

Consultation Paper on the establishment of a mediation mechanism between banking supervisors

Introduction

1. In endorsing the FSC report on Financial Supervision (so-called Francq report), the ECOFIN Council's conclusions of 5 May 2006 invited CEBS to "...explore the preconditions to the establishment of a mediation mechanism – especially as regards the potential areas of application and the practical functioning of this mechanism – and where appropriate to test the mechanism in the banking field in 2008".
2. The Francq report sets out the broad framework in which the mediation mechanism could be designed:
3. It defines mediation as a 'tool that may help solve day-to-day supervisory disputes as regards cooperation issues or conflicting requirements for supervised entities, keeping in mind that it should remain a "peer mechanism" between supervisors and controlled by them.'
4. "It is a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of a dispute".
5. The establishment of a mediation mechanism naturally falls within the remit of the Level 3 Committees' competences and should be tailor-made to the specificities of each sector, without prejudice to the Commission's legal and institutional responsibilities as guardian of the Treaty entrusted with ensuring that Community law is implemented and enforced.
6. At its September 2006 meeting, CEBS decided to establish a dedicated task force to assist the Committee implementing the recommendations of the Francq report, and in particular in developing proposals for a mediation mechanism at CEBS.
7. CEBS proposes to build on work already done by CESR, on the grounds that it is neither necessary nor efficient to duplicate work that has successfully been done by another Lamfalussy Committee.
8. CESR has participated as an observer to the task force meetings and its contributions have been very helpful for the task force. One of the objectives of this co-operation has been to properly understand the mechanics of the CESR mechanism and their specificities to the CESR context.
9. CEIOPS has also participated as an observer to the task force meetings.

10. The CESR framework which has been put into place in the 'CESR protocol on mediation', was published in August 2006. This mechanism operates in the specific context of the Market Abuse Directive and of the Directive on Markets in Financial Instruments but also applies *"in a general way to cooperation and exchange of information under all EU Directives and Regulations applicable in the securities field, as well as to operational disputes arising under relevant EU laws providing for mutual recognition of decisions (e.g. authorisations, approvals)"*.
11. The main features of the CESR mediation mechanism were deemed applicable also for CEBS. However adjustments are included in the process compared to that adopted by CESR, to address the specific legal setting in which the prudential supervision is currently exercised.
12. The categorisation of the type of cases that mediation can cover is also different from CESR's due to the specific nature of banking supervisory activities. CEBS approach has a prudential focus, while CESR taxonomy is centred on conduct of business issues.
13. This consultation paper provides a design for a CEBS mediation mechanism and is now submitted to a three-month public consultation.
14. It sets out the basic principles and the key features of the mechanism as formalized in the annexed draft Protocol.
15. The paper is now submitted for public consultation. The consultation period is three months and will run until 19 June 2007. Comments received will be published on the CEBS website unless respondents request otherwise. Comments should be sent to the following e-mail address: CP13@c-eps.org
16. CEBS would especially welcome responses to the following questions

<p>Do market participants have comments on the proposed mechanism?</p> <p>Has the CESR mechanism been sufficiently adapted to fit the prudential focus of CEBS?</p>

Executive summary

17. The mediation mechanism is a peer mechanism aiming at improving the cooperation and convergence amongst CEBS Members.
18. Given the current EU legal setting and by nature, the mediation mechanism cannot be legally binding. As the mediation mechanism operates on a voluntary basis, CEBS Members have a general and strong commitment to participate in the process. It is also a 'accept' or 'explain' approach: should a CEBS Member decide not to participate or not to follow the outcome of a mediation, it should explain the reasons why to CEBS Members.
19. The CEBS mediation mechanism only deals with issues of cross-border nature, so that purely domestic disputes fall outside the scope of the mechanism. The definition of "cross border" should be functional and pragmatic rather than legalistic.
20. The CEBS mediation mechanism must necessarily address only the issues that are within the competence of CEBS Members. It should primarily focus on the Capital Requirements Directive and related CEBS Guidelines, as supervisory competent authorities are currently mostly dealing with issues arising from the implementation of Basel II. The objective is to support the application of the already existing cooperation tools among supervisory competent authorities such as CEBS Guidelines related to validation and to home/host cooperation in the context of the Operational networks.
21. It is believed that if this tool should be used on an exceptional basis, in a context of smooth cooperation between supervisory competent authorities, it could nevertheless help avoiding not only disputes but also, to some extent, tensions (as, when the latter appears, it might be difficult to prevent it from ending up in a dispute). Therefore, when an issue between two or more supervisory competent authorities appears to be a potential source of tension, needing the help of a third party to solve it, mediation could be used as a kind of "preventive" mechanism. This will support a quick and efficient decision taking.
22. A forward looking approach should prevail: mediation should be used not only to take a decision which effects are immediate but also to give the opportunity to supervisors 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.
23. Potential areas where mediation could be useful to solve tensions or disputes include for instance
 - a. Processes for consultation of other relevant competent authorities in advance of decision-taking by a specified competent authority (e.g. in the context of Article 143 of Directive 2006/48/EC, when considering the equivalence of a third country authority);

- b. Exchange of information (e.g. provision of relevant and essential information according to Article 132 of Directive 2006/48/EC;
- c. Processes for joint agreement or decision-taking among competent authorities (e.g. in the context of Article 129(2) of Directive 2006/48/EC in relation to model approval and within the legal timeline laid down in the latter); and
- d. Other potential general cases relating to cooperation between competent authorities (e.g. in the context of Pillar 2).

