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European Banking Federation

Le Secrétaire Général

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Mr Fabrice DEMARIGNY
Secretary General of CESR
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Subject: FBE's response to CESR's Paper for comments on the mediation mechanism

Dear Mr Demarigny,

The European Banking Federation¹ (FBE) welcomes the opportunity to comment on the Paper for Comments on CESR's mediation mechanism. In line with our comments on CESR's Call for Evidence on the proposed mediation mechanism of May this year, the FBE welcomes this first formal round of consultation on this issue.

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 for 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.

In respect of our general position on CESR's proposals for a mediation mechanism, the FBE firmly believes that:

- all necessary safeguards should be in place to ensure that the mechanism is consistent with the highest **respect for the relevant EU law**. It should in no way undermine the principle of mutual recognition and should respect the prerogatives of the European Commission and the European Court of Justice in interpreting law at Levels 1 and 2;

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, with total assets of more than €20,000 billion and over 2.3 million employees.

- it should focus exclusively on **conflicts between authorities** of a **cross-border** nature;
- the mediation mechanism should be legally **non-binding**;
- 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;
- the **scope of application** beyond that of the Market Abuse Directive (MAD) (i.e. failure to exchange information) and that provided for by MiFID, should be carefully considered.
- attention should focus on resolving the issues around the role of **market participants** in the process whilst mediation takes place between two supervisors. There is an inherent tension between ensuring transparency of information towards the market versus putting in place the necessary safeguards to guarantee confidentiality of information.
- **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;
- **neither quantitative nor qualitative conditions or thresholds** should be used to restrict the access of a dispute to the mediation mechanism;
- 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; and
- **cost-benefit analysis** should also be a central tenet of CESR’s approach to and subsequent use of the mediation mechanism.

I would be happy to discuss any aspect of this response with CESR in detail and look forward to the Committee taking due account of our comments. Alternatively, please contact Mr Stephen Fisher, Financial Markets Adviser, (stephen.fisher@fbe.be; +32 2 508 37 45).

Yours sincerely,

Guido RAVOET

Enclosure: 1



RESPONSE

CESR MEDIATION MECHANISM (Ref: CESR/05-483c)

PAPER FOR COMMENTS

I. INTRODUCTION

1. The European Banking Federation¹ (FBE) has been a strong supporter of the Lamfalussy Process from the outset. 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 role at Level 3 as well as to the Himalaya Paper.
2. The FBE continues to do likewise for the Level 3 Committees in the other financial sectors, for example in banking with CEBS. Therefore, we approach questions surrounding the implementation of the new regulatory framework in the round.
3. Notwithstanding FBE's support for the Lamfalussy Process since its inception, we remain committed to providing CESR, as is the case for the other Level 3 Committees, with constructive criticism as regards how implementation of the new regulatory framework could be improved and/or refined. Therefore, the FBE is at CESR's disposal to provide answers to wider philosophical and strategic questions surrounding the evolution of the Level 3 Committees in general as well as being in a position to offer practical advice on how to optimise the functioning of the Committees in the short to medium term.

II. GENERAL REMARKS

4. The FBE considers mediation to be a useful tool for a Level 3 Committee. Mediation can become a very effective way to reduce the band of divergence between supervisors in Europe. Reducing the scope for regulatory arbitrage, must be one of CESR's key priorities in implementing the mediation mechanism.
5. We fully agree with CESR that the tool should be used as a last resort and when all other possible remedies have been exhausted. In this sense the tool should be used sparingly and selectively. In line with the legally non-binding nature of the proposed mechanism, mediation is in no way a substitute for enforcement by the European Commission at Level 4 of the Lamfalussy Process.
6. With such parameters for the mediation mechanism being established, our members could then recognise the need for a general initiative to establish a mediation mechanism, subject to certain conditions being met. Restating the

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conditions which we have previously raised with CESR during the Call for Evidence on this subject, the FBE firmly believes that:

