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**An evaluation of equivalence of supervisory powers in the EU under the Market Abuse Directive  
and the Prospectus Directive  
A report to the Financial Services Committee (FSC)**

**Summary of key findings**

With the intention of fully playing its role as a network of supervisors, CESR has actively advocated the need for national authorities to benefit from equivalent supervisory powers. The capacity to act on an equal footing for the performance of cross-border investigative, supervisory and sanctioning powers is considered by CESR as a precondition to a credible EU supervisory system. The 5<sup>th</sup> May 2006 ECOFIN Council conclusions recognised the need to achieve greater equivalence of powers. The current mapping and evaluation of powers covers the two directives and their relevant implementing measures applicable for more than two years: the Market Abuse Directive (MAD) and the Prospectus Directive.

As a general comment, it can be said that Member States have seriously taken into account the need to achieve equivalence when granting to their competent authorities the minimum powers envisaged by the directives. The general degree of equivalence is high (on average, 93%), although significant divergences still remain in important points. The overall picture that can be seen in Annexes 1 and 2 of this report is more satisfactory for the Prospectus Directive than for MAD. This might be explained by the fact that the Prospectus Directive is a maximum harmonisation directive. The Annexes identify the individual Member States where further convergence will contribute to better supervisory arrangements in the Union.

In more detail, where divergence still exists (less than 85% of equivalence), it should be noted that several supervisors lack the possibility to issue practical rules to properly apply the directives; in particular with respect to list if insiders and notification of management transactions under the MAD or for the determination of equivalent information under the Prospectus Directive. As regards the general powers to apply the directives, the remaining weak points cover the capacity to disclose supervisory information to the public under the Prospectus directive (register of qualified investors and the publication of Summaries of prospectuses) or under the MAD (disclosure of measures or sanctions to be imposed due to infringements). Authorities are generally well equipped of supervisory, investigative and sanctioning powers except in some cases for the capacity of being informed by issuers if delay in the publication of inside information, the possibility to require telephone and data traffic records, request the freezing and/or sequestration of assets, request temporary prohibition of professional activity or carry on-site inspections of issuers. This affects of course their capacity to cooperate with their foreign counterparts. It should be recognized however that the cross-border supervisory cooperation powers have been significantly harmonised. Still, some areas of improvement remain; in particular the capacity to open an investigation solely on a request by a foreign authority.

This mapping exercise has been a very rich opportunity for CESR members to compare supervisory practices and try to benefit from each other best experiences. It helped also to identify areas of potentially divergent application that can be corrected by further supervisory convergence at Level 3. All this information has been sent to the relevant operational groups of CESR that are currently evaluating the practical functioning of these two directives.

Similar work will be carried out after sometime of functioning of the Transparency Directive and MiFID.



## I. INTRODUCTION

1. In 2004, CESR conducted a mapping exercise on supervisory powers given to securities' supervisors and the relevant results were published as an Annex to the CESR "Himalaya Report"<sup>1</sup>. In 2006, CESR conducted a second mapping exercise that was focused on the powers that CESR authorities have in relation to the Market Abuse Directive (MAD) and the Prospectus Directive (PD) and covered twenty seven (27) jurisdictions<sup>2</sup>, compared to the 2004 exercise which covered only seventeen (17) jurisdictions.
2. Based on the relevant provisions of the two Directives, two extensive questionnaires were drafted to address legislative, regulatory and market differences among jurisdictions. Members were asked to submit their responses by the end of June 2006. Following an extensive analysis of these responses, CESR has prepared six (6) documents in total for publication, the following three (3) documents for each Directive that are attached to this report:
  - A full report;
  - An executive summary; and
  - A correspondence table illustrating with tick boxes the supervisory powers of the competent authorities.
3. This report highlights the main issues in relation to supervisory convergence that CESR wishes to bring to the FSC's attention<sup>3</sup>. There are clearly differences between having a supervisory power and using it. As such, this report covers those areas where there are differences in terms of the powers that have been given to the authorities, and highlights important differences in how these powers are exercised (further details of which can be found in the full reports).
4. This report should be read in conjunction with the attached documents should there be any issue necessitating further analysis or more detailed explanation.

## II. GENERAL CONCLUSIONS

5. As a general observation almost all the authorities have the powers that were granted to them by the MAD and the PD and their respective implementing measures. CESR authorities did not explicitly indicate any further constitutional interpretative constraints regarding sanctions, investigation and rulemaking or conflicts of a constitutional nature in the exercise of respective powers.
6. In relation to powers, the 2004 exercise showed that the regulated markets still retained considerable powers in the areas of the MAD and the PD. The current exercise demonstrates that the situation has changed. According to both MAD and the PD, powers should be with the administrative competent authorities.
7. The MAD provides the competent authorities with the possibility to exercise their powers in collaboration with other authorities or with market operators, under their responsibility by delegation to such authorities or to the market operators or by application to the competent judicial authorities. Although the role of the stock exchanges in relation to market abuse supervision has been diminished, in some jurisdictions, stock exchanges continue to play an important role. This is due to the fact that sometimes the difference between delegating some tasks and delegating the full power is not clear. Some member states have extended the notion of tasks (e.g. in the areas of supervision of the issuers and price sensitive information).

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<sup>1</sup> Preliminary Progress Report "Which supervisory tools for the EU securities' markets? - An Analytical Paper by CESR", October 2004, Ref: 04-333f

<sup>2</sup> The exercise was conducted before Romania and Bulgaria became members of the European Union.

<sup>3</sup> It is important to bear in mind when reading this report, that in cases where there is no reference to a particular CESR member, this is because that member did not respond to the relevant question.