24. As set out in the CESR mediation mechanism, market participants cannot directly activate the mechanism. It is not a 'complaint' mechanism but a 'peer' mechanism. Wherever possible, market participants will be involved but in an indirect way for instance via their national CEBS Member, via the CEBS Consultative Panel, or via meetings with Operational networks.

25. A non CEBS Member can opt into the mechanism. Such opt in will be subject to signing of a joinder agreement, or by using a CEBS Member to represent it, on a case by case basis. This is consistent with the CESR mechanism.

26. Clear and rapid procedures have been devised to ensure a fair, efficient and confidential process as well as to suit the potential diversity of the cases.

27. Consistently with the CESR approach, two procedures can be activated: an evaluative procedure and a facilitative procedure. In both cases, strict deadlines have been introduced to allow for a quick and efficient procedure.

28. CEBS considers it important and beneficial for the parties to be able to rely on a third party, the gatekeeper, who is the CEBS Vice Chair or a CEBS Member designated by the CEBS Vice Chair for the following functions:

1. assessing the merits of each issue for escalation to mediation
2. overseeing the mediation process and procedure. In that respect, the gatekeeper has a role to play in ensuring that timeframes are met and can change them to ensure an expeditious procedure is being followed
3. making decisions, when acting as a facilitator, should the parties disagree

29. Where appropriate and with a view to encouraging supervisory convergence, reports or summaries of mediated outcomes will be made public on an anonymous basis, e.g. through the CEBS Annual Report.

30. It is intended to test the mechanism in 2008 and review it in two years time.

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I. Key Features of the CEBS Mediation Mechanism

I.A. The nature

31. The CEBS mediation mechanism is structured as a peer mechanism aiming at improving cooperation and convergence amongst CEBS Members organisations.
32. The outcome of any mediation process cannot have any legal effect, be legally binding or be enforceable. Furthermore, it cannot prejudice infringement proceedings of the European Commission ("Commission") or the European Court of Justice ("ECJ") as well as national courts proceedings as mediation cannot impinge the national courts' competences.
33. This will also be true as regards mediation in other areas where agreed on by CEBS at Level 3. Any proposed mechanism will not pre-empt or call into question the general European system for monitoring and interpreting EU law. In this regard, the CEBS mediation mechanism aims to contribute to greater supervisory convergence at Level 3 and fair implementation and application of CEBS Level 3 measures¹ and EU law, and might also help to prevent regulatory arbitrage. Equally, the mediation mechanism, being a measure expected to be resorted to exceptionally, should foster a deepening of the CEBS network.
34. A full and appropriate assessment of an issue through mediation requires the input by all parties. As the mediation mechanism operates on a voluntary basis, there should be a general and strong commitment of CEBS Members to participate in the mechanism. A mandatory participation would be inconsistent with the voluntary nature of the process.
35. An effective peer mechanism requires adequate transparency of the mediation process among CEBS Members.
36. Therefore CEBS Members should commit reciprocally to an "accept or explain" approach, so that a CEBS Member would either opt to participate in the mediation process initiated by another CEBS Member or explain the reasons for its refusal to participate. Unaccepted mediation requests and the reasons of declining authority(ies) for not participating will be reported to CEBS.

¹ CEBS Level 3 measures include Standards, Guidelines and Recommendations.

37. There is an expectation that the CEBS Members will accept mediation requests and cooperate in good faith with the gatekeeper and the CEBS Member seeking mediation, with a view to reaching an amicable solution.
38. Finally, it should be entirely at the discretion of a Member as to whether or not to follow the outcome of the mediation process. However, if a party decides not to follow the recommendation stemming from the mediation procedure, it shall explain in writing the reasons to CEBS.
39. In principle, mediation is a process for solving tensions or disputes that have already arisen and where bilateral efforts to settle the matter have been exhausted. (See Scope below)
40. It would generally speaking not be appropriate to expect a CEBS Member to revisit, through the mediation process, an individual regulatory decision already taken, for a number of legal issues. For example, in many Member States administrative decisions recognising individual rights are hard to revoke or withdraw save under very special circumstances and after due process under national laws; rulings by national courts that do not accord with the outcome of mediation cannot be overruled by a CEBS Member.
41. Consequently, mediation would better suit disputes involving, in particular, persistent or significant differences of opinion between CEBS Members on the criteria applied consistently to support certain decisions. It would be a way of agreeing on common criteria or practise for disputes that are frequent or sufficiently relevant.
42. In these instances, the purpose of mediation would not be to reverse and reconsider a specific decision, but to settle acceptable terms for those issues for the future.
43. Often such cases will have wider implications for CEBS Members outside the parties involved in the dispute and would therefore be more suitable for consideration by CEBS Expert Groups. It will be necessary to ensure that if the mediation mechanism identifies issues that are of wider concern, these should be properly dealt with by the relevant CEBS Expert Groups.
44. This is consistent with the expectation that referrals to mediation will only actually be made in limited circumstances.

I.B. Parties involved [Articles 2 and 3 of the draft Protocol annexed below]

45. The mediation mechanism is designed as a peer mechanism to sort out disputes on supervisory issues.
46. Any "peer mechanism" should by nature involve only stakeholders linked by the objective they pursue – i.e. prudential supervision of credit institutions or investment firms – but also that equally bound to

confidentiality rules and professional secrecy as laid down in Directive 2006/48/EC. This means that CEBS Members will be the only participants to mediation. If an issue is to be escalated to mediation no more than one member per country should be involved in the process.