- all necessary safeguards should be in place to ensure that the mechanism is consistent with the highest **respect for the relevant EU law**. It should in no way undermine the principle of mutual recognition and should respect the prerogatives of the European Commission and the European Court of Justice in interpreting law at Levels 1 and 2;
 - it should focus exclusively on **conflicts between authorities** of a **cross-border** nature;
 - the mediation mechanism should be legally **non-binding**;
 - 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;
 - the **scope of application** beyond that of the Market Abuse Directive (MAD) (i.e. failure to exchange information) and that provided for by MiFID, should be carefully considered.
 - attention should focus on resolving the issues around the role of **market participants** in the process whilst mediation takes place between two supervisors. There is an inherent tension between ensuring transparency of information towards the market, versus, putting in place the necessary safeguards to guarantee confidentiality of information.
 - **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;
 - **neither quantitative nor qualitative conditions or thresholds** should be used to restrict the access of a dispute to the mediation mechanism;
 - 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; and
 - **cost-benefit analysis** should also be a central tenet of CESR’s approach to and subsequent use of the mediation mechanism.
7. We are encouraged that CESR appears to have taken on board the majority of the aspects of the FBE’s recommendations in its Paper for Comments. We note however that CESR’s thinking on each of these aspects is developed to varying degrees. We deal with these developments in the detailed remarks below.

III. DETAILED REMARKS

Key features of the mechanism

Question 1: <i>Do you agree with the key features proposed by CESR?</i>
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8. Overall, the FBE is in agreement with the key features of the mechanism proposed in CESR's Paper for Comments. CESR appears to have struck a good balance between the necessity for having a robust and consistent mechanism in place whilst taking on board that in no way are the outcomes reached during mediation legally binding or to impinge upon the general European system for monitoring and interpreting EU law.
9. CESR's proposal for a non-binding mechanism implies that the Committee must have regard to the Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.² FIN-NET recommended that all existing bodies, and bodies, to be created with responsibility for the out-of-court settlement of consumer disputes respect the principles of independence, transparency, adversarial, effectiveness, legality, liberty and representation. CESR's mediation mechanism should not therefore deviate from these principles.

The nature

10. Whilst we believe that it should be optional for CESR members to refer a case to the CESR mediation mechanism we are not convinced that all CESR members would in any event **voluntarily participate** in a mediation process requested by another member. Industry feels that the credibility of the mediation mechanism rests on the consistency of application and the results it achieves in reducing the band of supervisory divergence over time. Therefore, we urge CESR to take note of how far its members will readily buy into the mediation proposals and how far they would co-operate in the event that another member requested to enter mediation with them.
11. Logically, given our doubts about CESR members' potential buy into the mediation process, we support CESR's stated preference to start with a less ambitious approach and leave CESR members with a good deal of **flexibility** to react to the request for mediation. Once the culture of greater understanding and trust has evolved still further within CESR's membership, then it could consider stronger measures to urge members to comply with the mediation process. The suggested "**accept or explain**" approach is nonetheless a good way to proceed from the outset.
12. As regards CESR's proposal for mediation to be a process for disputes that have already arisen (or **ex-post mediation**), as stated in our comments on CESR's Call for Evidence on this subject, we note that 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

² Commission Recommendation 98/257/CE.

as the Commission's review as to whether EU law was violated - can be commenced.

13. If CESR were to insist on an *ex-post* mediation mechanism then industry would encourage the Committee to embed flexibility into the system. Such flexibility would allow for competent authorities involved to agree on a specific route if they believed that in a particular situation the more appropriate timing would be different from the default *ex-post* mediation rule.
14. The FBE expresses strong support for CESR's assertion that it might not be appropriate for the Committee to revisit individual mutual recognition decisions through the mediation mechanism. In fact, we feel that CESR should steer clear from the area of **mutual recognition** completely, given the potentially very problematic legal issues that could result from the Committee's involvement in this area. Fundamentally, the proper allocation of legal responsibilities under the Directives must at all times be respected, of which the mutual recognition of decisions is one such responsibility.

Parties involved

15. In principle the FBE supports CESR's approach allowing for **market participants** to bring matters that could qualify for mediation to the attention of their national CESR member. However, 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. Nonetheless, the FBE has taken note of CESR's request from market practitioners for input, bearing in mind that the mediation mechanism should not be transformed into a complaints' mechanism.
16. We encourage CESR to make full use of its **Market Participants Consultative Panel** to determine whether, and where, regulatory inconsistencies have occurred, and where there could be cases for further regulatory convergence. Going forward we look forward to CESR's decisions in this respect going with the grain of the market and seeking to resolve issues that will contribute to reducing the band of divergence of supervisory practice in Europe.

Cross-border scope

17. The FBE is fully supportive of CESR's intended use of the mediation mechanism in so far as it will only deal with **issues of a cross-border nature**.