8. The PD gives member states the possibility to allow through their national laws the delegation of specific tasks from the competent authorities to third entities such as the stock exchanges/regulated markets. According to the national laws and regulations implementing the PD, almost half of the authorities do not have the power to delegate tasks relating to the PD (CZ, FI, EE, DE, HU, LV, LT, MT, NL, PL, SK, SI, SE and UK) while the other half does have this power (AT, BE, CY, DK, EE, FR, EL, HU, IE, IT, LU, NO,PT and ES). However, even in the member states that implemented the possibility to delegate tasks (see above) almost all authorities have not used this discretion in practice. Therefore, all the authorities with the exception of one (NO) exercise directly the powers provided for in the PD and its implementing measures. In the case of NO all the powers including the sanctioning ones have been delegated to the stock exchange. In another jurisdiction (IE) the authority has delegated certain tasks to the stock exchange subject to such conditions as the authority specifies. Notwithstanding any delegation the final responsibility for supervising compliance with the PD lies with the authority. Finally, in one jurisdiction (DK) many powers are exercised with application to the judicial authorities.
9. Although as a generalisation, taking both Directives into account it can be said that harmonisation in the area of powers has generally been achieved, there still remains significant divergences in national practices and day to day application of the Directives, particularly in relation to the nature, level and application of sanctioning powers. Furthermore divergences have been observed regarding the interpretation of general terms of the Directives. These issues are being addressed in the context of the operational groups of CESR (Prospectus Contact Group and CESR-Pol) and CESR recognises that more work needs to be done at Level 3 in order for more supervisory convergence to be achieved in these areas.
10. It should be noted that less issues arise out of the day to day application of the PD as compared to MAD. This difference can be attributed to the fact that the PD contrary to MAD is a maximum harmonisation directive.
11. It should be subject to concern and future consideration the contrast of rules, powers and practices amongst Member States that this study has shown. This might unsurprisingly reveal that the minimum harmonization approach of the MAD proves to be seriously detrimental to supervisory convergence in this field
12. The mapping exercise has shown a very diverse picture regarding the degree of experience of CESR members in relation to the exercise of the powers in practice, which could be attributed to the differences in the nature and the size of the national financial markets as well as to the different timeframes of implementation. CESR considers that it would be appropriate to determine how the situation changes overtime by conducting a similar exercise in two (2) years' time that will also cover Bulgaria and Romania.
13. Set out below are some general conclusions about the situation in relation to the powers arising out of MAD and the PD.
  - A. **General conclusions about the situation in relation to the powers arising out of the Market Abuse Directive.**
  14. Regarding the *powers* arising out of MAD, in most of the cases, almost all the authorities have the relevant powers provided for in the directive and its implementing measures with some exemptions (e.g. information the authority has on issuers who decide to delay the public disclosure of information, power to ensure the fair and transparent publication and dissemination of statistics, exemptions, power to require the cessation of activities, power to request the freezing and/ or sequestration of assets and cooperation in investigations) where the authorities are divided between those which have and those which do not have the relevant power. In one jurisdiction (SI) some powers are exercised in collaboration with other entities. In another jurisdiction (IE), the authority has delegated certain functions to the stock exchange subject to such conditions as the authority specifies. Notwithstanding any

delegation, the final responsibility for supervising compliance with the MAD lies with the authority. The authority can also refer to judicial authorities if enforcement issues arise..

15. In relation to *supervisory practices* consisting of supervisory tools, criteria, and the interpretation of general terms of MAD, it is apparent from the mapping exercise that there are similarities and differences. Differences include disclosure to third parties, market manipulation, delay of disclosure, disclosing to the public of measures and sanctions etc. A more intensive use of IT tools has been also identified. To this end, a significant number of authorities have also developed sophisticated IT tools for the surveillance/ monitoring of the market and the detection of market abuse cases.
16. In relation to *administrative measures and sanctions*, all authorities are empowered to take appropriate measures or impose sanctions in the case of infringements of the provisions of the directives. All the authorities except four (DK, EE, FI and NO) can do so directly and the four exceptions can do so in conjunction with application to judicial authorities. In one of these four jurisdictions (NO) sanctions are imposed also in collaboration with the stock exchange.
17. In the 2004 mapping exercise 16% of authorities had no powers in this area at all and so there has been a significant improvement in the degree of convergence in this area. There is, however, quite a difference in the range of sanctions available to authorities and differences were reported concerning the form and the content of a published sanction or measure. A more detailed description of the pecuniary sanctions (administrative fines) is to be found under section 19 of the Report. It should be noted that CESR (in the context of CESR-Pol), following a mandate by the Commission, has undertaken an exercise in order to draw up a list of administrative sanctions and measures that can be imposed for violation of MAD provisions.
18. The outcome of the mapping exercise of 2004 showed a lack of powers with respect to international cooperation. The implementation of MAD seems to have settled this issue in principle. There are no authorities that are not equipped with respective powers on the *exchange of information and international co-operation*.
19. It should also be noted that CESR-Pol has prepared a Service Level Guidance (ref CESR CESR/03-191) dated 16 June 2003. This document sets out the common position of the members of CESR-Pol on how they wish to see their requests for assistance under the multilateral MOU to other members treated and how they will treat requests addressed to them.

#### **B. General conclusions about the situation in relation to the powers arising out of the Prospectus Directive**

20. In relation to the *powers* arising out of the PD and its implementing measures, all CESR authorities are the designated central competent authorities in their respective country.
21. In the 2004 exercise an overwhelming majority of CESR members did not have *the power to transfer supervisory powers to another securities' regulator in another member state*. The PD is the only Directive of the securities' sector that introduced the possibility for an authority to transfer the power of approval of the prospectus to the competent authority of another member state without however compelling it. The transfer of power should be differentiated from the delegation of specific tasks in the sense that it entails the transfer of responsibility arising out of the exercise of the transferred power. All the authorities but two (DE and LV) have the power to transfer the approval of a prospectus to the competent authority of another member state. However, in practice, almost all the authorities that have this discretion have not used it yet<sup>4</sup>. Only one authority (ES) reported a case of transfer of the approval to another competent authority of the EU (UK).
22. Regarding the main purpose of the PD i.e. *the power to approve the prospectus and the supplement* all the authorities with the exception of one (NO) have this power. In NO this

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<sup>4</sup> Please note that this situation has improved since the exercise was conducted.

power has been delegated to the stock exchange. In one jurisdiction (IE) the authority has delegated certain tasks relating to the scrutiny of prospectuses to the stock exchange but the power of approval lies with the authority as provided in the PD.