47. EEA supervisory competent authorities that are Observers to CEBS may participate in a mediation procedure.
48. This will also help providing rapid solutions to disputes between competent authorities which affect the provision of banking services on a cross-border basis.
49. Market participants will always be able to bring potential matters to the attention of the relevant CEBS Member. However, whilst CEBS welcomes input from market participants in identifying potential matters suited to mediation, it is not intended to transform the CEBS mediation mechanism into a complaints mechanism.
50. Therefore, it will be at the CEBS Member's full discretion to admit the request by the market participant or to turn it down. In the latter case, the CEBS Member may choose to communicate the existence of such an initial request to CEBS.
51. Additionally, the CEBS Consultative Panel – comprised of high-level representatives of market participants – meets with CEBS Members on a regular basis. These meetings could afford market participants the opportunity to discuss amongst other things regulatory inconsistencies across the EU, areas where CEBS should undertake further work to improve supervisory convergence. In addition, meetings of CEBS operational networks constitute another potential source of issues that can be brought up for mediation (these issues can be raised directly by market participants when attending the meeting of the operational networks but can also come up in the discussion between supervisors).
52. Other supervisory authorities such as those competent in the insurance and securities sector are offered the possibility to participate in the CEBS mediation mechanism through a joinder agreement. Situations where such participation might be appropriate may include, for example, a case where the prudential supervision of the entity concerned is the responsibility of a supervisory authority which is not the banking supervisory authority.
53. The decision to participate will ultimately be a matter for the non-CEBS Member concerned. The terms and conditions of such joinder agreements will require further consideration.

I.C. Procedural principles

54. Rapid: The main objective of mediation is for the parties to reach rapid and effective solutions. The CEBS mediation mechanism aims to achieve

rapid effective and balanced solutions whilst also building in appropriate safeguards to ensure the high quality of the process.

55. Efficient: CEBS Members would be expected to use all efforts to solve issues bilaterally, so that mediation proceedings are regarded as a measure of last resort. The procedural framework must be unambiguous, and provide strict deadlines to be adhered to, so that the scarce resources of CEBS Members are used in the most efficient way.
56. Regarding the suitability of issues, the introduction of qualitative or quantitative thresholds does not, at least at this initial stage of such a new process within CEBS, appear useful and could on the contrary lead to unnecessary uncertainty and complexity. It will be the responsibility of CEBS Members to assess thoroughly the merits of any particular issue/s before initiating mediation proceedings at CEBS.
57. Fair: The mediation process has to guarantee an unbiased process respecting the basic principles of fairness and impartiality, which will be of particular importance in the selection process of the "mediators". These guarantees will be crucial for the acceptance and credibility of the mediation process.
58. Confidential: Confidential information will frequently be part of the mediation process. Moreover, confidentiality of the discussion will also encourage a climate of openness and willingness amongst CEBS Members to settle their disputes. Therefore, all parties to the process, be it the authorities directly involved, the gatekeeper, the mediator or the panellists, must abide by confidentiality and professional secrecy obligations as laid down in Title 5, Section 2 of Directive 2006/48/EC. This also means that the gatekeeper, the panellists and the mediator must abide by the secrecy rules of the parties involved, and not only to the secrecy rules of the organisations they belong to.
59. Respectful of the EU legal setting: the sole competence of the ECJ to give a legally binding ruling in cases concerning EU law will be fully respected. This means that any outcome of the mediation process will not be legally binding on the CEBS Members involved.
60. Furthermore, the mediation mechanism should not be used where legal proceedings have already been initiated by the Commission or before the ECJ, or before competent national authorities.
61. Finally, the resolution of a dispute between CEBS Members through the mediation mechanism cannot prevent the Commission from taking legal action against the Member States involved under the EC Treaty.

II. Scope of the CEBS Mediation Mechanism

II.A. General considerations

62. The CEBS mediation mechanism would only deal with issues of cross-border nature, so that purely domestic disputes (e.g. cooperation between national authorities from the same jurisdiction) fall outside the scope of the mechanism. The definition of "cross border" should be functional rather than legalistic.
63. The CEBS mediation mechanism must necessarily address only issues that are within the competence of those CEBS Members concerned.
64. It is to be emphasised that the mediation mechanism cannot be regarded as a tool for providing interpretations of EU legislation, but will be used to aid in the day-to-day application of CEBS Level 3 measures and EU law in order to facilitate supervisory convergence between CEBS Members at Level 3.
65. 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).

II.B. Scope [Article 1 of the draft Protocol annexed below]

66. In principle, the mediation mechanism is designed for use in the case of disputes arising from the application of the Capital Requirements Directive (Directive 2006/48/EC and Directive 2006/49/EC) and related CEBS Guidelines. In addition, where agreed by the parties concerned, mediation could also be used in cases relating to other EU banking legislation and/or other CEBS Guidelines. Furthermore, in its future review of the mediation mechanism (see paragraph 112 below), CEBS will consider whether it is necessary or desirable to formally expand the scope.
67. A basic categorisation of potential disputes could be:
- Processes for consultation of other relevant competent authorities in advance of decision-taking by a specified competent authority (e.g. in the context of Article 143 of Directive 2006/48/EC, when considering the equivalence of a third country authority);
 - Exchange of information (e.g. provision of relevant and essential information according to Article 132 of Directive 2006/48/EC);
 - Processes for joint agreement or decision-taking among competent authorities (e.g. in the context of Article 129(2) of Directive 2006/48/EC in relation to model approval and within the legal timeline laid down in the latter); and

