

25 September 2007

Feedback document on the comments received on the Consultation Paper on Mediation (CP13)

Background

1. In March 2007, CEBS published its thirteenth consultation paper (CP13), setting out its proposal for a mediation mechanism between banking supervisors. The consultation period ended on 19 June 2007.
2. In advance of the closing date, a public hearing was held at CEBS' premises in order to receive early feedback from the industry on the proposed mechanism.
3. CEBS received written contributions from the British Bankers' Association, the Austrian Federal Economic Chamber (BSBV), the Austrian Raiffeisen Banking Group, UniCredit Group, Deutscher Sparkassen und Giroverband, Belgian Financial Sector Federation, European Banking Federation (EBF), European Savings Banks Group (ESBG) and a Joint response of LIBA-ISDA-FASD-SSDA. All responses submitted are published on CEBS' website.
4. Some respondents commented on the general functioning of CEBS and the status of L3 tools, which is something that goes beyond the scope of the consultation paper. This paper summarises the key points raised in the written comments and made at the public hearing that are directly related to the proposed mediation mechanism and highlights CEBS' response to them. When taking into consideration the respondents' views CEBS tried to ensure the maximum level of consistency with CESR' mechanism, as it did when designing the mediation mechanism for CEBS.
5. The final "Mediation Protocol" is being published together with this feedback document.

General comments

6. Respondents are generally supportive of any instrument that CEBS can put in place to achieve further convergence and reduce the supervisory burden of cross-border banking groups. They therefore welcome the setting up of a mediation mechanism that aims at solving potential disputes between supervisors in their day-to-day supervision.
7. However, some respondents raised certain doubts as to how effective this tool could be:

- a. Some are concerned over the non-bindingness of the mechanism. They believe that the mechanism should be enforceable so that effective pressure are put on supervisory authorities to find an 'harmonised' solution;
- b. Some are concerned that the evaluation procedure is over-complex and may therefore jeopardise the smooth functioning and the expeditiousness of the mechanism.

8. The following sub-section deals with these two points in turn.

Non-binding nature of the mechanism

9. In the absence of a legally binding mechanism, suggestions from respondents include:

- a. CEBS members making a formal pre-commitment to accept the participation in such a mediation process on a general basis (as opposed to a case-by-case basis);
- b. setting up 'a self-binding mediation mechanism', whereby the supervisors would strongly commit to abiding by the outcome of the mediation; through e.g. issuing a Memorandum of Understanding, or a change to CEBS Charter or any EU legal text if necessary.

10. Other respondents did not raise concerns about the non-binding nature of the mechanism. Indeed, two respondents strongly supported the voluntary nature of the mechanism and the non-binding nature of its outcome, supported by the comply/apply or explain approach. It should also be noted that one other respondent felt that the approach proposed by CEBS was already too strong, noting that the accept/comply or explain approach can contradict the principle of voluntary participation and undermine the competences of national supervisors and ultimately Member States, without this being subject to parliamentary control.

11. CEBS would like to note that the formal establishment of the Mediation mechanism by CEBS is in itself an expression of the strong commitment of CEBS Members. It would also like to clarify that although the mechanism is not legally binding, the comply/apply or explain approach has been adopted with a view to ensuring the effective implementation of the mechanism via peer pressure.

12. In addition, in order to make the Mediation Mechanism operational and to give it additional weight, CEBS will attach the Mediation Protocol to its Charter. CEBS is open to other means as experience is gained.

13. One respondent asked whether the Commission's interpretation envisaged in paragraph 104 of the Consultation Paper could jeopardise the legal non bindingness of CEBS mediation mechanism. CEBS wishes to point out that the Commission will only be asked its views on possible conflicting legal interpretations of applicable legislation, and not on the merits of the case.

Complexity of the procedure

14. With regard to the complexity of the evaluative procedure, CEBS believes that the mechanism should be flexible enough to suit the preferences of the parties and the specificities of the potential cases while allowing for a speedy resolution. In addition it should be noted that some features of the CESR mechanism have been simplified already for CEBS' purposes (e.g. no specialist gatekeeper).
15. However, CEBS will be open to further simplification, and indeed will review the procedures and the possibility of further simplification once they have been tested, and when experience is gained.