23. In relation to *supervisory practices*, consisting of supervisory tools, criteria, interpretation of general terms of PD, some similarities but also some divergences came out of the mapping exercise. In order to supervise the obligation to publish a prospectus and a supplement as well as the use of the exemptions, authorities use different practices, approaches and tools depending on the nature and the size of their markets. Some authorities follow a more proactive approach (AT, CY, FR, PL, PT, SE and IT) in the sense that they monitor on a regular basis their markets though others (e.g. UK) undertake a risk-based approach. Regarding the supervision of the exemptions, on average the authorities apply ex post supervision. This includes the usual tools of supervision and sources of information for the violations including the monitoring of the media, complaints from market participants or investors, whistle blowing, information exchange between the different departments of the authority, reports provided by the stock exchange, announcements made and web-spidering. Authorities interpret the general terms of the PD such as “as soon as possible”, “as soon as practicable”, “if possible in advance of the offer” differently.
24. Interestingly, IT is used extensively for different purposes such as:
- supervision e.g. in order to monitor that the prospectus, the base prospectus and the registration document is not published prior to the necessary approval, web-spidering is as a source of information on possible violations of the provisions of the PD
  - as means of publication: e.g. publication of the prospectus or the annual document on the website of the issuer or of the competent authority.
  - as means of communication with the issuer e.g. notification of the issuer about the approval of the prospectus by electronic means such as fax and e-mail
25. Regarding the *administrative measures and sanctions* to be imposed in case of a failure of the issuer to comply with the obligation to publish a prospectus, most authorities have the power to impose the administrative measures provided to them by the PD as well as the sanctions provided by national legislation. In one jurisdiction (NO) the sanctioning power has been delegated to the stock exchange. In two jurisdictions (DK and FI) the sanctioning power is exercised in collaboration with the stock exchange. In some other jurisdictions (FR, DE, DK, SI, SE, ES) judicial authorities can also impose sanctions for violations of the PD provisions. The pecuniary sanctions (fines) to be imposed by the administrative authorities are different and they are listed on a table under section 20 of the full report.
26. The area of *international cooperation* is one where great progress has occurred. According to the findings, all the authorities but one (NO) have the power to provide direct assistance to foreign regulators in cases where there is shared competence or when the approval has been transferred. All the authorities but two (NO and SI) are required to provide assistance to the competent authority of other Member States, when requiring suspension or prohibition of trading for securities traded in various Member States. Moreover, all the authorities but three (MT, NO and SI) are required to provide assistance to the competent authority of a host Member State from the stage at which the case is scrutinised. Summing up, it appears that the authorities possess a certain amount of powers in order to cooperate with the other authorities. However, some differences regarding the perception of the cooperation to be provided seem to exist.
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### III. SPECIFIC CONCLUSIONS

#### A. Supervisory powers under the Market Abuse Directive

27. The following section of this report highlights the areas of differences that exist amongst the CESR members as well as some issues of interest in relation to the nature of powers and their use for the MAD.

##### **Accepted Market Practices**

28. All the authorities, except NL have directly the power to accept market practices in accordance with the guidelines issued by CESR. The NL regulator only has the power to advise the Minister of Finance on the suitability of accepting a particular market practice. However, there is little experience to report with regard to accepted market practices.

29. In determining whether or not a particular market practice can be considered to be “acceptable”<sup>5</sup>, DK, IE, IT, LU, NO, SE and the UK may consider factors other than those set out in the relevant directive when making this determination, as provided for in the MAD implementing measures. It is important that competent authorities while considering the accepted market practices consult with the competent authorities in the framework of CESR with a view to avoid different approaches for comparable markets.

##### **Access to inside information and list of insiders**

30. All the authorities except SE and NO have the powers necessary to establish whether or not an individual has access to inside information and to ascertain whether or not relevant persons misuse inside information with the view of imposing administrative sanctions or measures. In SE and NO although the authorities have investigatory powers they do not have the power to decide whether or not an individual has had access to inside information since the decision lies with the criminal authority.

31. The authorities rely on a wide range of supervisory tools to ascertain whether abuse of inside information has taken place. In particular, many authorities use IT-based surveillance systems (AT, DE, ES, FR, HU, IE, IT, LT, NL, PL and UK) in addition to the usual tools such as analysis of media, co-operation with stock exchanges or on-site inspections. The report provides more detailed information regarding the supervisory tools in Sections 2 and 5a.

32. Seventeen authorities (AT, CZ, DE, DK, EL, ES, FI, FR, IS, IE, IT, LT, SI, MT, NO, LU, UK) issue rules and/ or regulations with respect to the list of insiders. Ten authorities (BE, CY, HU, EE, LV, NL, PL, PT, SE, SK) do not issue such regulations either because they do not have the power or because they do not deem it necessary, since they consider that the relevant provisions of their law, which has transposed the MAD in their domestic legislation, cover sufficiently this topic.

##### **Monitoring Market Manipulation**

33. There is a difference in the way that the authorities can exercise their powers in monitoring market manipulation. AT, BE, CY, CZ, DE, EE, EL, ES, FR, HU, IE, IS, IT, LT, LU, NL, PL, PT, SK and UK have the necessary supervisory tools to directly monitor and prevent market manipulation. In contrast the following authorities (DK, IE, FI, LV, MT, NO, SE and SI) exercise this power in collaboration with the stock exchange. Significantly, FI can only exercise this power with application to judicial authorities.

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<sup>5</sup> Namely the extent to which additional factors to those indicated in Art. 2.1 of the implementing measure 2004/72/EC are taken into account.

34. In detecting market manipulation, the supervisory authorities make extensive use of IT-tools, although only eleven authorities have reported to have special supervisory IT tools (see above under paragraph 31).