Procedural principles

18. The credibility of the mediation mechanism in the eyes of the market will be built on the results **of timely and consistent decision making** resulting in reducing the band of supervisory convergence over time.
19. The watchwords CESR has identified - **rapid; efficient; fair and confidential** - are the correct ones in the view of the industry. We are especially pleased to note that

CESR does not intend to introduce qualitative or quantitative thresholds into the mediation process.

20. In addition to the watchwords CESR highlights, the FBE stresses the importance of **transparency** (towards the market) in any mediation process. We advocate that CESR publishes a strict timetable pertaining to each mediation case and publish on its website the progression and ultimate conclusion of mediation discussions. Adherence to principles of transparency would only serve to complement CESR's suggested principles of rapidity, efficiency and fairness whilst not necessarily undermining confidentiality assuming the information published on the website was done so in an anonymous way. Moreover, where market participants trigger mediation between two supervisors, CESR should be explicit on those market participants' right to participate, and their role in the proceedings, without prejudice to the fact that the mediation mechanism is exclusively to be used for dispute resolution between two supervisors.
21. In parallel to calls for transparency to be embedded into the mediation process, CESR must reconcile this with the need to ensure **confidentiality**. Anonymity is not an automatic guarantee of confidentiality. We urge CESR to set out how these contradictory principles, at first sight, could be reconciled.

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

22. It is of great importance to make a **clear distinction** between disputes arising between supervisors in respect of their **administrative duties** towards their CESR colleagues and issues of **European law**. CESR must be clear that all issues directly related to interpretations of European law (at Levels 1 and 2) fall outside the scope of mediation and should be dealt with exclusively by the European Commission and European Court of Justice.
23. The FBE is content with CESR's assurances that the mediation mechanism will in **no way be binding** on CESR's members and that a higher EU law will always be fully respected leaving EU Institutions fully empowered to carry out any legal and enforcement proceedings.

Scope of the Mediation Mechanism

Question 2: <i>Are there examples of other potential disputes or cases where agreement between competent authorities is required, in addition to the ones set out in the last bullet point in par. 41 that should be considered for mediation?</i>
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24. As we stated earlier in this paper regarding the potential for market participants to bring forward potential issues for CESR's attention, we firmly believe that it is too early in the implementation phase of capital markets-related legislation to give any further examples. There also has to be a bedding-in phase for CESR to become accustomed to using this new tool in an optimal manner. The FBE nonetheless, reserves the right to make suggestions of potential disputes or cases where agreement between supervisors is required in the future.

25. We urge CESR to demonstrate its thinking in respect of those requests that would otherwise be refused on the basis of, “[N]ational legislation that does not allow [...] any leeway in accommodating the demands from the CESR Member seeking mediation”. CESR must satisfy itself and demonstrate that the reason, when employed, is genuine and is in no way abused as a way in which to avoid decisions it wishes not to take.
26. Related to the issues listed in paragraph 41 and taking into account the FBE’s position on the procedural principles of the mediation mechanism, we are concerned by the drafting of the fourth bullet point which appears to be a ‘catch-all’ category for CESR to ensure that the mediation mechanism covers all unforeseen types of case in the future. This coupled with 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 (i.e. by touching on mutual recognition issues), lead us to call for CESR to offer greater assurances and clarity as regards the intended scope of the mediation mechanism.

Question 3: *Should the negative criteria set out in the first bullet point par. 42 apply to legal proceedings, which are initiated by the CESR member in relation to an underlying dispute to which that CESR Member is party?*

27. The FBE believes that a litmus test of the successful co-operation of CESR members will be the number (and type) of cases referred to the mediation process. Industry sincerely hopes that there will be few if any cases referred to mediation as all other attempts to find a resolution will have been used before considering mediation. That said, FBE supports the negative criteria CESR sets out since we welcome a clearly defined scope of mediation where negative criteria play a role.

Question 4: *Should the mediation mechanism be made available to competent authorities that are not CESR Members?*

28. If the objective of the mediation mechanism is to reduce the band of supervisory convergence within the European Single Market, then logically the ability for non-CESR members to opt into mechanism should be made available. Convergence of supervisory standards on a wider global level is similarly seen by industry as a positive development. Given that the proposed mediation mechanism would be optional and non-binding CESR could therefore go further and allow non-CESR members to access the mechanism. However in practice, the FBE is unclear about the incentives for non-CESR members to opt into the mediation mechanism. It would be pragmatic to focus first on making the mechanism work among CESR’s members before opening up the possibility for non-CESR members to use the mediation mechanism.

