



November, 30 2005

Response by Deutsche Bank AG to CESR's paper for comments on the establishment of a mediation mechanism (Ref. CESR/05-483c)

I. General remarks

1. Deutsche Bank welcomes the opportunity to comment on CESR's paper on the establishment of a mediation mechanism (CESR/05-483c). Deutsche Bank provided input to CESR's previous call for evidence on this subject (CESR/05-253) and we are grateful to note that CESR has taken into consideration many of the ideas put forward by us and others in the previous round of consultation. We consider it encouraging for the further process that market participants have expressed a broad support for the envisaged mediation mechanism between CESR members.
2. Deutsche Bank supports the Lamfalussy process and is committed to participating in efforts to ensure a smooth and frictionless functioning of the process. In this light, Deutsche Bank continuously participates in various consultations.
3. We consider it useful that CESR looks beyond issues of immediate concern and exchanges ideas with the financial industry, EU and member states' authorities and the wider public on the development of the structure of financial supervision in the EU. We would like to underscore CESR's objective to ensure full and consistent implementation as well as effective enforcement of all FSAP measures. These are the foundation of building an integrated EU financial market and are the test for member states' commitment to that objective.
4. We believe that it is necessary to re-consider the appropriateness of supervisory tools and structures on an ongoing basis, in order to ensure that these correspond to the evolving nature of EU financial markets. We consider it necessary that due attention be paid to the cohesiveness of the EU's supervisory regime across financial market segments.
5. Deutsche Bank believes that all EU securities regulators should have the same competences within their respective jurisdictions. This is the pre-condition for supervisory convergence, supervisory co-operation and for a mediation mechanism to work effectively. Deutsche Bank is convinced that the idea of a cooperative network of securities supervisors and the instrument of peer review, as constituted by CESR, will only work satisfactorily if the participating national authorities enjoy equal powers. It would obviously be pointless to admonish a national supervisor for non-compliance, if it was not within the powers of that supervisor to rectify the issue in question.



II. Ensuring supervisory convergence

6. Supervisors' approaches still vary to a noticeable extent. This reflects differences in supervisory traditions as well as the fact that the powers national competent enjoy are not equal. It also reflects different market structures in member states; it is, e.g., logical that a member state, in which a large proportion of households hold equities will devote more attention and resources to safeguarding the interest of retail investors.
7. While the financial industry has an obvious interest in reporting behaviour of national regulators that stands in contrast to the original intention of a particular piece of legislation and in particular in contrast to the aim of building an integrated securities market in the EU, this should not prevent CESR from conducting peer reviews.
8. In fact, we feel that it is CESR's central task to monitor implementation efforts of national supervisors, to keep and continuously up-date comparative tables of the progress of implementation as well as the instruments and methods employed and to discuss (non-) action by member states that gives rise to the suspicion of possible non-compliance. Importantly, monitoring implementation activity should be concomitant with the legislative process in member states, i.e. should strive to identify deficiencies in the implementation process at as early a stage as possible.
9. Notwithstanding the Commission's role under level 4, Deutsche Bank believes that the first place to ensure the equivalence of supervisory action should be level 3 and that CESR should therefore (further) develop the tools necessary to do so. Peer reviews should be conducted in an open and transparent manner, so that pressure is increased on non-compliant CESR members to bring their actions into compliance with common rules or to explain a continued deviation from those rules.
10. While we believe that continuous cooperation, peer reviews, and staff exchanges will gradually enhance the degree of congruence in supervisory action, there will inevitably remain instances where supervisors differ in their interpretation of a particular norm. For these cases, **the establishment of a mediation mechanism seems a suitable means to ensure supervisory convergence.**



III. Comments on the proposed mediation mechanism between CESR members

General remarks:

11. The effective day-to-day application of EU legislation by CESR members is of vital importance. In a more and more integrated financial market, effective supervisory convergence necessitates efficient day-to-day co-operation and an unobstructed exchange of information between national authorities.
12. Deutsche Bank **supports the establishment of a mediation mechanism** between CESR members that goes beyond the scope of the mediation elements enshrined in existing EU financial regulation, such as Art. 16 of the MAD.
13. In our view, a mediation mechanism would provide a suitable tool to solve conflicts without entering into time-consuming infringement proceedings, by the time of whose conclusion irrevocable market realities have often been established. It goes without saying that any mediation mechanism must in no way question and compromise existing rights of the Commission as the Guardian of the Treaty as well as the position of the European Court of Justice as the final arbiter on EU rules.
14. Nonetheless, it needs to be carefully borne in mind that the establishment of a mediation mechanism **would take CESR into a new dimension** as regards the scope of its mandate as well as the nature of its work. In addition, the input of market participants must be appropriately embedded in the smooth functioning of the mediation process.

