



RESPONSE

Ref: CESR/05-253

ESTABLISHMENT OF A MEDIATION MECHANISM

CALL FOR EVIDENCE

MAY 2005

I. INTRODUCTION

1. The European Banking Federation¹ (FBE) has been a strong supporter of the Lamfalussy Process from the start. The FBE was closely involved in all of the consultations held by the various institutions over the last three years aimed at identifying and implementing further improvements to the functioning of the Process, and has provided input to CESR's consultations on its Level 3 Role as well as the Himalaya Paper. The FBE has been committed to identifying and addressing shortcomings in the implementation of the new regulatory framework through a continuous process of review, monitoring and fine-tuning.
2. It is with this principle in mind that the FBE welcomes CESR's current Call for Evidence on the proposed mediation mechanism. The views we express in this response are consistent with the views we expressed in the past on this subject, which are rooted in our belief in the central contribution of stronger supervisory convergence to the ultimate success of the Lamfalussy Process. Our views are also informed by our support for pragmatic and flexible solutions as well as our commitment to the key roles played by the various institutions which will safeguard the rights of the market participants involved in the cross-border provision of investment services under EU law, particularly the Commission and the European Court of Justice.

II. GENERAL REMARKS

3. In principle, many of our members welcome the general initiative of establishing a mediation mechanism, as long as several basic and important conditions are met. Most of these conditions were mentioned in our previous responses on this subject, and many are at least generally included in CESR's Call for Evidence. Since many of the specifics of these concerns are not spelt out in detail in the Call for Evidence, we are not able to determine at this point whether CESR's plans will adequately address our concerns. Thus we hope that our comments will help in the preparation of the upcoming Consultation Paper.
4. First of all, such a mechanism should not interfere with the right of the entities involved to seek **recourse to legal remedies**. This especially requires for the mechanism not to interfere with the role of the European Court of Justice in the interpretation of EU law. For this reason we also believe that such a mechanism can only be considered in a

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, from 26 national Banking Associations, with assets of more than EUR 20,000 billion and over 2.3 million employees.

manner that is **not binding** (as proposed by CESR (page 3 of the Call for Evidence) and that it should be **optional**, not mandatory, **for CESR members to refer a case** to the CESR mediation mechanism before initiating legal action at EU level. Similarly, efficiency would require that mediation be reserved for those cases where the bilateral talks between the CESR members fail or problems arise so that there is a concrete benefit in a “neutral” platform.

5. Secondly, it is critical for any mediation mechanism to be designed with due respect for the competence of the **European Commission at Level 4** and to avoid interfering with the Commission’s own **enforcement** procedures and competences.
6. Naturally, if this role were to be developed, it should be done in a way that does not create **a conflict of jurisdictions**.
7. Moreover, as CESR noted in the 2004 open hearing (CP on CESR’s Level 3 Role), there is a potential problem if mediation becomes a way of **‘shortcutting’ EU law**. CESR noted then that it would aim to avoid this. Before we can evaluate the impact of CESR’s plans in this area, we would need to know more about the specifics of the future policies and the overall framework being envisioned by CESR. As we point out in the next section, we are especially concerned about proposals related to the pre-approval of products, which could certainly have the effect of undermining the EU passport. The mediation mechanism should under no circumstances lead to a situation whereby a routine disregard for EU law could be unintentionally allowed or encouraged.
8. Finally, we do not think that a **‘more automatic’ mediation** (as referred to in the Himalaya Paper as a medium-term proposal) is either necessary or likely to be useful at this point. We believe that ‘a more automatic mechanism’ – especially in the absence of any experience with such a mechanism - would by definition exacerbate the risks posed by the mechanism, such as the potential of undermining EU law and interfering with the Commission’s role. Once the system is in place, it can be subject to a regular review to ensure that it functions as designed and to identify any changes that could make it more useful and efficient.

III. DETAILED REMARKS

A. General nature of the mechanism

9. We agree with CESR that such a mechanism should:
 - be legally **non-binding**;
 - focus on **conflicts between authorities**, involving “no automatic right of referral by market participants” as proposed by CESR; and
 - deal only with **cross-border cases**.

B. Scope

10. CESR asks consultees to give examples of the **types of disputes** most likely to benefit from the new mediation mechanism. We find it difficult to identify specific examples at this point in the process. Many key pieces of legislation under the FSAP are only now being implemented. Financial sector institutions need to gain more experience in order to assess the concrete types of problems that might come up and the measures that might be most effective to address these problems. Consequently it is very hard to identify at this point the kind of disputes that would be most likely to benefit from the proposed mechanism.
11. In principle, as long as the basic conditions that guarantee an appropriate mechanism are met, the **scope** of areas addressed by the mechanism can be usefully extended beyond the scope of the MAD (i.e. failure to exchange information). As we point out above, it is too early to define the most appropriate types of disputes.
12. With regard to disputes regarding **mutual recognition**, we wish to reiterate our strong belief that the mediation mechanism should under no circumstances lead to a situation whereby a routine disregard for EU law could be unintentionally allowed or encouraged. The existing mutual recognition rules established in directives already adopted – especially under MiFID and the Prospectus Directive - will enable the market participants to function on a cross-border basis without any vetting by the authorities of the host Member States. In such cases, we do not see any need for a further review by CESR or any member of it to determine the fitness of the product for circulation within the EU. In fact, it would be an infringement of these directives to install any mechanism that requires a vetting of a new product or a new service.