- Other potential general cases relating to cooperation between competent authorities (e.g. in the context of Pillar 2).
68. Negative criteria or restrictions could be applied to render disputes unsuitable for mediation. More specifically, mediation would be excluded in the following cases:
- Legal proceedings have already been initiated at EU level or at national level;
 - The issue underlying the dispute is being dealt with by, or has been referred to, CEBS for work at Level 2 or Level 3;
 - National legislation, which is not within the regulatory competence of the requested CEBS Member, does not allow the latter any leeway in accommodating the demands from the CEBS Member seeking mediation;
 - Where bringing the case to mediation could constrain an authority's ability to comply with legal or procedural requirements, or to meet an obligation to take immediate action in the interests of preserving financial stability, such as in an emergency situation.
69. In certain circumstances, the Capital Requirements Directive (CRD) requires decisions to be taken "in full consultation" with other competent authorities or obliges them to try to reach a joint agreement for the EU group as a whole (i.e. in the context of model approvals). At the same time, the CRD is clear that the responsibility for the final decision – which must be taken within a specific period of time – legally rests with one specified competent authority only. In that sense, the mechanism for resolving any disputes between the relevant competent authorities is clear.
70. It is possible that problems will arise during the course of the consultation or joint agreement process. The wording of the CRD and the associated CEBS Guidelines should substantially reduce the chances of disputes arising and consequently dispute resolutions be needed. However, as supervisors must 'do everything within their power' to reach a joint decision, it seems sensible to consider whether the mediation mechanism could resolve tensions before the final decision is taken.
71. It would be imperative to avoid that mediation results in a deviation from the objective sought by the legislator, i.e. an efficient decision-making process between home and host supervisors. Therefore, it must be clear that mediation can absolutely not be used as substitute to current mechanisms of full cooperation between supervisors, nor to delay a decision, nor to invalidate a decision already taken. As in other cases, the issue must first have been discussed bilaterally.
72. The role of the Gatekeeper will be critical in determining whether the use of mediation would be beneficial or feasible in the circumstances.

III. Procedural Framework of the CEBS Mediation Mechanism

III. A. The Gatekeeper [Articles 4 and 13 of the draft Protocol annexed below]

73. The basic approach for CEBS mediation is to set up a clear procedure but flexible enough to suit the preferences of the parties. If both parties agree on a procedure for the mediation process, their choice should be respected. Nevertheless, it will be beneficial to count on a third party for the following functions: assess the merits of each issue for escalation to mediation, oversee the mediation process and procedure and make decisions should the parties disagree.
74. Such a role would be played by a CEBS "Gatekeeper". The Gatekeeper will be the Vice-Chair of CEBS, or a CEBS Member designated by the Vice-Chair of CEBS, in consultation with the parties involved in the mediation request.
75. The Gatekeeper would not express views on the issues, but would consider the merits for escalation to the mediation on the basis of objective criteria, as described in paragraphs 67 and 79.
76. This role would especially require sufficient experience in the matters covered by the mediation mechanism, and the appointment by CEBS to this position should be for a sufficient period of time to guarantee some degree of continuity in the process. The full support of the Gatekeeper from the CEBS Secretariat would be useful in this respect.
77. As the use of specialist Gatekeepers was designed in the specific context of CESR and may not be necessary in the CEBS context, it has been deemed preferable to simplify the procedures and at this stage to leave it up to the Gatekeeper to assess on a case-by-case basis whether to ask CEBS to appoint specialist Gatekeepers.
78. CEBS Members will be expected to escalate a dispute to mediation only after all bilateral efforts to resolve differences have been exhausted. If the Gatekeeper has good reasons to believe that this has not taken place or that an easy and rapid resolution of the dispute is feasible, she/he will express those views to the parties and may offer her/his aid to them before any escalation of a dispute to the mediators. Nevertheless, if the two parties remain determined to ask for mediation, the Gatekeeper shall not impede them from doing so.
79. The Gatekeeper would assess preliminary statements provided by the CEBS Members involved in a dispute and determine, in consultation with the parties, whether any of the negative criteria set out in paragraph 67 apply.
80. Assuming they do not, the following additional questions would have to be analysed, whether:

- All procedural steps to come to an amicable solution under the relevant provisions have been taken.
- The case has been properly articulated, in accordance with the requirements of the applicable CEBS Level 3 measures or EU legislation.
- The grounds for refusal of cooperation envisaged in the provision invoked by the requesting authority do apply and have been clearly communicated to the latter.

III. B. Organisational choices [Article 9 of the draft Protocol annexed below]

81. Two models for mediation are provided:

- The "evaluative model" which consists of a panel that would evaluate the issue and propose a solution,
- The "facilitative model" in which the parties are supported by a mediator in their negotiations to reach a solution :

82. The choice between the two models (evaluative /facilitative) should be made in view of the nature of the issue and, especially, according to the preferences of the parties. Should they disagree, the Gatekeeper will have the final say on which procedure to follow.

Composition of mediation panels and selection of mediators

83. The Gatekeeper will appoint mediators and panellists from the CEBS Members that have volunteered. Mediators/Panellists will be appointed specifically for each dispute, in consultation with the parties, having due regard to the nature of the dispute, the expertise required and the need to ensure that the process is a genuine "peer" mechanism. When selecting panels or mediators, Gatekeepers will endeavour to warrant an appropriate representation from members (no more than one member by country) and to avoid any bias in legal or cultural views that could influence the outcome.

84. The following requirements would apply to mediators and panellists:

- Mediators/Panellists would have to be experts from CEBS Members, which could comprise persons with the adequate expertise for any of the different issues within the scope of the mediation mechanism.
- Mediators/Panellists would be expected to have appropriate seniority, so as to enhance the credibility of the mediation process.
- Any list of CEBS Members volunteering to be nominated as mediators/panellists would be reviewed at least on an annual basis, taking into account the need for a balanced representation from the membership and to provide a sufficient number of alternates for panellists.