**Publication of inside information and delay of disclosure and provisions for informing the public- Publication and dissemination of research- Publication and dissemination of statistics**

35. All CESR members other than SE and DK have the power to directly monitor whether or not the issuers inform the public as soon as possible of the publication of inside information. In SE, it is the regulated market that does the monitoring and the authority monitors the regulated markets. In IE, EE and FI this power is exercised directly and in collaboration with the stock exchange. In DK, the power is delegated to the stock exchange. In the above jurisdictions stock exchanges continue to play an important role in this area.
36. This is an area where the MAD gives a lot of options/ discretion and therefore we have two categories in an area where there is a notable difference between CESR members in relation to the requirement of issuers to notify the authority without delay should they decide to delay the public disclosure of inside information. Of the 27 members surveyed, only fifteen AT, BE, CY, CZ, ES, FI, HU, IT, LT, LV, NO, MT, PL, SI, SK require this, and the other 11 DE, DK, FR, EL, IS, IE, LU, NL, PT, SE, UK do not (although SE requires that such notification be made to the regulated market).
37. Having two categories has some consequences for the monitoring powers of the regulators. The nature of a member's supervisory response to non disclosure would depend on whether or not the regulator must be informed of an issuer's delay in disclosing inside information. If it must be informed, then non-compliance would be addressed with the usual range of sanctions. Where the delay is in accordance with the law then of course no intervention would be necessary. The jurisdictions which do not require the issuer to inform the authority without delay would hold the view that there are legitimate reasons why an issuer might wish to delay disclosure. This needs to be coupled with sufficient examination processes and methods for whether or not delays are appropriate.
38. All jurisdictions but SE monitor what issuers do to ensure the confidentiality of delayed information. SE does not have this power itself since it has delegated it to the stock exchange. Ensuring the confidentiality of delayed information is a significant issue as it is closely related to the obligation of issuers to inform the public as soon as possible of inside information which is related to them. If an issuer decides to delay the public disclosure of inside information under his responsibility, such a delay should not mislead the public and the issuer should ensure the confidentiality of the delay information.
39. All countries except EE and SI regulate the production and dissemination of research. In SI there is a provision in the law on this issue, but the authority states that it does not perform daily supervision. A number of countries (AT, EE, DE, NL) have advised that they also intend or have already issued additional regulations and/or guidelines regarding the production and dissemination of research, other countries consider that the measures provided in the MAD are sufficient in this regard.
40. Although self-regulatory bodies of journalists exist in most jurisdictions, meaning that journalists are subject to self-regulatory provisions, in some of them (AT, CY, CZ, FI, HU, LT, LU, MT and PT), the self-regulatory provisions for journalists are not recognized by the respective supervisory authorities.
41. Ensuring that those institutions that disseminate statistics that are liable to have a significant effect in financial markets do so in a fair and transparent manner is important. The exercise revealed that only 16 CESR members (BE, DE, EL, DK, AT, FR, MT, PT, ES, LV, IS, SK, IT, CZ, CY and UK) have the power to directly do so, in contrast 9 have no such power (EE, LU, FI, NO, LT, IE, NL, SI and PL) and two (SE and HU) do so in collaboration with other institutions.

**Supervisory and administrative powers /administrative measures and sanctions**

42. In order to be able to carry out their responsibilities under the market abuse directive, there are a number of administrative powers, measures and sanctions that have been given to competent authorities under the provisions of the directive and its implementing measures.
43. This headings below highlight those areas where there is considered to be a significant difference in the powers that some CESR members have been given. It should be noted, that several Member States have reported that there still is a lack of experience in the application of the respective provisions of the directive.

**Require existing telephone- and data traffic records**

44. In order to be able to conduct an investigation into whether or not market abuse has occurred, it is necessary for the relevant authority to be able to have access to telephone and other forms of data traffic records.
45. All member states (except NO, ES and FI) have the power to require existing telephone and existing data traffic records. However, several supervisors (AT,CY,EE, NL, NO and SE) indicated that they had encountered resistance from telecom providers in obtaining information pertaining to call data.

**Request freezing and/or sequestration of assets**

46. The ability to freeze and sequester assets is an important tool in deterring market abuse.
47. All authorities but five members ( FI, DE, ES NL, SE) have the power to freeze or sequester assets directly, in collaboration or in application to judicial authorities.

**Administrative measures and sanctions**

48. The ability of CESR members to take administrative measures or impose sanctions on those who do not comply with the relevant provisions is very important because this is what really gives the authorities the power to exercise effectively their tasks. Moreover, differences in the nature and the amount of administrative sanctions could result in regulatory arbitrage. Given the importance of this topic, the European Commission is currently undertaking an exercise to map and publish a list of the administrative measures and sanctions under the MAD and its implementing measures.
49. The CESR mapping exercise revealed that there are some differences as follows:
50. SE – is only empowered to impose administrative measures or sanctions for violations of reporting obligations, LV is only empowered to impose administrative measures or sanctions for violations of reporting obligations and can not impose administrative sanctions for financial crime as it is investigated and decided by the police, in DK enforcement against those sanctioned by the authority is done by the police. In NO, only the police are empowered to impose financial fines, in FI, the power to impose financial penalties lies with the court, and EE has the power to impose administrative sanctions, except in cases of misuse of insider information which must be forwarded to the public prosecutor for criminal proceedings.
51. A number of jurisdictions (e.g. CY, CZ, DE, EL, HU, IE, IT, MT, LT NL, PL, PT, ES and UK) have advised that criminal sanctions can also be imposed for market abuse cases. It should be noted that under the MAD it is left to the discretion of the member states to provide in their national legislation the possibility of also imposing criminal sanctions for market abuse cases.