A Procedural Framework for a CESR Mediation Mechanism

The need for a Gatekeeper

Question 5: *Do you have any comments on the proposed role of Gatekeeper?*

29. In principle, the FBE recognises the logic in having a need for a mediation Gatekeeper. We especially welcome mention of the Gatekeeper using objective

criteria in considering whether or not to propel a specific case into the mediation process.

30. We consider that the aforementioned objective criteria to be of particular importance to achieve consistency and neutrality in the process. We therefore urge CESR to set out details of the criteria and seek the views of its stakeholders thereon whilst reminding the Committee of the need for a light touch approach in this area.

Question 6: Which of the options in par. 53 is most appropriate in your view, or could there be a combination of them?

31. The FBE recognises the potential value added of having specialist Gatekeepers preside over specific technical areas, such as financial information. We believe that the model of differentiated procedures would be the most effective approach. However, we remind CESR of the need for sufficient flexibility to be embedded within the system so that the Panel could switch from one set of procedures to another, subject to the agreement of all parties involved in mediation.
32. As regards the most appropriate composition of the mediation panel and/or the selection of mediators, we believe that a standing panel of experts would be valuable and should be tasked with building up a body of knowledge and experience. Nonetheless, this ought not to restrict CESR's ability to appoint other experts in addition to the standing panel where deemed appropriate.

Question 7: 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?

33. In respect of the SOLVIT system being read-across to disputes subject to mediation, the FBE considers that it was conceived as such to serve the needs of EU citizens with dispersed centres in different member States which communicate with each other. We therefore believe that SOLVIT would not be an appropriate model for mediation between Member State regulators.
34. The FBE is of the opinion that if a CESR member has turned down a mediation request from a market participant, it would nonetheless be useful to inform CESR. As the bedding down of the Lamfalussy structures, powers and tools remains an ongoing, and to a certain extent an iterative process, we believe that there would be merit in CESR building up a 'case history' in mediation. Establishing a boundary based between those cases that have been accepted and those which have been refused would only serve to fine tune the process in the future, which would be to the good of industry and the supervisory community alike.

Question 8: Do you have any views on the role of the Commission envisaged in paragraphs 66 and 67?

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

35. The role of the Commission that CESR foresees it will play in mediation, as set out in paragraphs 66 and 67, appears to be consistent with the overall aim of reducing the band of supervisory divergence. We express strong support for CESR's recognition of the important role the Commission must play in enforcement without prejudice to the proposals that CESR will call on the Commission to provide views on the subject of the mediation action. The Commission, like CESR, has an obligation to the market to ensure that any advice it offers CESR is delivered in the same rapid, fair and efficient way as CESR intends the mediation mechanism to work.

36. However, it is unclear how involving the Commission in the mediation mechanism, would work in practice. Since all disputes eligible for mediation would by their very nature relate to a differing interpretation of EU law, if the Commission were to give a decision on interpretation in these cases it would seem to negate the purpose of the mediation mechanism, as a dialogue between supervisors. We therefore seek CESR views on this area and ask it specifically to explain how mediation could play a role, if any, in the event of the Commission issuing a decision.

Question 9: Do you agree with the proposed procedural framework of the mediation mechanism?

Do you agree with the mediation process outlined in Annex 3 for cooperation and information exchange cases?

37. Overall, the FBE agrees with the proposed procedural framework of the mediation mechanism. We consider it positive that CESR would undertake to review the efficiency of the mediation mechanism after two years.

38. In respect of the mediation process for cooperation and information exchange cases, outlined in Annex 3, we welcome the clear and short timetable outlined in Annex 3. The rapid resolution of disputes is at the heart of the potential value a mediation mechanism could add to the reduction of the band of supervisory divergence in Europe and the consequent smooth functioning of the European Single Market.

IV. CONCLUSION

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

- the highest respect for the relevant EU law, in particular mutual recognition arrangements. Therefore, a clear distinction must be drawn between the competence of CESR (i.e. to resolve cross-border disputes between two supervisors) and matters related directly to the interpretation of EU law which is the competence of the European Commission (and European Court of Justice);
 - application of the scope of mediation, beyond the Market Abuse Directive and MiFID, should be carefully considered;
 - that CESR provide clarity on the role of market participants whilst mediation takes place between two supervisors, assuring transparency to the market on one hand, whilst not breaching the fundamental principle of confidentiality; and
 - that the mediation mechanism remain optional and non-binding.
40. 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 for a mediation mechanism following this first round of consultation