- In the facilitative approach, the mediator would be also a CEBS Member acceptable to both parties, not necessarily chosen from a pre-established list of experts and with the possibility of the Gatekeeper him-/herself playing that role.

85. For the sake of flexibility, the following procedural aspects of the CESR mechanism have not been taken on board:

1. The specialist gatekeepers, that CESR envisages for dealing with very specific and complex cases, (see paragraph 76 above),
2. The Standing panel, that CESR envisages when very frequent and similar cases were to go into mediation in a particular area.

86. These aspects are not particularly detrimental for CEBS but it was considered essential not to pre-empt any organisational choices that might be appropriate at a later stage. If need be, it is left up to the Gatekeeper to ask CEBS to appoint specialist gatekeepers on a case-by-case basis. A re-insertion of these procedures could be considered as part of the review of the mechanism in two years time.

III.C. Procedure and referrals [Articles 10, 12, 14 of the draft Protocol annexed below]

87. In light of the foregoing, the following paragraphs describing the mediation procedure should be understood as general in nature but focusing especially on the evaluative model.

88. The CEBS Member requesting mediation would provide a preliminary statement, following which the requested CEBS Member would be required to provide a response to the statement of the requesting authority. Appraising this information, the Gatekeeper can assess whether the dispute should be escalated to mediation. The other party to the dispute would be expected to make a submission and to enter into mediation, or would explain the reasons for not accepting to become party in the mediation process.

89. If the assessment of the Gatekeeper according to the criteria comes to the conclusion that an issue merits escalation to a mediation panel, the Gatekeeper would refer it to a mediation panel.

90. The mediation panel of experts would generally consider the matter on the basis of the documents submitted to the Gatekeeper by the parties to the dispute; however oral submissions could be more practical in specific cases. The panel of experts might request additional information from the parties that is necessary for a sound assessment of the issue. Finally, the panel will propose a solution to the parties.

Voting rules

91. The mediation panels will be formed by three persons. Although the optimal would be consensus, panels will require voting rules when they need to produce a recommendation. If voting proves necessary, simple majority voting will take place with no panellist allowed to abstain. Dissenting recommendations will not be possible. The Panellists shall keep all deliberations and voting results confidential, so only the final outcome will be communicated.

Referrals and appeals

92. It is expected that referrals and appeals will only occur in very exceptional cases.

93. If a Gatekeeper comes to the conclusion that a mediation request does not fulfil the conditions for mediation, the party seeking mediation may ask the CEBS Chair for the decision of the Gatekeeper to be reviewed by the CEBS Members. In case the decision of the Gatekeeper is not upheld, the issue would be referred to a mediation panel.

94. If no agreement can be reached between the parties following the deliberations of the mediation panel, the matter could be referred to a panel of CEBS Members at the request of one of the parties to the dispute.

95. The panel of CEBS Members would comprise an odd number of at least three members appointed either by the Chair of CEBS on a case-by-case basis for each dispute. Members serving on a panel will not be representatives of either CEBS Member that is party to the issue under discussion. Any member elected will not serve as a member of the panel if she/he is otherwise conflicted. CEBS Members' panels will observe the same voting rules as the mediation panels: majority voting with no right to abstain or dissent from the result and with a confidentiality obligation on the deliberations.

96. The panel of CEBS Members considering a matter will agree upon a procedure suitable to the matter in dispute.

97. Generally, the parties to the dispute will be given an opportunity to present their positions through written submissions. Written submissions will be exchanged between parties, copied to panel members and to the CEBS Secretariat, but shall otherwise be treated as confidential.

98. The need for oral submissions will be considered on a case-by-case basis having regard to the preferences of the parties, the complexity of the issues, the urgency of the matter and what is necessary to ensure the fair disposition of the matter.

III.D. Transparency vis-à-vis CEBS Members [Article 12 of the draft Protocol annexed below]

99. The issues dealt with in the mediation mechanism will generally be of confidential nature and the utilisation of the process will be greater if proceedings are restricted to the parties and the Gatekeeper/panellists/mediators unless all parties concerned agree otherwise. However, given the objective of increasing supervisory convergence at Level 3 it would be helpful to share information with other CEBS Members as to the type of issue being escalated to mediation and to furnish a report of mediated outcomes.
100. For this reasons, Gatekeepers will inform CEBS Members on an anonymous basis (i.e without the names of the competent authorities and market participants if any involved in the case) and on general terms of all the cases that are accepted into mediation.
101. Where CEBS Members not directly involved in a dispute have an interest in a matter that is being mediated, the Gatekeeper, subject to the prior parties' consent, would have a role in ensuring how they will be kept informed on its progress and be able to provide input in the process. However, as the outcome of the mediation process would only apply to the parties, it would not be appropriate for other CEBS Members to intervene or dissent until the mediation process is complete.

III.E. Role of the European Commission [Article 12 of the draft Protocol annexed below]

102. Mediation between CEBS Members cannot impinge on the role of the Commission and the ECJ in the interpretation and enforcement of EU law. As mediation will be a CEBS Level 3 tool and outcomes will be non-binding, there is no danger of interference with the prerogatives and competences of the Commission or the ECJ.
103. Gatekeepers will inform the Commission on an anonymous basis (i.e. without the names of the competent authorities -and market participants, if any- involved in the case), and on general terms of all the cases that are accepted into mediation.
104. Furthermore, if the Gatekeeper understands that the dispute brought to mediation hinges mainly on conflicting interpretations of applicable legislation -particularly if any of them might represent an infringement of EU laws-, he/she will consult the parties and the Commission immediately after accepting the case into mediation. This consultation would be in anonymous format. Taking into account the need for a rapid procedure, the Commission will express expeditiously any views it may have on the topic, which should then be taken into consideration by the mediation panel. If the Commission does not

express any opinion within the appropriate time-frame, the mediation process will resume.

