) In addition, CESR does not consider that having a gatekeeper is against the cooperative spirit of the mechanism, on the contrary, the basic approach for the mechanism is to set up a clear procedure which is also flexible enough to suit the preferences of the parties. CESR considers it

important and beneficial for the parties to be able to count on a third party for the following functions:

1. assessing the merits of each issue for escalation to mediation;
 2. overseeing the mediation process and procedure;
 3. reviewing and updating the list of experts on a regular basis
 4. making decisions should the parties disagree; and
 5. information and communication.
- 50) The role of the gatekeeper, is set out in Article 4.1 of the protocol which clearly states that each mediation request shall be organised, managed and supervised by the gatekeeper. In addition, as set out in Article 15, the gatekeeper also has a role to play in ensuring that timeframes are met and can change them to ensure an expeditious procedure is being followed.
- 51) In terms of the number of gatekeepers, the proposal to have three specialist gatekeepers was supported by respondents, who recognised the need to allow for the expertise of the gatekeeper to change in accordance with the type of issue that is brought to mediation. Article 4.2 of the protocol provides for 3 gatekeepers and sets out who they will be.
- 52) On the issue of appointment of the 3rd specialist gatekeeper, as can be seen from the protocol, CESR has concluded this should be the Vice Chair or another Chair appointed by him (so for example an expert group chair) depending on the nature of the dispute.
- 53) In order to deal with potential conflicts of the CESR chairs as gatekeepers and matters where their organisation is a party to the mediation in question, CESR has changed the original proposals and included a specific article (Article 13) to deal with conflicts of interests so that the relevant CESR chair will have to appoint another CESR chair in consultation with the parties, when the Chair is conflicted.
- 54) The gatekeeper plays a role throughout both the facilitative and evaluative mediation procedures. The preliminary request for mediation is made to the gatekeeper and the requested party (as set out in Article 7.1) , the gatekeeper will make a preliminary assessment of the issue as set out in Article 8, having first checked that none of the negative criteria apply and that all the conditions set out in Article 1.2 are met.
- 55) As set out in Article 8.1 of the protocol, even if the gatekeeper considers that the matter is not suitable for mediation but the parties want to mediate, the gatekeeper will not impede them from doing so.
- 56) Having accepted a matter as being suitable for mediation, the gatekeeper will ask the parties to select the type of mediation procedure that is considered to be appropriate for the matter in question (as set out in Article 9.1) and will also have the final say if the parties are unable to agree on what type of mediation (facilitative or evaluative) should be followed as set out in Article 9.2 of the protocol.
- 57) The gatekeeper then selects the panellists/or the mediator in accordance with Articles 9.3 -9.7 in consultation with the parties, and can also be the mediator in the facilitative procedure should the parties agree.
- 58) During the course of the mediation the gatekeepers role will be to communicate on a regular basis with either the panellists or the mediator and assess if there is a need to inform other CESR members of the progress (subject to the parties' consent) in accordance with Article 10.4, communicate any Commission views, and checks that the procedure is expeditious and if necessary change timeframes in accordance with Article 15.
- 59) Following the end of the mediation in the case of the use of the evaluative procedure, the gatekeeper plays a role in relation to any referrals to CESR Chairs in cases where following the recommendation of the mediation panel no agreement can be reached, as set out in Article 10.6.

60) The gatekeeper also has an important role to play in relation to informing the rest of CESR and the Commission about the requests that have not been admitted into mediation, the cases that have been accepted into mediation and their outcomes as set out in Article 12.1.

E. key features of the facilitative and evaluative mediation procedures [Articles 10 & 11]

61) The consultation paper explained that there could be two possible approaches to mediation depending on the nature of the dispute between the parties, a facilitative and an evaluative approach. The facilitative procedure involves one single mediator whose task is to facilitate negotiations between the parties in order for them to reach a mutually satisfactory solution. The evaluative procedure involves a mediation panel of at least 3 panellists who evaluate the issue and make a written recommendation to the parties.

62) It was also suggested that the evaluative model would predominantly be used for the cases involving cooperation and exchange of information, and an Annex setting out the procedure for the evaluative model was set out.

63) Overall, the consultation process supported differentiating between two different models of mediation, but respondents were unclear about how the facilitative model would work. Some questioned the need to be prescriptive in differentiating between the two types of models, pointing out that there is a need to ensure that there is flexibility in the mechanism so that it can deal with any potential issue.

