Email CESR re Mediation Mechanisms

11 May 2005

From: Anthony Belchambers, CEO, FOA, London

Dear Fabrice

"Establishment of a Mediation Mechanism: Call for Evidence" (CESR/05-253)

The FOA is grateful for the opportunity of commenting on CESR's approach to establishing an internal mediator system for resolving conflicts between national regulators – a process which we fully support and believe is essential to underpin the need for open and effective processes of mutual reliance and information sharing which are critically important for the efficient regulation of a single market in financial services.

We also:

(a) recognise the legal constraints in which the mediation mechanism will have to operate;
(b) support the overall objective of establishing a "rapid and effective" procedure for settling inter-regulatory disputes;
(c) support the basic principles set out in para 10 of the mandate.

Key features of a mediation mechanism

The FOA supports the characteristics that the mechanism should be legally non-binding and that there should be no automatic right of referral by market participants. However, the FOA would question the restriction to "cross-border cases", firstly, because it is not entirely clear what that means i.e. is it cross-border flows of information or flows of information relating to cross-border dealings and, secondly, if it is to apply beyond the original suggested area (and the FOA believes it should), this would be an unwarranted limitation on the scope of mediation.

The role of market participants would be to provide information of breaches, errors or regulatory bias either directly to CESR or to their home state regulator and/or, as appropriate, provide written or oral evidence.

Scope for mediation

The FOA believes that it is important that the mechanism has a preventative role to the extent that there should be a mechanism for issuing a caution or warning of referral prior to the making of a decision where it is reasonably expected to be inappropriate – otherwise it should only be a post-decision process.

In terms of scope, the FOA believes that the mediation process may have a role to play in terms of encouraging compliance with some of the post-FSAP objectives of even-handed interpretation and implementation of EU directives, balanced and fair enforcement processes and decisions, the removal of protectionist barriers as well as addressing failures in information flows and lack of regulatory co-operation, but not restricted to MAD. The FOA expresses this view on the basis that the decisions would not be legally binding and that the process of mediation would be, as far as possible, designed to encourage a consensual solution.

Mediation procedure

The FOA believes it is critically important that the process is not bureaucratic or legalistic and that, in line with other such procedures, its primary purpose is to encourage parties to settle and agree on an appropriate course of action. It is important therefore that the wider the range of disputes that may fall within the scope of the mediation, the more flexible the approach i.e. confrontational processes and unnecessary formality should be kept to a minimum. There should also be opportunities for the parties to agree on an appropriate process in a unique case with the consent of the mediator. Against that informal and flexible background, it is equally important that there are basic procedures which (no matter what the nature of the case) comply with human and basic legal rights, procedural transparency and consistent and fair treatment.

The FOA believes that it should be optional for CESR members to refer a case to the CESR mediation mechanism, but that CESR members should be mandated to give mediation full and proper consideration (unless CESR members are content for it to be mandatory to refer a case to the mediation mechanism). Perhaps, once the credibility and value of mediation is assured, the process could become mandatory.

If the mediation procedure is to operate effectively and fulfil a preventative role, there should be no quantative or qualitative conditions or thresholds (and this may be appropriate if the optional approach was adopted). On the other hand, if there was a "fast-track" process (and the FOA believes there should be), this could be restricted to certain types of cases where, for example, the facts are not in dispute or where the case is of a comparatively minor nature. This would facilitate the adoption of quantative or qualitative conditions or thresholds being adopted in relation to the use of a more comprehensive mediation mechanism.

With regard to the issue of confidentiality, the FOA believes that, unless there are public good reasons for justifying publication or the matter is otherwise in the public domain or there are overarching legal obligations calling for publication of a case, regulatory authorities are entitled to the same degree of confidential treatment as any other organisation or individual. Further, it is undesirable for the regulatory reputation of the member state to have the acts and omissions of its regulatory authority publicly impugned prior to a mediator's decision.

I hope these views are helpful to CESR in determining the scope and processes which will be appropriate for the proposed internal mediator system.

Regards
Anthony Belchambers
Chief Executive
Futures and Options Association