105. Subject in this case to the parties' consent, if it is understood that the issue would benefit from their views, the mediator/panel could consult the CEBS Consultative Panel.

III.F. Timing [Article 15 of the draft Protocol annexed below]

106. The efficiency and effectiveness of the mediation mechanism will be measured by the speed of the mediation process. Even if the provision of timeframes for the process is not appropriate in all instances, since the complexity of issues referred to the mediation mechanism will diverge considerably, deadlines will aid the timely functioning of the process (e.g. establishment where relevant of panels, etc.).

107. In cases of particular urgency, the facilitative model provides for the flexibility to come to rapid solutions, such as by the possibility to make only oral submissions to the panel. For complex disputes being mediated, with respect to the estimated time frame, six months are expected to be the maximum period from the activation until the finalisation of a mediation process.

III.G. Outcome [Article 12 of the draft Protocol annexed below]

108. All CEBS Members and the Commission will be informed about the outcome of the issues having been mediated in anonymous form, and on general terms, respecting the confidentiality and professional secrecy obligations under EU law.

109. . The objective of the mediation process is to further convergence at Level 3. As it is not possible to give binding force to the outcome of a mediation procedure, parties to a dispute may chose to ignore the outcome. However, the expectation is that they would generally act in accordance with the outcome of the mediation procedure, with particularly high expectations in the case of exchange of information and cooperation. The reasons provided by a party not complying with the outcome of the mediation would be reported to CEBS Members.

110. Where mediation does not solve a dispute, an issue that requires resolution by other Level 3 tools (e.g. by the adoption of guidance) may well have emerged or could even be of relevance for the Commission for Level 1 or Level 2. Any such issues identified during the process of mediation should be brought to the attention of the CEBS Members and the Commission via the Gatekeeper, during or after the mediation process.

111. As mediated outcomes only apply to the parties concerned, any publication of the outcome could run the risk of it being viewed as going beyond this limited scope.
112. However, given Level 3's objective of encouraging supervisory convergence, it might be helpful for CEBS, where appropriate, to publish or report a particular mediated outcome - appropriately anonymised to comply with confidentiality and professional secrecy requirements under EU legislation - and/or to issue guidance for other competent authorities or market participants. Additionally, summary reports (e.g. in CEBS' Annual Report) could be provided for. As regards market participants that may be directly concerned by a specific mediation process, appropriate transparency of the outcome of the process would be provided by the respective party to the dispute.

IV. Review of the CEBS Mediation Mechanism

113. CEBS is aware of the fact that the establishment of a mediation mechanism is a new procedure for dealing with disputes in respect of which experience is rather limited. In order to assess the functioning of the mechanism and to adapt it where necessary after having gained sufficient experience, CEBS will review the mechanism no later than two years after approval of the mediation process.

Draft protocol of the CEBS Mediation Mechanism

Having regard to:

- (1) The Charter of the Committee of European Banking Supervisors, ,
- (2) The ECOFIN Conclusions of the 5th of May 2006.
- (3) The European Parliament's Resolution on the "Current State of Integration of the EU Financial Markets" adopted on 28 April 2005 (Ref. A6-0087/2005).
- (4) The White Paper on Financial Services of the European Commission, published on 5 December 2005 (page 10, footnote 30)

Considering the need to put in place an effective mediation mechanism for solving the potential disputes between supervisory authorities, enhancing day-to-day cooperation between authorities and strengthening supervisory convergence,

Considering that market participants, besides the possibility envisaged in Article 3 of this Protocol, have also the possibility to bring potential matters to the attention of the relevant CEBS Authorities, to the CEBS Consultative Panel, or to the CEBS Operational networks,

Considering that the effectiveness of the new mediation mechanism established under this Protocol will be reviewed after two years,

The members of the Committee of European Banking Supervisors (CEBS) have agreed:

SECTION I

GENERAL PROVISIONS

Article 1

Scope

1. This Protocol regulates the "Mediation Mechanism" of the Committee of European Banking Supervisors.
2. The Mediation Mechanism will be used to settle disputes between the parties as set out in Articles 2, par. 1 and 2 par. 2, concerning:
 - a. Processes for consultation between CEBS Authorities;
 - b. Processes for exchange of information;
 - c. Processes for a joint agreement or for decision-taking among CEBS Authorities,
 - d. Other potential general cases relating to cooperation between CEBS Authorities.

3. Disputes eligible for mediation will have to meet all of the following conditions:

- a. The issue under dispute has a cross border nature.
- b. All reasonable bilateral efforts to settle the dispute have been exhausted or, alternatively, both parties agree to submit their dispute to mediation.
- c. Legal proceedings concerning the issue underlying the dispute have not already been initiated at EU level or at national level;
- d. The specific issue under dispute is not being dealt by, or has not been referred to, CEBS or any of its Expert Groups;
- e. There is no legal constraint which falls outside the regulatory competence of the requested party that prevents it from accommodating the demands from the party seeking mediation.
- f. The action sought by the party seeking mediation is not the reversal by the requested party of a previous administrative decision recognising individual rights.
- g. Bringing the case to mediation cannot constrain an authority's ability to comply with legal or procedural requirements, or to meet an obligation to take immediate action in the interests of preserving financial stability, such as in an emergency situation.