64) CESR has taken these comments on board and has made the mechanism as flexible as possible by clearly differentiating between the evaluative procedure which is set out in Article 10 of the protocol, and the facilitative procedure which is set out in Article 11 of the protocol.

65) In accordance with the request to be as clear as possible about how these procedures will work in practice, as can be seen, differences in the procedure to be followed when using the evaluative or facilitative procedure have been built into the protocol.

66) The choice between the evaluative and facilitative procedure is a matter for the parties who as set out in Article 9.1 will be asked by the gatekeeper to choose which procedure they would like to follow. In order to cater for the possibility of the parties not being able to agree to which type of mediation should be used, the gatekeeper will make the final decision as set out in Article 9.2

67) Other differences between the two procedures are:

- The nature of those who are used to help the parties resolve the issue in question, namely panellists in the case of the evaluative procedure, and mediators in the case of the facilitative procedure (discussed in more detail in Section F below).
- The right to refer to a panel of CESR Chairs in the event that one of the parties does not agree with the outcome of the mediation only applies when the evaluative procedure is used.
- The nature of the final outcome of the mediation procedure, namely a written recommendation in the case of the evaluative procedure will always be given, in contrast to better reflect the more informal and conciliatory nature of the facilitative model, the final outcome of the facilitative procedure where it succeeds will be the solution agreed by the parties.
- The facilitative model is considered to be more flexible and have more leeway to help the parties come to an agreement, and it is anticipated will nearly always also be faster.

- The nature of who can be a mediator as opposed to a panellist. In the facilitative procedure, the potential sources of mediators is not limited to the list of mediators/panellists but is extended to other CESR members and the gatekeeper if the parties agree – again reflecting the facilitative nature of the facilitative procedure, which gives the gatekeeper a much greater role in helping the parties reach an agreement.

F. Panel/mediator selection [Article 9 of the protocol]

- 68) The consultation paper made a number of proposals in relation to how mediators and panellists should be selected, to which a number of mixed responses were given.
- 69) Some respondents considered there to be a need for greater flexibility and less complexity in the process so that the choice is left to the parties in question, so that in line with the voluntary nature of this process, the parties feel comfortable with and have confidence in those that are helping them reach agreement, a point which was strongly made by the mediation experts.
- 70) Some respondents considered there to be a need for strict and transparent rules, so for example having some form of rotation from a pre-established list.
- 71) Some raised doubts about the appropriateness of the gatekeeper to select the members of the panel.
- 72) On consideration of the points raised, CESR points out that it agrees with these comments and has therefore introduced the following in its mechanism as set out in Article 9:
- a) creating a list of panel members/mediators made up of experts from CESR members who have to have the requisite expertise and seniority and that this list gets updated and reviewed by the gatekeeper on a regular basis and reviewed and agreed by CESR on an annual basis;
 - b) ensuring that the gatekeeper has to refer to this list when establishing a panel or selecting a mediator as set out in Article 9.3, but that in the case of the selection of a mediator, the gatekeeper can go outside this list and choose a CESR member or the gatekeeper (if the parties agree) as set out in Article 9.5;
 - c) ensuring that the appointment of panellists and mediators is only done after consultation with the parties as set out in Article 9.6;
 - d) ensuring that there is no conflict between a selected panel member and a party to the dispute, selection has to be made in accordance with Article 13.2 which makes it clear that mediators, panellists and Chairs cannot be representative of either of the involved parties and will not be otherwise conflicted; and
 - e) catering for the use of standing mediation panels in order to deal with similar issues of mediation that may frequently arise, as set out in Article 9.8.

G. Size and voting rules for mediation panel

- 73) In finalising the Mediation Mechanism, CESR considered it necessary to do some further work on specifying the recommended size and voting rules that should apply to panels and how a mediation recommendation should be reached.

- 74) Although this is not an issue that was consulted upon, CESR has added the following to the final Mediation Mechanism:
- a) CESR has introduced the size of panels that are to be used in the evaluative procedure namely an odd number of at least 3 members as set out in Article 9.3
 - b) Majority voting has been introduced as a method by which the panellists reach agreement as set out in Article 10.5, and it is made clear that there can be no abstentions or dissenting recommendations.
 - c) It is made clear that all panel deliberations and voting results will be kept confidential as set out in Article 10.5