### **Power to determine the measures/sanctions imposed**

52. The ability to determine what administrative measure should be taken or sanction imposed is important in deterring market abuse and dealing with non compliance. All the authorities have the power to directly determine the measures and/ or sanctions that could be imposed, however not all members are able to exercise their powers in this respect in the same way. In IE, while the authority has the power to determine and impose the sanction, it may apply to the Court to confirm the sanction, in DK the authority can order those who do not comply with the provisions of the directive and its implementing measures to do so, but is reliant on the police for enforcement of those orders.

### **Imposing sanctions for failure to cooperate in an investigation**

53. Only 21 CESR members (BE, CY, CZ, DE, DK, EE, EL, ES, FR, HU, IC, IT, LT, LU, MT, NL, PT, SE, SI, SK and UK) are empowered to directly impose sanctions for failure to cooperate in an investigation under article 12 of the Directive.
54. In FI, the authority can only fine regulated entities (which means that in reality if it needs cooperation from anyone else it is not empowered to get it). Four authorities (IE, LV, PL and NO) have to apply to judicial authorities in order to be able to sanction for lack of cooperation.
55. In IE, the matter is a summary offence prosecutable by the competent authority only in court. In LV if the person does not reply to the authority twice during a year, the authority will send the case to the public prosecutor and there is criminal liability.
56. In AT the authority has delegated this power. The competent authority has to apply to the District Administrative Agency for execution of orders.
57. In DK, the competent authority has the power to give orders to persons who do not comply with the provisions but the orders are enforced by the police. The competent authority can also fine regulated entities as a coercive measure if a legal person does not provide the authority with information or fails to comply with a decision of the authority.

### **Disclosing measures and sanctions**

58. The disclosure of measures and sanctions is a very important measure that creates pressure on market participants through the tactic of “naming and shaming” however according to the directive discretion is given to the authorities as to whether or not they disclose them. As a general observation it should be noted that the situation in this area is good and this is an important achievement of the MAD.
59. BE, CZ, EL, ES, FR, HU, IE, IS, IT, LT, LU, LV, MT, SK, NO, PL, and SI stated that they disclose directly to the public every measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of the MAD, unless such disclosure would seriously jeopardize the financial market or cause disproportionate damage to the parties involved. AT, CY, DK, EE, FI, DE, NL, PT, SE, and UK do not disclose every respective measure and sanction as they exercise their discretion not to.

### **CESR Members’ co-operation and assistance powers**

60. In addition to the powers already described above that are necessary for each authority to be able to carry out its responsibilities in relation to the regulation of its domestic markets, the ability to cooperate and assist fellow authorities in investigating market abuse is crucial.
61. All the authorities have the powers to co-operate with each other and exchange information and documents. They can render assistance by requesting documents in any form whatsoever, by requesting information from any person, including those who are successively involved in

the transmission of the orders and by requesting information from any person, including those who conduct the operations concerned, as well as their principals. There have been no cases of refusals by CESR members to provide assistance to another competent authority member of CESR after the implementation of the MAD. In all jurisdictions the information supplied would be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the relevant competent authorities receiving the information are subject.

62. The following can be reported in detail:

**Requiring existing telephone- and data traffic records**

- All the authorities, except FI, SI and ES, have the power to render assistance by requiring existing telephone and existing data traffic records. BE, IS, and IT can exercise the power to render assistance by requiring existing telephone and existing data traffic records with application to judicial authorities.

**Requiring the cessation of practices**

- All the authorities, except SI, have the power to render assistance by requiring cessation of any practice that is contrary to the provisions adopted in the implementation of the MAD.

**Suspending trading**

- All the authorities, except SI, have the power to render assistance by suspending trading of the financial instruments concerned.

**Requesting the freezing of assets**

- AT, CZ, FR, DE, EE, EL, HU, IS, IT IE, LU, LV, NO, PL, PT and UK have the power to render assistance by requesting the freezing and / or sequestration of assets. BE, DK, IT, LT, MT and SE have this power with application to judicial authorities. CY has the respective power if the investigated activity falls within the scope of application of the national law or otherwise and if the case involves money laundering it might be directed to the national agency for the prevention and investigation of money laundering (MOKAS). ES, FI, NL and SI do not have the power to render assistance by requesting the freezing and / or sequestration of assets.

**Temporary prohibition of professional activity**

- All the authorities, except DK and SI, have the power to render assistance by requesting temporary prohibition of professional activity. BE and IS have the power to render assistance by requesting temporary prohibition of professional activity with application to judicial authorities.

**Opening an investigation solely on request of a foreign authority**

- All the authorities except SI have the power to directly open an investigation solely on a request from a foreign authority (without self interest in this investigation).

**Timely provision of assistance**

- All the authorities have the power to act immediately upon request of a foreign authority to immediately (a) supply any information required and (b) take measures to gather the required information. CY, FI, PL, MT, NL, and NO mention that there is not a definitive timeframe in the MAD apart from “immediately” and that national definitions vary from “as soon as possible” to “without delay” to “soon as practicable”. All the authorities endeavour to revert with information to the requesting authority as quickly as possible.

## B. Supervisory Powers under the Prospectus Directive

63. This section of the report highlights the differences found in powers and supervisory practices amongst CESR members, as well as other issues of interest in relation to the day-to-day application of the powers given to the authorities by the relevant provisions of the prospectus directive.

### Delegation of tasks

64. All CESR members were designated as the central competent authorities in their jurisdictions. In the case of AT, IS and ES, other administrative authorities have also been designated in relation to arrangements for approval and publication of the prospectus.
65. Half of the authorities do not have the power to *delegate certain tasks* (CZ, FI, EE, DE, HU, LV, LT, MT, NL, PL, SK, SI, SE, UK) while the other half do have this power (AT, BE, CY, DK, FR, EL, HU, IE, NO, IT, LU, PT, ES). However, little delegation has been evidenced other than in the case of NO which is the only authority that has delegated all its powers under the PD to the stock exchange including supervisory and sanctioning powers.

