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Mr Fabrice Demarigny  
Secretary General  
Committee of European Securities  
Regulators (CESR)  
11-13, Avenue de Friedland  
75008 Paris

Paris, 30 November 2005

## **AFG RESPONSE TO CESR CONSULTATION ON CESR MEDIATION MECHANISM**

Dear Mr Demarigny,

The Association Française de la Gestion financière (AFG)<sup>1</sup> welcomes CESR's decision to consult publicly on possible forthcoming CESR mediation mechanisms.

Following the so-called Himalaya Report by CESR, this new document stresses the need for developing further pan-European practical solutions for solving issues which might arise (and which indeed already arise today) between CESR members. It can in particular be stressed that a lack of reciprocal trust, largely (but not only) caused by insufficient

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<sup>1</sup> The Association Française de la Gestion financière (AFG)<sup>1</sup> represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include around 400 management companies and investment companies. They are entrepreneurial or belong to French or foreign banking, insurance or asset management groups. AFG members are managing around 2000 billion euros in the field of investment management - making the French industry one of the leaders in Europe (for collective investment in particular, with more than 1100 billion euros i.e. 20% of EU investment funds assets under management) and at global level. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes funds and products such as regulated hedge funds and a significant part of private equity funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA).

cooperation/exchange of information, leads to severe issues in the field of mutual recognition of decisions.

Therefore, as a general remark, AFG wishes to underline its **strong support to the aim of CESR's approach and also the need for considering CESR's Mediation Mechanism<sup>2</sup> as only a first and slight step towards a more integrated pan-European securities and asset management supervisory system**. As stated in AFG's response to CESR's Himalaya Report, the ultimate step should lead to a single European securities and asset management supervisor – both to the benefit of investors and professionals. We thus wish CESR's final paper to be much more ambitious.

In addition, we naturally share the views expressed by our European association EFAMA.

You will find below AFG's answers to the series of questions raised by CESR's consultative paper.

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## **KEY FEATURES OF THE PROPOSED CESR MEDIATION MECHANISM**

*Q.1: Do you agree with the key features proposed by CESR?*

**Our answer is yes on the principle, with some significant nuances. As expressed right below, the goal and means to reach it are not ambitious enough.**

We agree with CESR that the goal of CESR's mediation process is to contribute to a better regulatory convergence at Level 3, although our aim is of course much more ambitious than '*contribute to a better*'.

On the substance, we have several significant remarks:

- we do not completely agree on the fact that the mediation mechanism is "*a process to solve disputes between CESR Members only*." This statement would be misinterpreted as preventing market participants from any initiative in this mechanism. As CESR's paper itself provides for the possibility for market participants to raise practical cases to the attention of at least one CESR Member, we consider that the definition of CESR's mediation should be replaced by: "*a process to solve disputes between CESR Members, including those disputes arising from individual cases raised to the attention of one or several CESR Members by market participants.*";
- we do not support CESR's suggestion to prohibit mediation in case of already taken decisions (as CESR suggests to limit CESR's mediation mainly to persistent or

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<sup>2</sup> In any case, some existing Directives such as Article 16 of the Market Abuse Directive already legally mention CESR's mediation between its members: "[CESR]... *where discussion will take place in order to reach a rapid and effective solution.*"

significant differences of opinion between CESR Members on the criteria applied consistently to support certain decisions). We consider that CESR's mediation should be available for administrative individual decisions already taken by national regulators when it appears for the market participant involved that the criteria which were applied were not the right ones. In any case, it should be possible to revisit already taken negative decisions of this type (but not positive decisions, which should benefit from a grandfathering clause) as soon as CESR's mediation has concluded on similar cases afterwards. It would not constitute retroactivity of the taken decision, but a reopening of the case with the view to level the playing field for market participants;

- we do not support CESR's mediation mechanism as **optional** for CESR Members to enter. We are concerned by the fact that some CESR Members might opt in or opt out depending on their interests. Traditional mediations between two persons are optional as there is always the alternative to enter a legal procedure instead. But it is not the case here. We therefore ask for the mechanism to be made **mandatory** for CESR Members through an amendment of CESR's rules of procedures;
- we do not support either CESR's mediation mechanism outcomes as optional as well. We understand the reason of 'peer pressure' but have strong doubts on the efficiency of practical implementation of the conclusions of a mediation if a CESR member do not really wish to do so. At this level too, a mechanism mandatory in the implementation of its conclusions would be better;
- market participants should be authorised to raise issues for potential mediation not only to the attention of their national CESR Member, but also/instead to **other CESR Members, as long as they are involved in the specific case** (for instance a host regulator). This remark aims to minimize risks for the claim not to be taken into account by the domestic regulator for unjustified reasons which could be based on conflicts of interest in particular (if the local market participant and its local regulator do not share the same view, the latter might not be keen to bring the case to the attention of CESR);
- the highest level of transparency should be ensured after the outcome of mediations, in order to inform and to guide the whole community of market participants which might have similar concerns to the one raised in the context of the specific mediation case.