Article 2

Parties

1. Only authorities represented at CEBS ("CEBS Authorities")² will be parties to mediation procedures regulated by this Protocol.

2. By way of exception, when the issue under dispute falls within the scope of Article 1.2 but the CEBS Authority seeking or being requested mediation is not, or is only partially, the national authority competent to deal with it, CEBS Authorities may act in the mediation procedure on behalf of those other national competent authorities, or the non-CEBS competent Authority may join the mediation mechanism directly by signing a joinder agreement. Appropriate arrangements will be made in such cases to associate the relevant non-CEBS Authorities in the mediation process.

3. Mediation requests shall normally be addressed to one single party and shall normally be requested by one single party.

Article 3

² i.e. National authorities being represented in CEBS as envisaged in the European Commission's Decision (2004/5/EC). Please note that in some countries there may be more than one.

Market Participants

Parties may request mediation either on their own initiative or after a market participant has prompted them to do so. It is at the discretion of each CEBS Authority to admit the request of a market participant and initiate the mediation or turn it down. In the latter case the CEBS Authority may communicate the existence of such initial request to CEBS.

Article 4

Gatekeepers

1. Subject to the procedural provisions contained in Section II, each mediation request and procedure shall be organized, managed and supervised by a CEBS Gatekeeper.
2. The following persons will act as Gatekeepers: the Vice-Chair of CEBS or a third CEBS Member designated by the Vice-Chair of CEBS, in consultation with the parties involved in the mediation request.

Article 5

Legal nature

1. Once a dispute has been admitted by the Gatekeeper in keeping with the procedure described in Articles 7 and 8, parties shall be expected to accept mediation requests and cooperate in good faith with the Gatekeeper and the party seeking mediation, with a view to reaching an amicable solution.
2. If, exceptionally, a party refuses to accept mediation request once it has been admitted by the Gatekeeper, such party shall explain in writing the reasons to the Gatekeeper, who will report the event to CEBS in accordance with Article 12.
3. Mediation outcomes shall not have any legal effect, be legally binding or be enforceable. Furthermore, they will not prejudice the initiation of infringement proceedings of the European Commission or the European Court of Justice or national authorities. Moreover, it will not pre-empt or call into question the general European system for monitoring and interpreting EU law.
4. If a party decides not to follow the recommendation stemming from the mediation procedure, it shall explain in writing the reasons to CEBS.

Article 6

Duty of confidentiality

In accordance with Articles 5.3 of the CEBS Charter, mediators, panellists, gatekeepers and members of the Secretariat involved in mediation cases will keep strict confidentiality in respect to the data, documents, findings, discussions and results pertaining to the mediation process, without prejudice to the reporting and information provisions of this protocol.

SECTION II

PROCEDURAL RULES

Article 7

Mediation Requests

1. The party requesting mediation will provide the Gatekeeper and the requested party with a preliminary statement describing the case.
2. The requested party will provide a response in writing within 2 weeks, for the dispute to be assessed by the Gatekeeper in accordance with Article 8.

Article 8

Preliminary assessment

1. Unless the parties agree for the dispute to be mediated, the Gatekeeper will check that the case is covered by the scope defined in Article 1.2 and that the conditions set out in Article 1.3 are met. Furthermore, to determine whether the dispute is eligible for mediation, the Gatekeeper will also assess the following issues:

- All procedural steps to come to an amicable solution under the relevant provisions have been taken.
- The case has been properly articulated, in accordance with the requirements of the applicable CEBS Level 3 measures or EU legislation.
- The grounds for refusal of cooperation envisaged in the provision invoked by the requesting CEBS Authority do apply and have been clearly communicated to the latter

2. The Gatekeeper shall make a decision on the eligibility of the case for mediation within 2 weeks from the response of the requested party and shall communicate his/her decision to the parties and the Chair of CEBS.

If the Gatekeeper concludes that an issue is not eligible for mediation, the requesting party may appeal the Gatekeeper's decision not to admit a mediation request and ask the CEBS Members to review the Gatekeeper's decision. The CEBS Members will analyze the request and communicate their decision to the Gatekeeper within 2 weeks, who will inform the parties accordingly. If the Gatekeeper's decision is upheld, the procedure will come to an end. If the Gatekeeper's decision is not upheld, the mediation procedure will resume.

3. If the Gatekeeper considers that the dispute accepted to mediation hinges mainly on conflicting interpretations of applicable EU legislation, immediately after admitting the case he/ she will inform the parties and, on an anonymous basis, consult the Commission on the conflicting interpretation of the issue at stake. Any views of the Commission, if provided within 3 weeks, shall be taken into consideration in the mediation.

Article 9

Selection of mediation procedures, mediators and panellists

1. If, in accordance with Article 8, a dispute is admitted to mediation, the Gatekeeper will ask the parties to choose, within 3 working days, between the following mediation procedures:

a. An evaluative procedure, involving a Mediation Panel that evaluates the issue and recommends in writing a solution to the parties.

b. A facilitative procedure, involving one single mediator to help the parties to reach a satisfactory solution to the dispute.

2. If no agreement can be reached between the parties on which procedure to follow the Gatekeeper shall make the final decision.

3. In the evaluative procedure, the panel will consist of an odd number of at least three panellists, who will be selected from an expert's list containing experts from CEBS Authorities who volunteer to be involved in the Mediation Mechanism, have the adequate expertise for any of the different issues within the scope of the Mediation Mechanism and appropriate seniority. Volunteers should be proposed by CEBS Members.