### Register of qualified investors

66. Although all authorities, except SE who decided not to create it, have the *power to create* and supervise this register, four members (CY, DK, CZ and PT) have not yet created it. Several members reported that as of June last year they had not received any applications for inclusion in the register.
67. Moreover, a certain divergence is noted in relation to the *accessibility of the register* in different Member States. In some jurisdictions the register is publicly available, while in others the register is only available upon request. In four jurisdictions (CY, FR, LT and SE) the register is not available to issuers. This unavailability means that in those jurisdictions the issuer is not able to determine whether or not an individual is on the list of qualified investors.
68. Some authorities raised concerns related to *data protection*, because authorities do not wish to make the register a tool for solicitation.
69. Taking into consideration the need to ensure an adequate level of data protection while making the register available to all issuers, CESR will consider the need for harmonising the reported divergences in this area.

### Prospectus – obligation to publish, monitoring of documents, exemptions, equivalence of information and responsibility for the information

70. There are different techniques and approaches amongst the CESR membership relating to how to supervise the obligation to publish a prospectus before a public offer of securities or admission to trading on a regulated market is made, the monitoring of the relevant documents, use of exemptions, assessment of equivalence of information, as well as in relation to the timing and means of publication of the annual document. The most significant of these areas is set out below
71. All authorities have the power to ensure that public offers of securities are not made without *prior publication of a prospectus*, either through the use of a direct power for most authorities, or through the exercise of the power with application to a judicial authority (AT, and DK), or even through the delegation of the power to the stock exchange (NO). For admission to trading, in some jurisdictions (BE, IS, LT and PL) this power is exercised in collaboration with the stock exchange which means that both the authority and the stock exchange supervise that the admission to trading on a regulated market does not take place without the prior publication of a prospectus, but the responsibility to ensure this does not happen rests with the authority.
72. Although all Member States incorporated the relevant provisions in their legal frameworks, different approaches are apparent concerning the correct application of the different *exemptions*. Apart from the case of NO where all the powers on this subject, including the

power of supervision and sanctioning have been delegated to the stock exchange, most of the authorities have a direct power, with the following exceptions:

73. Exemptions provided in Article 3.2 - IS exercises this power in collaboration with the stock exchange.
74. Exemptions provided in Article 4.1 - MT exercises this power in collaboration with the stock exchange
75. Exemptions provided in Article 4.2 - AT, (in application with judicial authority), LT and IS exercise this power in collaboration with the stock exchange.
76. Exemptions provided in Article 5.2 - MT, FR and ES exercise this power in collaboration with the stock exchange.
77. The authorities from DE, FI, HU, IS, LT, NO, PL and SE do not have the *power to issue rules* or regulations determining *the equivalence of information provided for in Article 4*. NO delegated this power to the stock exchange. In the case of DE, in certain circumstances, the power to adopt rules may be delegated to the authority by the Ministry of Finance and Justice.
78. Regarding the power to *ensure that equivalent information is provided* where the situation of *Article 8.3* applies, all authorities exercise this power directly, except NO who has delegated this power to the stock exchange and CZ who has no powers on this area. The situation changes when it comes to the *power to issue regulations* determining what information will be considered as equivalent. AT, BE, DE, CZ, FI, EL, HU, IS, LV, NO, PL, SE, LT and ES do not have this power. In NO this power rests with the Ministry of Finance.
79. Regarding the area of the *responsibility for the prospectus and the summary*, all authorities have the power to ensure that those persons set out in the Directive are made responsible for the information provided in the prospectus and the summary. In NL this issue is regulated by the Civil Law. All members (except CZ, DK, LV, NL and SE) indicated that within their jurisdictions additional persons were indicated as responsible for the information provided in the prospectus. For instance the following additional persons were identified: the prospectus controller or drafter (AT, CY), the auditors (AT, FR, , IT, PT, SI), several financial intermediaries (AT, FR, EL, PT) and other persons designated as responsible in the prospectus (ES, IE, LT, UK, PT).
80. Almost all authorities have the power to *prohibit the publication of a prospectus* until it has been approved. CY does not have this power; AT exercises this power with application to judicial authority and NO has delegated this power to the stock exchange.
81. All the authorities have powers to ensure that the filing of the prospectus with the relevant authority occurs before its publication and that it is made available to the public as well as the power to monitor the validity of the prospectus. All the authorities except MT and NO have powers to ensure that the publication of the final price and amount of securities to be issued are filed and published. In MT this power rests with the Registrar of Companies and NO has delegated this power to the stock exchange. Also almost all authorities have the power to supervise the *advertising activity* of the prospectus as home Member States, NO has delegated this power to the stock exchange and SE exercises this power it in collaboration.
82. However some difficulties have been encountered in monitoring the compliance of advertising activity when acting as the *host Member State*, due to the fact that they are not the competent authority responsible for the supervision of the advertisements in relation to a prospectus that was approved by another authority.

### European Passport

83. The procedure followed when *passporting a prospectus* seems to be functioning rather well<sup>6</sup>. All the designated authorities have the relevant powers when acting as host member states and do not undertake any approval or administrative procedure in relation to the passported prospectus. An exercise of statistical data gathering regarding the number of passported prospectuses is currently being undertaken by the relevant CESR expert group.

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<sup>6</sup> Please note that this report reflects the situation that existed in June of last year, prior to an assessment by market participants of this issue which has subsequently revealed a number of divergent practices in this area.

84. Some issues have been highlighted regarding differences in the level of day-to-day application of the passporting of the supplements to the prospectus. For instance DE stated that when a prospectus has been passported to another member state, the subsequent supplement is not automatically passported. On the contrary in IE the default position is that supplements are automatically passported. NO declares to have difficulties in assessing the need to require a supplement when a prospectus has been passported to it.

#### **Transfer of approval**

85. Almost all authorities (except DE and LV) have the *power to transfer the approval* of a prospectus to the competent authority of another Member State, but half of them reported that in practice the transfer of approval has not taken place. In one jurisdiction, NO, the power of approval of prospectus has been delegated to the stock exchange, which means that the power to transfer the approval to the competent authority of another member state will also rest with the stock exchange. This delegation of powers was decided by the Ministry of Finance and the authority refers that, so far, no specific difficulties have been reported.