Scope

16. As noted in the consultative paper, the mechanism will primarily focus on the Capital Requirements Directive (CRD) and related CEBS Guidelines because supervisors are currently mostly dealing with issues arising from the implementation of Basel II. As to the types of issues eligible for mediation, no subject covered in the CRD has been explicitly excluded. This approach was broadly supported by respondents, subject to some specific comments which are summarised below together with CEBS' response.

Interaction with CRD procedures

17. Three respondents raised concerns about how mediation would interact with the legal decision-making procedures laid down in the CRD, in particular Article 129(2), and asked for references to this issue to be deleted or clarified.
18. CEBS agrees with respondents that the use of CEBS Guidelines on home/host cooperation and validation of advanced approaches and the project on operational networking are expected to substantially enhance supervisory cooperation and thereby reduce the need to resort to a mechanism to resolve disputes.
19. Moreover, should disputes arise, Article 129(2) indeed provides the right legal mechanism for resolving conflicting views without engaging in endless discussions.
20. However, mediation has been construed as an additional tool to help supervisors to take all the necessary measures within their powers to arrive at a joint decision, and to do so expeditiously, in order to avoid if possible the need to resort to a non-consensus decision by the consolidated supervisor at the end of six months.
21. Indeed, CEBS wishes to stress that mediation is intended to facilitate and speed up the CRD procedures, not to prolong or overrule them (the latter would not be legally possible, in any case).

22. Furthermore, CEBS would like to point out the following restrictions on the use of mediation in the context of the procedures already foreseen in the CRD:

- a. Decisions cannot and will not be called into question through the mediation mechanism. Taking an example, a distinction should be drawn between the criteria applied to support Article 129(2) decision, and the Article 129(2) decision itself which can not be challenged through the use of the mechanism;
- b. Mediation should not be misused to deviate from the objective (and the obligation) of having a quick decision taking for model approval or in situation of crisis;
- c. Mediation should not be misused as a substitute to the already existing and well performing on-going cooperation between supervisors.

23. Some confusion occurred over paragraph 22 of the Consultation paper which suggested that the procedure should give the opportunity to consider the issues in a more general context, "for instance to adopt a common approach or settle acceptable terms for similar issues for the future".

24. CEBS wishes to clarify that mediation cannot be used to reverse a decision already taken and is not meant to give 'automatic' precedences. Paragraph 22 of the Consultation paper should be read in connection with paragraph 65 of the Consultation paper which states: *'As regards the work of CEBS at Level 3, the mediation mechanism must not take on a role either in the development of CEBS Level 3 measures (even though the mediation process could have, as a "by-product", the identification of issues that could necessitate Level 3 measures by CEBS) or Level 2 (i.e. CEBS working under a mandate from the Commission).'*

25. It should also be noted that not only did other respondents not raise doubts about the potential inclusion of Article 129 within the scope of mediation, but indeed they suggested that the (forthcoming) Article 19 of the CRD (which sets out the process for evaluating merger and acquisition proposals between supervisors) also be included in the scope, on the basis that it involves a similar process to Article 129(2).

26. CEBS notes that no specific CRD issues are excluded and that the paper contains examples only. This seems appropriate, given the voluntary nature of the mechanism and its role in facilitating supervisory convergence. Furthermore, it is not possible at this stage in the CRD implementation process to specifically identify all areas of potential dispute.

Other comments on scope

27. Two respondents asked CEBS to be more specific about what it means by the statement that it will apply a functional rather than legalistic approach to the definition of cross-border.

28. CEBS would like to note that its intention is to look at the substance of each situation. Indeed, setting quantitative criteria or thresholds would not be helpful as they could be difficult to formalise and would in any case soon be out of date. In principle, CEBS would prefer to take an open approach, neither including nor excluding cases ex ante.

29. Two respondents raised issues relating to the proposed restrictions on the scope of the mechanism: one referred to cases that may be deemed unsuitable for mediation on the basis that the national legislation does not allow leeway to accommodate the demands of the CEBS member seeking mediation, noting that this should not be used as a means of avoiding making decisions at CEBS level.

30. CEBS believes that a case-by-case approach is needed to these issues and that the protocol should allow sufficient flexibility.