The scope of mediation:

15. Deutsche Bank believes that CESR rightly identified three areas for mediation, i.e. exchange of information, mutual recognition of decisions such as the approval of prospectuses, and other potential disputes. We agree that the first two areas are of particular importance for three reasons: First, in cases where a competent CESR member disregards the request of another competent national authority for information required, CESR mediation would permit to come up with a timely and effective solution. Second, country-specific provisions for the registration and authorisation of financial products vary to a substantial degree, ranging from significant delays in product authorisation to various additional requirements for product approval. For example, although the UCITS Directive provides for a maximum time limit of two months, in some member states it is general practice that funds are only approved in a significantly longer time period. Third, different national applications of the European provisions lead to a patchwork of isolated country-specific regulations that ultimately might endanger the coherence of European security regulation as a whole.



16. DB acknowledges that mediation should focus **solely on cross-border disputes and be legally non-binding**, as a binding mechanism would not be compatible with CESR's own legal status as a strictly inter-governmental forum. While recognising the constitutional limits of CESR, we would nonetheless question the effectiveness of a non-binding mechanism, all the more as it does not give legal certainty to market participants. In the mid-term, changes to the legal status of level-3 bodies seem indispensable, therefore.
17. In this light, DB also welcomes CESR's intention to review the mediation mechanism after two years. This assessment would allow to incorporate the experiences gained during the first two years and to amend the mediation procedure where appropriate.
18. CESR's intention to **exclude mediation** (a) in cases, where legal proceedings have already been initiated at EU or national level, (b) for issues already worked upon by CESR, or (c) already referred by CESR to level-2 (see para 42) is logical and appropriate. However, DB believes that mediation should also be available as regards national legislation that is not within the (sole) competence of the CESR member concerned. We think so for two reasons. First, this is an indispensable prerequisite for the smooth functioning of the opt-in clause of para 44 that would otherwise become irrelevant. Second, the inclusion would strengthen the position of the national competent authority concerned, when it advises on necessary changes to national legislation within the domestic political context.

General rules and procedures governing mediation:

19. The mediation mechanism should be conducted within a single procedural framework as the establishment of specialised mediation mechanism for each of the three above-mentioned areas would not lead to a coherent and reliable framework for mediation.
20. The implementation of a fast track procedure is welcome from a market participant's perspective. This would allow for a rapid and efficient dispute settlement. However, establishment of a fast-track procedure must not come at the expense of an adequate consultation of market participants.
21. Access to mediation should not be made conditional on either quantitative or qualitative thresholds being met, because such provisions would fall short in practice as many objects of financial market regulation refer to qualitative aspects and, hence, cannot easily and objectively be compared or quantified. This might lead to a high level of ambiguity within the mediation process. Consequently, Deutsche Bank believes that disputes should be deemed suitable for mediation irrespective of size and qualitative aspects, and, hence, treated in an equal und unbiased manner. We trust that CESR members would only bring material cases to mediation, so that there is no need for an ex ante selection. Moreover, Deutsche Bank believes that it should be the plaintiff's choice



to either request mediation under the auspices of CESR or, alternatively, to immediately initiate legal proceedings at the ECJ.

22. CESR asks for comments whether a single standing panel should be established or whether panel members should be selected by the gatekeeper on a case-by-case basis for each dispute. **DB believes that panel members should be selected on a case-by-case basis** to fully ensure expert knowledge and to rule out national bias of panel members. This process would raise the level of credibility and thus, contribute to the overall success of the mediation procedure. However, we would recommend that CESR members nominate a pool of potential panel members from which suitable experts are subsequently drawn to handle individual cases.
23. It must be fully ensured by CESR that members of the mediation panel will neither be representatives of a CESR member that is involved in a dispute subject to mediation nor otherwise conflicted. Mediators should be selected according to expert knowledge, seniority and their standing in the community. Deutsche Bank agrees with CESR that mediators should be reviewed on an annual basis.

Features of the proposed mediation system:

24. CESR envisages the role of a 'gatekeeper', who would decide whether a case is submitted to the mediation panel or whether further bilateral negotiations are called for. From our point of view, the **role of a gatekeeper is not needed** as mediation is voluntary and legally non-binding; it is, thus, based on the mutual trust of CESR members. A gatekeeper contradicts this cooperative spirit and would indicate a general level of distrust, which, if existent, would not be solved by a gatekeeper anyway.
25. CESR also differentiates between a system of three specialist 'gatekeepers', one for each of the following areas: co-operation and exchange of information; financial information; and all other disputes. In line with the reasoning of the preceding paragraph, Deutsche Bank believes that this differentiation is dispensable.
26. The 'comply or explain' approach envisaged for cases in which a CESR member refuses to respond to a mediation request is a necessary element for a voluntary mediation mechanism. It increases peer pressures on relevant CESR members to respond to and to comply with mediation proceedings. We would anticipate, though, and certainly hope that it would be the rare exception rather than the rule that a CESR member 'explains' his non-acceptance of a mediation request by another CESR member.
27. The proposal to allow for an 'opt-in of non-CESR members' is welcome. For cases where the national competency of a CESR member is limited or not given, the participation of another (non-CESR) competent national authority in the mediation process would enhance supervisory convergence on level-3 substantially. Going forward, however, we



would assume that this problem loses in importance to the extent that the powers of CESR members are being aligned. This underlines the importance of awarding equal powers to all national competent authorities.