C. Timing

13. We welcome CESR's question as to whether the referral of an issue to the mediation mechanism should wait until the supervisor has adopted the decision (*ex-post* mediation) or can take place before the decision is made (*ex-ante* mediation). This is an important feature that will have a significant impact on the final outcome of mediation.
14. It is very difficult to reach a decision on this point. In principle, both types of mechanisms have pros and cons. Depending on the circumstances, an *ex ante* mechanism could be more efficient, but it could also lead to greater difficulties in keeping to timetables, and could make it harder to ensure due regard for EU law. Another point to consider is that often it is only once a formal decision is made that other mechanisms – such as the Commission's review as to whether EU law was violated - can be commenced.
15. With these considerations in mind, we would like to reserve our opinion as to the timing of the mechanism. In any event, it seems reasonable to us at this point to envisage a system whereby competent authorities involved would be allowed to agree on a specific route if they believed that in a particular situation the more appropriate timing would be different from the "default" rule.

D. Other questions concerning the procedural nature of the mechanism

16. We believe that **one single procedural framework** should be adopted for all issues that is flexible enough to be used for all types of cases under the scope of the mechanism.
17. In line with our view that the mechanism should be non-binding and that it should ensure an efficient process, we strongly believe that it should be **optional**, and not mandatory, **for CESR members to refer a case** to the CESR mediation mechanism before initiating legal action at EU level. For efficiency's sake, it should be clear that the mediation mechanism is to be used only after bilateral talks between the members fail and a clear and mutual demand arises for a "neutral" platform.
18. With respect to the suggestion to use thresholds, we understand the underlying concern of CESR to keep the number of cases dealt with by the mediation mechanism to a reasonable level and to avoid a clogging up of the system. However, we believe that the cross-border problems brought to the attention of CESR will almost always be significant. Moreover, particularly at the beginning of the operations of such a mechanism, even smaller cases could have significance for the operation of the single market. Hence we **do not believe that either quantitative or qualitative conditions or thresholds are necessary** to restrict the access of a dispute to the mediation mechanism. Over time, after some experience is gained with the mechanism, this feature may have to be reviewed.
19. CESR asks whether the mediation mechanism should include a special, "**fast-track**" **process** (e.g. mediation by the CESR Secretariat or senior officials from CESR members), with the possibility of "review by a panel of CESR Chairs if concerns remain". In principle, we welcome such as an option, which could be useful in certain less complex cases, as long as a formal review is incorporated into the process and sufficient safeguards for transparency are in place.

E. Transparency

20. In principle, we support techniques that might be incorporated in the mechanism, as CESR suggests, "to ensure input from market participants whilst maintaining rapid decision-making". We think that it would be indispensable to involve the market participants first of all by publicizing the decisions once they are concluded. Moreover, it would be useful in certain cases to allow the interested parties (the wider industry) to submit comments *before* a mediation decision is made. This would be particularly useful when the mediation involves a divergence of views on the interpretation of the general application of EU law without involvement of any specific market participant.
21. Furthermore, CESR asks to what extent or until what stage proceedings or information concerning a case should remain confidential. First of all, the answer to this question will depend on other features of the mechanism, especially on whether the mechanism is used on an *ex ante* or *ex post* basis, which are not settled at this point.
22. Secondly, we see a distinction between the information that will be made available to the **parties involved** (i.e. the regulators and any market participants whose activities may be the indirect subject of the conflict) and the information disclosed to the **wider public**. In the latter case, information publicized should respect the confidential nature of the information at all stages of the process, while confidential information could be

shared with all those in the former category who are involved, subject to the agreement of all parties.

23. Moreover, confidentiality rules have to apply in an even-handed way to all participants directly involved in the process so that all such parties have equal access to the same information at the same stage of the process.

IV. CONCLUSION

24. In conclusion, we support CESR's proposal to establish a mediation mechanism, subject to the following conditions:

- The mechanism should be legally **non-binding**;
- It should focus on **conflicts between authorities**, involving “no automatic right of referral by market participants”;
- It should deal only with **cross-border cases**;
- All necessary safeguards should be in place to ensure that the mechanism is consistent with the highest respect for the relevant **EU law**, in particular **the mutual recognition systems**;
- The mechanism can be usefully extended beyond the **scope** of the MAD (i.e. failure to exchange information), as long as all relevant conditions are met;
- **One single procedural framework** should be adopted for all issues that is flexible enough to be used for all types of cases under the scope of the mechanism;
- It should be **optional**, and not mandatory, **for CESR members to refer a case** to the CESR mediation mechanism before initiating legal action at EU level;
- **Neither quantitative nor qualitative conditions or thresholds** should be used to restrict the access of a dispute to the mediation mechanism; and
- It would be useful to include a special, “**fast-track**” **process** (e.g. mediation by the CESR Secretariat or senior officials from CESR members), subject to a formal review being incorporated into the process and sufficient safeguards for transparency being in place.

25. We would be happy to discuss any aspect of this response with CESR in detail and look forward to receiving further details on CESR's plans when the consultation paper is published.