H. Transparency vis a vis CESR members [Article 12.1 & 10.4].

- 75) The consultation paper explained the need to build into the proposed mechanism a method through which supervisory convergence can be facilitated by sharing information with other CESR Members regarding the type of issue being escalated to mediation, and to provide some form of report regarding mediated outcomes, and the role of the gatekeeper in this process.
- 76) Although no specific questions regarding this aspect of the mediation mechanism were asked, overall there was very strong support for these proposals, as such CESR has included these proposals in its mediation mechanism.
- 77) Article 10.4 makes it clear that if during the course of the mediation it is apparent the issue being mediated is something that may be of interest to other CESR members, following the parties consent, the gatekeeper has to ensure that other CESR members are kept informed of the progress of the mediation and are able to provide input into the process.
- 78) Article 12.1 makes it clear that at least at every CESR plenary, CESR members and the Commission are informed of mediation requests not admitted by gatekeepers, the cases that are accepted into mediation, and the outcomes of mediation procedures are relayed as soon as possible to CESR members and the Commission.
- 79) It is important to point out that communication between a gatekeeper and CESR members will at all times respect the duty of confidentiality (for which an explicit article has been introduced into the protocol as can be seen from Article 6), and be on an anonymous basis as set out in Article 12.1.

I. Role of the Commission in the mediation mechanism [Article 8.3 of the protocol]

- 80) The consultation paper explained the need to ensure that mediation between CESR members cannot impinge on the role of the Commission and ECJ in the interpretation and enforcement of EU law, and how the role of the Commission in the process was envisaged.
- 81) Overall, the written responses to the consultation were supportive of the proposals pointing out that the views of the Commission were considered to be very useful in mediation cases involving the interpretation of EU law.
- 82) There were some suggestions that there was a need to ensure that there were tight deadlines within which the Commission was to come back with its views in order to ensure that delays in the process were avoided. It was pointed out that the Commission like CESR has an obligation to ensure that any advice it offers to CESR is delivered in the same rapid, fair and efficient way as

CESR intends the mechanism to work. In addition, some points of caution were raised regarding the need to ensure that the confidential nature of the process was not in any way compromised.

- 83) In contrast, the meeting with mediation experts strongly advocated strict confidentiality in the mediation process, and warned against the potential negative effects that the presence of a third party with sanctioning powers like the Commission can exert on the process and the likelihood of it being used as a method for potential dispute resolution.
- 84) CESR agrees with respondents to the consultation and the points made by the mediation experts. As can be seen from Article 8.3, CESR has established a timeframe of 3 weeks within which the Commission is to come back with its views in cases where the gatekeeper understands the dispute hinges mainly on conflicting interpretations of applicable legislation. During this time, the mediation continues in order to ensure that the mechanism is fast and efficient.
- 85) It was also pointed out that it is necessary for CESR to decide up front whether the Commission is to be asked for its view on the merits of the case or its interpretation of EU law. CESR points out that the Commission will only be asked for its views on the conflicting interpretation of EU law and not the merits of the case.
- 86) To deal with the concerns of confidentiality that were highlighted by a number of respondents, as explained above, an Article dealing with confidentiality has been introduced into CESR's mechanism and any communication with the Commission is to be made on a purely anonymous basis.

J. Role of market participants in the mediation process

- 87) The potential role of market participants in the mediation process was explained in a number of different places in the consultation paper and a number of questions about how to involve market participants were asked.

Market participants involvement in triggering mediation

- 88) CESR explained that it did not want the mediation mechanism to be used by market participants as a form of complaints mechanism, and that as such, it was important that in order for the mechanism to be used effectively as a tool to facilitating the achievement of supervisory convergence, it was necessary to ensure that the mechanism was one between peers and therefore only CESR members (or non CESR members who opt into the mechanism) can be directly involved.
- 89) CESR explained that wherever possible, market participants would be involved, but in an indirect way. Most respondents to the consultation paper supported the indirect manner in which market participants can trigger mediation by raising an issue directly with their national CESR member, and by providing for an alternative route through the Market Participants Consultative Panel which could also be used as a channel for market participants to express their general concerns.
- 90) Some respondents requested that it should be possible for market participants to raise issues either through their home or host CESR member as there was a risk that the matter may not be taken up by the home regulator, and that the restriction in market participants being able to raise concerns directly with their home competent authorities was unnecessary.
- 91) On consideration of this issue CESR sees no reason to restrict requests to market participant's home CESR member and makes it clear in article 3 of the protocol that CESR members can request mediation either on their own initiative, or after a market participant has prompted the CESR member to do so.
- 92) The consultation paper asked whether, in cases where a CESR member had turned down a mediation request that had been made by a market participant, CESR should be informed.