4. The list of experts will be agreed by CEBS and reviewed at least on an annual basis. The Gatekeeper will ensure that the respective list of experts is regularly reviewed and updated.

5. In the facilitative procedure, the mediator can be:

a) An expert included in the list described in the previous paragraph, or

b) A CEBS member or, subject to his/her consent, any other officer or employee from a CEBS Authority, or

c) The Gatekeeper, if the parties so agree.

6. The Gatekeeper will appoint the panellists or the mediator, in consultation with the parties, within one week from the selection of the procedure.

7. When selecting mediators and panellists, the Gatekeeper shall ensure an appropriate representation from CEBS Authorities in order to avoid any bias in legal or cultural views that could influence the discussion and the mediation outcome.

Article 10

Evaluative procedure

1. The Mediation Panel will generally decide cases on the basis of documents submitted by the parties to the Gatekeeper. Oral submissions may be

accepted or required on a case by case basis, having regard to the complexity of the issues, the urgency of the matter and what is necessary to ensure the fair consideration of the issue.

2. The Mediation Panel may request any additional information and/or clarification from the parties that is necessary for a sound assessment of the issue.

3. Subject to the parties' consent, if it is understood that the issue would benefit from their views, the Mediation Panel could consult on an anonymous basis the CEBS Consultative Panel

4. When during the course of the mediation it appears that CEBS authorities which are not parties to a procedure could have an interest in the issue being mediated, the Gatekeeper, subject to the parties' consent, will ensure that they are informed on its progress and are able to provide input into the process. Such CEBS authorities, however, will not be able to intervene during the mediation process.

5. After assessing the dispute, within one month from its appointment, the panel shall seek to come to an agreed view on its recommendation. If agreement is not possible, the panel will adopt its recommendation by simple majority voting. Panellists will not be allowed to abstain or make dissenting recommendations. Only the final recommendation, but not the voting results or deliberations, will be disclosed to the parties and the Gatekeeper. The Gatekeeper shall communicate the recommendation in writing to the parties.

6. If exceptionally, following the recommendation by the Mediation Panel, no agreement can be reached between the parties, any of the parties may instruct the Gatekeeper to refer the case to CEBS Members. This shall be done within 2 weeks of the communication of the recommendation to the parties.

7. The CEBS Members considering a matter will agree upon a procedure suitable to the matter in dispute and will draw mainly from the submissions and evidence already gathered in the primary evaluation by the Mediation Panel. If more information or clarification is needed, the CEBS Members will request such information from the parties. After assessing the dispute, the CEBS Members will seek to come to an agreed view on its recommendation. If agreement is not possible, the CEBS Members will adopt its recommendation by simple majority voting with no right to abstain or dissent from the result.

8. If any party does not intend to comply with the outcome of mediation, it shall explain in writing the reasons for non-compliance to CEBS within 2 weeks of the communication of the recommendation to the parties.

If any party does not effectively follow the recommendation within a reasonable period of time, it shall explain, at the request of the other party, its reasons to CEBS.

Article 11

Facilitative procedure

1. The mediator in the facilitative procedure will have all the necessary leeway and flexibility to help the parties to come to an agreement. In doing so, the mediator will respect the equal treatment of both parties.

2. The mediator will inform the Gatekeeper of the result of the mediation.

Article 12

Reporting and publication

1. Gatekeepers will report to CEBS and to the Commission, in an anonymous form:

a. Outcomes of mediation procedures, as soon as possible

b. Mediation requests, accepted or rejected, at least at every CEBS plenary.

2. The market participants directly concerned by the outcome of a mediation procedure will be informed about its outcome by the respective CEBS Authority in due time.

3. In cases where CEBS considers that such publication could encourage supervisory convergence or provide guidance to authorities or market participants, reports or summaries of mediated outcomes will be made public on an anonymous basis. Additionally, at CEBS' discretion, such reports or summaries may be made public, in an anonymous form, through CEBS' Annual Report.

SECTION III

OTHER PROVISIONS

Article 13

Conflicts of interest

1. The Gatekeeper will not be the Chair of either party and will not be otherwise conflicted. Whenever a Gatekeeper is conflicted, he/she shall notify as soon as possible such circumstance to the Chair of CEBS, who, in consultation with the parties, will appoint a CEBS Member as specific Gatekeeper for that case as soon as possible.

2. Mediators, Panellists and members serving on the Panel of CEBS Members will not be representatives of either party and will not be otherwise conflicted.

Article 14

Referral to CEBS Members

In considering referrals to CEBS under Articles 8, par. 2 and 10, par. 6, CEBS Members will normally act through a panel of an odd number of at least three CEBS Members, appointed by the Chair of CEBS for each dispute.

Article 15

Time frames

Bearing in mind the overriding need for mediation to be completed expeditiously, and in all cases within 6 months, Gatekeepers, at their own initiative or at the request of mediators or mediation panels, will be allowed, except for the timeframe foreseen in Article 8.3, to shorten or, when appropriate, extend the time frames set out in this Protocol.

Article 16

Administrative Support

The mediation procedure will be fully supported by CEBS Secretariat which will provide any necessary assistance to the Gatekeeper, the Mediators and Panellists and the Panel of CEBS Members with the view of facilitating the role of those bodies throughout the mediation process and the proper reporting to CEBS in accordance with Article 12.

Article 17

Entry into force of the Protocol

This Protocol shall enter into force on the date of its ratification by CEBS Members.