Cross sector application

31. The need to coordinate the mediation mechanism of CEBS with the mechanism already developed by CESR and that of CEIOPS currently submitted to public consultation has been highlighted.

32. With regard to relevant subject areas in this respect, the respondents drew the attention on key cross-sectoral areas such as the Pillar 2 approach for bank and insurance subsidiaries within a bancassurance group, internal control and governance as laid down in Article 22 of the CRD (Directive 2006/48/EC) and Article 13 of the MiFID, and organisational aspects of the supervision of branches (Article 32(7) of MiFID).

33. CEBS would like to stress that there are a number of tools that allow for cross-sectoral consistency:

a. The CEBS mechanism heavily draws from CESR's; especially with regard to its key features and procedural aspects. The main changes were restricted to what was strictly necessary and to tailor the mechanism to the prudential focus of CEBS;

b. Non-CEBS members have the possibility to opt into the mechanism by signing a joinder agreement.

34. Moreover, the gatekeeper has an important role to play in cases where there are clear cross-sector implications. In these cases, the gatekeeper is expected to take the issue to the 3L3 Chairs for decision on how to proceed and coordinate.

35. Respondents' suggestion to connect the three websites of CEBS, CEIOPS and CESR when the outcome of mediation cases are publicly available, will be considered as the cases arise.

Parties

36. Respondents wondered what would happen in cases where a dispute arises not only on a cross border, but also a cross-sector issue, and felt that it may be useful to have the members of all supervisory bodies involved in one country.

37. As explained in the Consultation Paper, CEBS mediation mechanism is in principle restricted to CEBS Members. However, where a dispute involves cross-sector issues a non-CEBS authority may participate to a CEBS mediation through a joinder agreement, whose terms would be determined depending on the specifics of the case.

The involvement of market participants

38. Respondents believe that the role and involvement of market participants should be reinforced. Suggestions in this respect included:

- a. Market participants to directly contact the gatekeeper to receive a preliminary assessment of whether their issue would be suitable for mediation, in which case they could then turn to the relevant supervisors to initiate the procedure. For cases where mediation would not be advised by the gatekeeper, the latter could advise market participants as to what would be the appropriate forum to address their issue.
- b. The decision of a national supervisor should be taken in close dialogue with the institution that brought the case to his attention;
- c. Clarify what happens when, in accordance with Article 3, market participants prompt their national supervisor to escalate an issue to mediation but the latter does not follow up or, if it is the case, where the requested supervisor refuses to enter into mediation. They argue that supervisors should not have full discretion to reject requests;
- d. Inform the market participants that a mediation case has been initiated;
- e. Provide the institution affected by a dispute, as well as its competitors, with the possibility to be involved to a certain degree in the process once it has been initiated and before the final decision is made, through for instance oral submissions/discussions/panel meetings;
- f. Give them the opportunity to make a written statement .

39. CEBS wishes to stress that the mediation mechanism is a supervisory peer mechanism, not a complaints mechanism. This means that only CEBS members (or non CEBS members via joinder agreement) can participate. Market participants are involved in the mechanism, in an indirect way.

40. As set out in Article 3 of the Protocol, CEBS members can trigger mediation either on their own initiative or after a market participant has prompted them to do so. In the event that a CEBS member rejects a market participants request to mediate, the existence of such a request may be communicated to CEBS. This does not prohibit market participants from informing CEBS directly in cases where their requests to mediate have not been taken up.

41. With regard to the involvement of market participants in the proceedings, CEBS does not consider it appropriate to provide for direct involvement. However, as set out in Article 10(2) of the Protocol, if additional information is requested in the course of the case and if this needs to come from a market participant, the relevant CEBS member will take contact with the market participant accordingly.

Transparency of the process

42. Respondents recognised that some degree of confidentiality (e.g. deliberations, voting results if any, names of the parties involved) must be warranted, but felt that the mechanism needs to be transparent enough to allow external parties to be able to understand:

- (i) the context and key issues;
- (ii) the means by which the decision was made;
- (iii) lessons for the future, particularly potential adjustments to the CRD and CEBS guidance;
- (iv) Any refusal to accept either a request for, or the results of, a mediation.

43. To avoid any breach of confidentiality of proprietary information, it was also suggested that CEBS could ask the market participants involved for their prior consent to reporting/publication.