#### **Supervisory powers, tools and sanctions**

86. Although the situation has improved due to the implementation of the PD, the mapping exercise shows that some members still do not have the *power to issue regulations* in specific situations, as detailed in paragraph 77 and 78 above.
87. All authorities have the direct power to *suspend a public offer or admission to trading* for a maximum of 10 consecutive working days with exception of NO which power has been delegated to the stock exchange. However the situation is different concerning *prohibition of trading on a regulated market*. CZ only has powers to suspend trading for a maximum of six months and in DE this specific power is within the competence of the Stock Exchange. FI exercises this power with application to the judicial authority and in NO this power has been delegated to the stock exchange.
88. As for the *prohibition of a public offer*, EE does not have this power, FI exercises it with application to the judicial authority and NO delegated it to the stock exchange.
89. All authorities (except NO, DE, DK and PL) have the power to carry out *on-site inspections* in their territory in order to verify compliance with the provisions of the PD and its implementing measures. The NO authority states that it has other control systems in place. In DE this competence lies with the German State Stock Exchanges Supervisory Authority and in DK the authority can only carry out on-site inspections on financial companies.
90. All the authorities but NO have the direct power to impose *administrative measures and sanctions in case of infringements*, and the mapping exercise revealed the exceptions and several different approaches. In NO these powers are delegated to the national Stock Exchange and in ES the regulator can not impose sanctions for very serious infringements since this power rests with the Ministry of Finance. As an issue of interest in ES the regional governments, which can supervise their regional exchanges, also have the power to impose administrative sanctions. As for DK and FI, certain sanctions are imposed with application to the judicial authority (market court).
91. This exercise also revealed that the same infraction may lead to different types of administrative measures or sanctions being taken by the authorities. For example in some case administrative measures such as suspension or prohibition of the offer by the competent authority are used while in others administrative sanctions, fines, or it may lead to penal sanctions are used. In most jurisdictions, the publishing of a prospectus without prior approval may lead to administrative measures. In addition in BE, CY, AT, FI, PL and UK it can lead to penal sanctions. The different administrative measures and sanctions as well as the range of administrative fines also vary significantly among members. A non exhaustive list has been drawn up as an example in section 20 of PD full report.



### Cooperation between authorities

92. The original exercise showed a lack of powers with respect to international cooperation in areas felt to be particularly critical such as accounting, auditing and corporate governance. Implementation of the PD provides the competent authority with the power to request information from issuers, auditors and more broadly from those involved in the offering process.
  93. Almost all authorities now have the power to *provide direct assistance* to foreign regulators in cases where there is a shared competence or when the approval has been transferred. The exception is NO whose delegation of all powers under the PD may create problems concerning cooperation, as the designated authorities will have to depend on the Norwegian stock exchange. CESR notes that in SI the law does not contain any special provisions, which means that the authority applies the general provision for mutual cooperation.
  94. All the authorities (except NO and CZ), when acting as the host Member State have the power to communicate to the home authority irregularities or other violations committed by the issuer or the financial institution in charge of the public offer, and to take all the necessary appropriate measures.
  95. The lack of actual practice in the implementation of the directive to date makes it difficult to draw clear conclusions in this area. Members highlight the fact that cooperation that can take place at a CESR level, especially in cases of new securities, complex products and multiple offerings/listings, as well as when an authority requests either suspension or prohibition of trading of securities traded in various member states may be a significant requirement for the smooth functioning of markets.
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## ANNEX 1: POWERS OF CESR MEMBERS IN RELATION TO THE MARKET ABUSE DIRECTIVE

Note that No distinction has been made in relation to how the powers are exercised unless indicated to the contrary

Figure 1. CESR Members' powers in relation to the Market Abuse Directive

Q	CESR Members have the power to ...	% Members with no power
1	... accept market practices in accordance with EC Guidelines	96 NL
7	... establish whether or not an individual has access to inside information	93 BE, NO (See Para 50 for explanation)
8	... ascertain whether or not relevant persons do not misuse that information as described in Art.2.1	93 BE, NO (See Para 50 for explanation)
9	... ensure that the prohibition in Art. 2.1 applies to the person(s) described in Art. 2.2	93 BE, NO (See Para 50 for explanation)
13	... monitor and prevent market manipulation	100
14	... monitor whether or not an issuer informs the public according to Art. 6.1	96 BE
15	... supervise whether the provisions reg. public disclosure provided for in Dir. 2003/124/EC are followed	100
16	... be informed by issuers without delay should they decide to delay public disclosure of inside information	59 DK,FR,DE,EL,IS,IE,LU,NL,PT,SE,UK
17	... issue regulations with respect to the list of insiders referred to in Art. 6.3	63 BE,CY,HU,EE,LV,NL,PL,PT,SE,SK
20	... issue regulations with respect to the notification of transactions referred to in Art. 6.4	89 HU, LV, SE
24	... monitor whether or not the provisions of Art. 6.5 are adhered to	100
26	... regulate structural provisions adopted by regulated markets to prevent market manipulation	96 CY
31	... ensure that public institutions that disseminate statistics do so in a fair and transparent way	63 EE,LU,FI,NO,LT,IE,NL,SI,PL
38	... supervise the exemptions of Art. 7	52 CZ, DK, EE, IS, IE,FR,LV, MT, PL, SI, SE, EI

Figure 2. Supervisory and investigatory powers (Art. 12); admin. measures and sanctions (Art. 14)

	CESR Members have the power to ...	% Members with no power
43a	... have access to any document in any form whatsoever, and to receive a copy of it	100
43b	... demand information from any person	100
43c	... carry out on-site inspections	100
43d	... require existing telephone and data traffic records	89 FI,NO,ES
43e	... require the cessation of any practice that is contrary to the provisions adopted in the Directive	100
43f	... suspend trading of the financial instruments concerned	100
43g	... request the freezing and/or sequestration of assets	78 FI, DE, NL, SE, ES
43h	... request temporary prohibition of professional activity	85 DK, DE, NL, SE