- 93) There was almost unanimous support for the proposal that in such cases, CESR should be informed, and one respondent proposed that market participants should have the right to inform CESR directly in such a cases and such notification is important in order to allow CESR to monitor its own members openness to the mechanism and its usefulness .
- 94) CESR has taken these comments into consideration, and makes it clear in Article 3, that in the event that a CESR member rejects a market participants request to mediate, the existence of such a request may be communicated to CESR.
- 95) It is important to point out, that this does not prohibit market participants from informing CESR directly in cases where market participants requests are not taken up by a CESR member.

Market participants involvement as a party in the proceedings

- 96) Some respondents considered it important that market participants be allowed to participate directly in the proceedings, particularly in cases where the Commission has been asked to provide an authoritative interpretation of the law, which has an indirect effect on the legal position of the market participant in question.
- 97) In contrast, the open hearing and meeting with the mediation experts did not consider it necessary or prudent to allow market participants to be directly involved in the process, although it was suggested that in cases where the case is initiated by a market participant, it may in exceptional circumstances be useful to allow the market participant to make representations to the panel if the evaluative model is being used.
- 98) On consideration of these requests, CESR does not consider it appropriate to allow a market participant to be directly involved in the proceedings but has ensured that in the event that further information is required during the evaluative procedure to ensure a sound assessment of the issues, as set out in Article 10(2) additional information may be requested – and if this needs to come from a market participant, then the CESR member will be in contact with the market participant accordingly.
- 99) In addition, provision has been made for informing the market participants who are directly concerned by the outcome by the respective CESR member, as set out in Article 12.2.

Market participants involvement through panel membership or being a mediator

- 100) Some respondents suggested that market participants should be involved by being either a member of the panel in cases where the evaluative model was used, or by being the mediator in view of their expertise and in order to take account of the financial industry's input in coming up with pragmatic outcomes.
- 101) CESR does not consider such involvement to be necessary, and is unable to see how the confidential nature of the proceedings can be ensured if these requests are to be somehow reflected in the mediation mechanism, even if it is only in exceptional cases, and has therefore not made any changes to the source of mediation panellists or mediators.
- 102) CESR points out that the mechanism is to be reviewed in two years, and will be in a better position to reassess the need to further involve market participants in the process.

Role of gatekeeper in seeking views from the market participants consultative panel [Article 10.3 of the protocol]

- 103) The consultation paper explained that one of the ways of getting market participants involved in the mediation was through the gatekeeper consulting with the market participants



consultative panel or depending on the case in question, the Consultative Working Group of the relevant expert group.

- 104) In line with the original proposals, Article 10.3 makes it clear that if it is considered that the issue would benefit from their views and the parties agree, – the mediator/panellists will consult with the Market Participants Consultative Panel or the Consultative Working Group of the relevant expert group.

K. Timing [Article 15 of the protocol]

- 105) Overall, the proposals set out in the consultation regarding the timing of the mediation process were well received, and consultees supported the proposals as well as Annex 3 which set out a diagram of the process for cases involving the evaluative approach.
- 106) A comment was made that the suggested timeframe of 6 months may be too long considering that the aim of the process was to facilitate swift resolution of the issues at hand.
- 107) CESR points out that it anticipates that 6 months should be the exception as opposed to the rule and that in the majority of cases, the issues will be dealt with within a shorter timeframe, especially taking into consideration the timeframes that have now been built into the rest of the process, and that an Article dealing with timeframes has been introduced (see Article 15) making it clear that the timeframe can be changed.
- 108) There was also strong support for the proposals in the consultation paper for a “fast track” procedure to be used in some cases, and requests for further elaboration on the process involved in “fast track” cases.
- 109) CESR points out that the reference to fast track was not a reference to a 3rd type of mediation procedure, but was just meant to highlight the fact that in order to facilitate swift resolution of an issue this will be built into the mechanism.
- 110) It is anticipated that in the majority of cases, the facilitative procedure would be used in order to speed up the process.

L. Reporting the Outcome of the mediation [Article 12.1 of the protocol]

- 111) The proposals set out in the consultation paper establishing how all CESR members and the Commission will be informed about the outcome of issues brought to mediation was well received although some concerns were raised about the ability to maintain confidentiality in light of such publication, discussed in more detail below.
- 112) CESR has taken these concerns on board and has set out in Article 12.1 how the outcome of the mediation procedure will be reported in an anonymous form to CESR and to the Commission by the gatekeepers as soon as possible.
- 113) CESR does not consider it necessary to imbed into the protocol the exact form in which cases will be reported to the rest of CESR. CESR will establish a procedure for doing this ensuring that nothing gets reported without the consent of the parties in question.