44. CEBS believes that a case-by-case approach is needed and the role of the Gatekeeper will be key.

45. Other suggestions for improving transparency include:

- a. Inform the CEBS Consultative Panel particularly with respect to the cases brought to CEBS attention by the Panel (see paragraph 112 of the Consultation Paper),
- b. Publish on the CEBS website summaries of all issues proposed for mediation, their status (rejected – in which case the supervisors' underlying explanation should also be published - or processed through mediation), the outcome of the mediation process, the final measures implemented subsequently to the mediation outcome for each issue treated, and the supervisors' supporting justification, should the outcome not be observed.

46. CEBS wishes to balance the need to both publish the mediation outcomes and to respect the confidentiality rights of all parties involved.

47. Articles 12 (2) and (3) are believed to strike the right balance. It is not considered necessary to imbed in the Protocol the exact form such publication will take.
48. One respondent questioned the proposal that the Gatekeeper will report to the Commission in an anonymous form the mediation requests and the outcomes of the mediation procedures in accordance with Article 12 of the Protocol.
49. CEBS would like to note that the report to the Commission is aimed at avoiding overlaps between the Commission's duty and competences (application of EC law) and those of the L3 Committees. Information on a general basis is considered useful in this respect.

Features

50. One respondent advised that CEBS should adhere to the Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes¹ which are the principles of impartiality, transparency, effectiveness and fairness.
51. CEBS wishes to stress that the proposed mechanism is based on the above mentioned principles, although not explicitly referred to. For instance, Articles 9(7) and 13 of the Protocol provides specific rules on the appointment of the mediator, panellists and Gatekeeper in order to prevent possible conflicts of interest.
52. In particular, Article 13 clarifies the request of one respondent that it should be explicit that a (home) supervisor from one Member State for a particular institution should not serve as a mediator or a panellist where the case under consideration relates to an issue occurring in another part of that institution's EU Group activities, and where the parties to the mediation are supervisors to these businesses.

Procedures

53. One respondent noted that the 'facilitative procedure' was not described in the Consultation paper nor in the Protocol. CEBS believes that such detailed description is deemed not to be necessary, since the procedure is meant to "facilitate" a rapid and amicable solution of a dispute by way of a flexible and informal procedure. However, its key basic features are grounded in the Protocol (Articles 9(1)(b), 9(5) and 11).
54. With regard to timing, it was recommended to introduce strict timelines. Another suggestion was that mediation cases should be solved as quickly as possible and the 6-month envisaged timeline should only apply to the most complex issues.

¹ Commission Recommendation 98/257/CE

55. CEBS wishes to point out that it is difficult to fix ex-ante timelines, without the procedures having been tested. 6 months is the maximum length envisaged for a mediation procedure. It does not preclude disputes to be settled in a shorter period of time.

Selection of mediation panel

56. One respondent puts forward some helpful suggestions for the mechanism to work efficiently:

- a. in the initial months of the use of mediation, as many CEBS Members as possible should be exposed to the mediator/panel mechanism; with the right type of expertise;
- b. a panel "on standby" in the case of evaluative procedure would be one way to guarantee a quick kick off.

57. CEBS agrees that the role that the Gatekeeper plays in the selection of the Panel members will be vital. It also agrees that a panel on standby could be helpful in the initial months and suggests that the Gatekeeper could consult the Chairs of the CEBS Experts Groups to examine the feasibility of the setting up of a sort of list of experts by theme, even though an *ex ante* organisation might prove inadequate due to the specific nature of each case.

58. As suggested by respondents, a chart clarifying the steps of the mechanism is attached to this document. In particular, it clarifies that the mediation panel envisaged in the evaluative procedure as well as the Panel of CEBS members that could be formed in the exceptional cases where the decisions of a gatekeeper are contested by the parties, comprise at least an odd number of members.

Review

59. Market participants would prefer a shorter period before the mechanism is reviewed although recognising that a meaningful number of mediations would need to have been concluded before a review was possible. One respondent suggested that the CEBS Consultative Panel should be explicitly involved in the pre-public consultative phase of this process.

60. CEBS does not wish to change its review clause. The spirit is that, when sufficient experience proves the need for a change in order to improve the effectiveness of the mechanism, CEBS is open to improve it.