28. Whereas CESR envisages a mediation mechanism based upon a prominent role of the gatekeeper, **Deutsche Bank holds the view that a possible mediation mechanism should be structured as a three-stage process.**

- First, mediation should be initiated following a complaint by either one (or more) national competent authority (authorities) or **market participants** (the latter via the Market Participants Consultative Panel). Following the notification, the competent authorities concerned should engage in bilateral consultations striving to reach a rapid and effective solution. The secretariat of CESR is to be kept fully informed and should support this process by acting as informal broker in an impartial manner.
- If bilateral consultations fail to produce a result within 30 days, the complaining party may, as a second step, request the establishment of a **mediation panel** that would be made up of a limited number of experts, drawn from a pool nominated ex ante by CESR members. Nationals of the members states involved in the issue would not be eligible as panel members. The task of the mediation panel would be to issue a report on the relevant dispute within three months. In doing so, the panel should consult market participants in an appropriate manner. Once released, the report would be adopted by CESR members.
- As a third stage, **enforcement is ensured by a twofold mechanism**. First, CESR members exercise peer pressure on the authorities concerned and potential offences are reported to the mediation panel. Second, in case of non-compliance of a national authority, the mediation panel would issue a recommendation to all CESR members for a **Level-2 endorsement of the proposed panel interpretation**. If CESR members – excluding involved parties – agree on this step, the ESC is requested to clarify relevant rules in question. If needed and deemed suitable by the ESC, the committee can ask the Commission to amend Level-2 legislation or even ask the Commission to upgrade it to Level-1. It must be carefully borne in mind that policy initiation must remain the sole prerogative of the Commission and that Level-2 endorsement should only occur if the peer pressure mechanism remains without effect; however, this should be the rare exception rather than the rule.



Role of market participants

29. Deutsche Bank would like to emphasise that market participants should form an integral part of the mediation process and assume a pro-active stance by reporting deficiencies and offences to the Market Participants Consultative Panel. It needs to be carefully borne in mind that the overall success of a mediation mechanism will depend upon the involvement of not only CESR members but also that of other stakeholders.
30. In the light of the aforementioned, Deutsche Bank is firmly convinced that **mediation should also be available in response to a complaint by market participants**. The Market Participants Consultative Panel might provide the appropriate channel for this.
31. While DB is fully aware that CESR mediation is envisaged to be purely intergovernmental in its nature, in the medium-term, **individual market participants should be granted the right to participate directly in those proceedings that directly affect them**. This should encompass the rights to initiate mediation proceedings and to present evidence to the panel.
32. In its consultation paper, in contrast, CESR proposes to channel complaints of market participants solely via their national respective CESR member. If this proposal is adopted, CESR should always be informed when a national CESR member turns down a mediation request by a market participant. This procedure would ensure after all that requests of market participants are taken into account.
33. **Confidentiality of market participants' commercial interests** and trade secrets must be fully respected. Deutsche Bank welcomes CESR's intention to respect professional secrecy obligations and to apply strict confidentiality. Hence, results of mediation cases must be published on an anonymous basis only, as far as the interests of market participants are concerned.

Transparency of mediation

34. To enhance supervisory convergence, it would be beneficial to release information on the results of mediation procedures on a regular basis. These reports should provide information on the types of disputes raised and should point out issues with a wider relevance for the cooperation of CESR members.
35. In areas where mediated issues have a wider impact and are of general relevance, issues should be communicated by CESR to relevant level-1 or level-2 institutions.



IV. Institutional boundaries and democratic accountability

36. The benefits of a mediation mechanism are potentially substantial and, hence, its establishment must occur in an open and transparent manner. Institutional boundaries need to be fully respected and democratic accountability to be wholly met. Interference with the enforcement competencies of the Commission or, ultimately, with the European Court of Justice needs to be avoided.
37. While Deutsche Bank would, in principle, appreciate a strengthening of CESR's competences by the establishment of a mediation mechanism, we would also reiterate that this leads CESR further into a legal grey area. The mediation mechanism would need to be reconcilable with national administrative and judicial procedures, with democratic accountability and must not compromise the Commission's enforcement procedures – something that might be difficult to achieve within the existing legal framework. These concerns clearly demonstrate the limits of the current structure of financial supervision in the EU. Against this background, Deutsche Bank is convinced that over time the need to move beyond the existing intergovernmental, cooperative arrangement of financial supervision will become ever more evident.