Publication of the mediation outcome [Article 12.2]

- 114) The consultation paper explained how CESR would publish the outcome of mediations.
- 115) Although there was support for the proposal that the outcome of mediations should be published, there was a general request for CESR to publish the outcome in a way which preserves the confidentiality of the proceedings, and some consultees suggested that there



should be no publication without the consent of the parties, unless it could be assured that such publication would not breach the confidentiality arrangements to which the parties are bound.

- 116) The open hearing and meeting with mediation experts made the point that this issue raised conflict between pragmatism on the one hand (whereby the more confidential the process both before and after the process, the bigger the incentive would be to use mediation as a method of dispute resolution), and precedent on the other – the more ex- post publicity, the more useful the mediation process will be in facilitating supervisory convergence.
- 117) Publication is considered both by CESR and the respondents to be important for both supervisory convergence and to increase cooperation between market participants and CESR Members.
- 118) Some respondents were quite specific in relation to the type of publication that should be done, for example, there was a suggestion that a properly anonymised simplified version of each case that is submitted to mediation should be provided and published on CESR's website on a periodic basis.²
- 119) In addition to this, it was explained that all disclosures of the terms of the dispute (to the public, to Commission, to the Market Participants Consultative Panel, and to other CESR Members) needs to be subject to strict rules that ensure confidentiality, and that the individual rights of market participants to confidentiality has to be respected at all times.
- 120) CESR agrees with the need to both publish the mediation outcomes, and to respect the confidentiality rights of all parties involved. CESR reiterates that it will publish the reports and or summaries of the mediated outcomes in an anonymised format but in terms of the frequency of publication, it is not possible for CESR at this stage to know what this will be because publication will only happen when CESR considers that such publication could encourage supervisory convergence or provide guidance to authorities or market participants.
- 121) Provision for such publication has been made in Article 12.3 of the protocol, and as explained in paragraph 113 above, it is not considered necessary to imbed into the charter the exact form that such publication will take, but a procedure for publication will be created.

Confidentiality.

- 122) In order to deal with the confidential nature of the mechanism, and to deal with the concerns raised by respondents in relation to this principle, CESR has introduced an Article that deals exclusively with the duty of confidentiality as can be seen from Article 6.

M. Review of the mediation mechanism [recitals to the protocol]

- 123) CESR explained its intention to review the mediation mechanism within a two year period after the process has been approved.
- 124) The consultation process showed full support for this proposal, but highlighted that there was an expectation that this review would be transparent and public, as such CESR has included this review of the mechanism after two years.

² With enough information so that market participants can judge the overall progress with the use of the mechanism the nature of the disputes that are emerging during the implementation phase of the FSAP, as well as information about the use of the mediation mechanism.



Annex A – list of respondents to the mediation consultation paper

ABN AMBRO
AFEI (Federation Bancaire Francaise)
AFG (Association francasie de-la gestion financiere)
Bankers and Securities Dealers Association of Iceland
BBA (British Bankers' Association)
BNP Paribas
Clifford Chance
Danish Securities Dealers Association
Deutsche Bank
Deutscher Anwaltverein (German Bar Association)
EFAMA (European Fund and Asset Management Association)
European Savings Banks Group (ESBG)
Euronext
FBE(Federation Bancaire Euopeenne)
Finnish Association of Securities Dealers
Federation of European Securities Exchanges (FESE)
International Swaps and Derivatives Association
International Capital Market Association
London Investment Banking Association
London Stock Exchange
MEDEF (Mouvement des Entreprises de France)
MEDIARCOM (European Médiation Association Norwegian Securities Dealers Association)
Swedish Securities Dealers Association
The Bond Market Association
UNICE
Zentraler Kreditausschuss



Annex B- list of mediation experts

Ms. Sandra Estanque, -MEDIACOM

Mr Jan Meyers,- Cleary Gottlieb Steen & Hamilton

Ms Anke Sessler- Clifford Chance,

Mr Jon Lang – Independent Commercial Mediator

Ms Marie Claude Robert

Mr Andre Prum,- head of law faculty in Luxembourg

Pr Jean-Jacques Daigre- Professeur de Droit bancaire et financier,



Annex C – The CESR mediation protocol

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 5th 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")³ 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.

³ 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 preempt 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.