## **SCOPE**

*Q2: 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 para. 41 that should be considered for mediation?*

**We do not see any other examples at this stage but it does not mean that there are none.**

*Q3: Should the negative criteria set out in the first bullet point in para 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?*

**Without prejudice to any further reflection on this point, the answer is yes.**

*Q4: Should the mediation mechanism be made available to competent authorities that are not CESR Members?*

**Although not settled yet, as a general principle our answer would be no as long as the mechanism has not been tested successfully by CESR between its own members. However, in specific cases where non-CESR member competent authorities are involved (such as central banks in some Member States for the cross-border notification of UCITS), these non-CESR member authorities should be captured in the process (with a relevant and explicit justification).**

We tend to consider that for the near future CESR's mediation mechanism could apply to CESR Members (and related market participants) only. Even an option for non-CESR Members to opt in might lead to unclear situation. When this mechanism has been tested successfully in practice, the question will have to be reopened.

On the contrary, as we mentioned in answering Question 1, we wish CESR's mediation mechanism not to be optional for CESR Members.

## **PROCEDURE**

*Q5: Do you have any comments on the proposed role of a Gatekeeper?*

**We agree on the proposed role of the Gatekeeper, with a nuance: the Gatekeeper should be neutral; belonging to a third-party CESR member might not be sufficient.**

We agree on the idea of introducing a Gatekeeper as described in CESR's paper. In particular, we agree that CESR Members are expected to make all bilateral efforts to solve the dispute before a mediation process can start. A Gatekeeper could be appointed by CESR to screen the requests and check that the requirements are met. He could also help CESR Members in reaching a solution before getting a mediation.

However, we have one wondering: should the Gatekeeper be a CESR Member or shouldn't it be an independent person (or more appropriately, independent persons)?

*Q6: Which of the options in para 53 is most appropriate in your view or could there be a combination of them?*

**Option 2, i.e. a single Standing Panel for each relevant area, with – in exceptional cases – the ability for the Gatekeeper to call for a special ad-hoc mediation panel with the appropriate expertise needed to take on some specific and complex cases.**

Option 2 seems preferable, as the members of each single Standing Panels would develop a personal expertise in their field of competence.

*Q7: Could proceedings on similar issues in the framework of the EU SOLVIT system be relevant for disputes subject to mediation?*

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

**Regarding the first question, we do not really understand it. Moreover, the example of SOLVIT and the possibly positive experience from it are not sufficiently developed in Annex 2.**

**Regarding the second question, our answer is yes, definitely, as it would put pressure on the relevant CESR Member to deliver sound reasons for having turned down the mediation request.**

*Q8: Do you have any views on the role of the Commission envisaged in paras 66 and 67?*

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

**Regarding the first question, we support the role of the Commission as envisaged by paras 66 and 67.** We consider crucial that it has access at the same type of information as for all CESR Members. Already today, Commission representatives are observers of CESR meetings. Moreover, as mediation relies of course on Level 3 guidelines but is put in the broader context of European legislation, it seems reasonable to give the Commission access to information (as interpretation of European legislation might be at stake).

**Regarding the second question, our answer is yes. Further input of market participants is needed and therefore should become mandatory.** Regarding any possible further input by market participants in the CESR mediation process, we support para 66 but obviously input from market participants must go further. There should be a **mandatory** (instead of optional) consultation of the Consultative Working Group of the appropriate Expert Group - or of the Market Participants Consultative Panel when the case does not fit with a specific existing Consultative Working Group. In our view, the professional expertise used by CESR from market participants in drafting level 2 or level 3 advice should be used as well for the specific cases raised in the context of the mediation mechanism.

*Q9: 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?*

**Regarding the first question, we agree with the timing as proposed by CESR, including on the 'fast-track' procedure.**

**On the second question and without prejudice to any further reflection, our answer is yes. But we feel that the same process and timeframe should apply for other types of cases as well.**

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If you wish to discuss the contents of this letter with us, please contact myself on 00 33 1 44 94 94 14 (e-mail: [p.bollon@afg.asso.fr](mailto:p.bollon@afg.asso.fr)), or our Head of International Affairs Stéphane Janin on 00 33 1 44 94 94 04 (e-mail: [s.janin@afg.asso.fr](mailto:s.janin@afg.asso.fr)).

Yours sincerely,

(signed)

Pierre Bollon