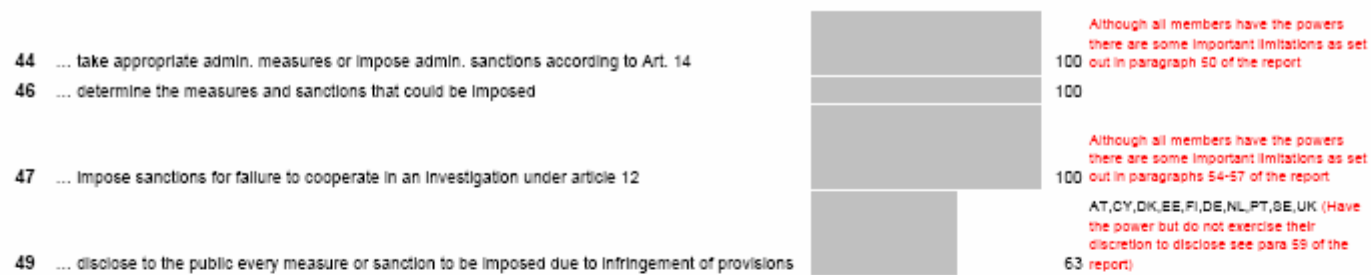
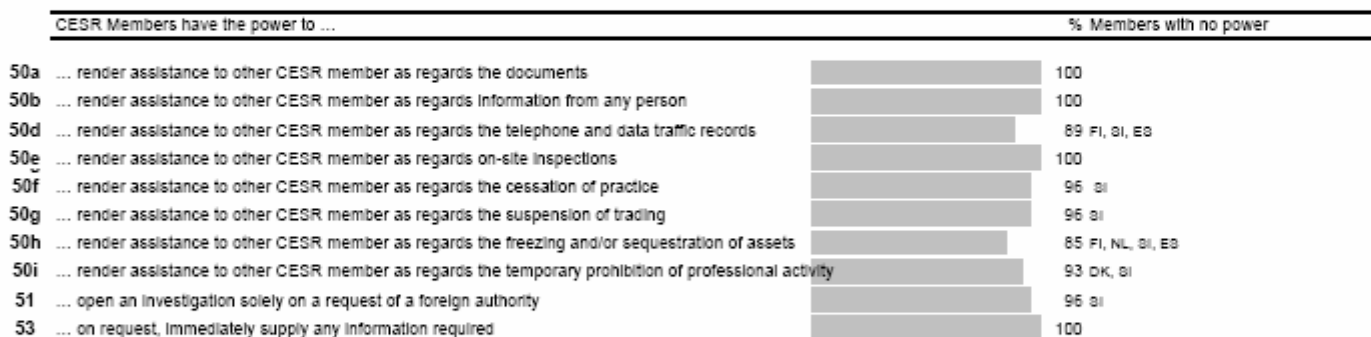


Figure 3. CESR Members's cooperation and assistance powers



## ANNEX 2: POWERS OF CESR MEMBERS IN RELATION TO THE PROSPECTUS DIRECTIVE

Figure 4. CESR Members' powers in relation to the Prospectus Directive

**NOTE:** These tables reflect only the position of those Members who have no power on a specific issue. Differences in how these powers are exercised (for example delegation and powers exercised in collaboration with the stock exchange or with application to judicial authorities are not reflected here. Note that the fact that in Norway all the powers have been delegated by law to the stock exchange is also not reflected in this table.

Q	CESR Members have the power to ...	% Members with no power
1	... create and supervise the register of the qualified investors	96 SE
3	... ensure that the register of qualified investors is made available to issuers	85 CY, SE, LT, FR
5	... ensure that public offers are not made without prior publication of a prospectus within your territory	100
6	... ensure that the exemptions of Art. 3.2 are being applied correctly	100
7	... ensure provisions set out in Art. 3.3	100
8	... ensure that the exemptions of Art. 4.1 are being applied correctly	100
9	... ensure that the exemptions of Art. 4.2 are being applied correctly	100
11	... issue rules/regulations determining the information that would be considered equivalent (Art.4)	70 DE, FI, HU, IS, LT, PL, SE
13	... ensure that the exemption provided in Art. 5.2 is being correctly applied	100
19	... ensure that the final offer price and amount of securities is filed and published	96 MT
21	... ensure the equivalence of information where Art. 8.3 applies	96 CZ
21	... issue rules/regulations determining the information that would be considered equivalent (Art.8.3)	AT, BE, CZ, DE, FI, EL, HU, IS, LT, LV, NO, PL, SE, ES
22	... monitor that the documents referred to in Art. 9 are only valid for a period of 12 months	100
23	... ensure that the document referred to in Art. 10.2 is published annually by the relevant issuers	100
24	... ensure that the document is filed with them after the publication of the financial statement	100
25	... ensure the compliance of disclosure requirements with regard to the document	100
26	... ensure that the exemption provided for in Art. 10.3 is correctly applied	100
27	... ensure that documents incorporated by reference in prospectus are those permitted in Art. 11.1	100
28	... ensure the inclusion of a cross reference list where applicable in accordance with Art. 11.2	96 CZ

Figure 5. CESR Members's powers related to arrangements for approval and publication of the prospectus (Chapter III of the Directive)

CESR Members have the power to ...	% Members with no power
29 ... approve prospectuses	100
30 ... prohibit the publication of a prospectus until it has been approved	96 CY
34 ... transfer the approval of a prospectus to the competent authority of another member state	93 DE, LV
35 ... ensure that the approved prospectus is filed	100
36 ... publish on their websites all the prospectuses approved or a link over a period of 12 months	100
38 ... ensure that the prospectus is made available to the public in time and in the way required by Art. 14.1	100
40 ... supervise the compliance of advertising activity with the principles referred to in Art. 15	100
41 ... ensure that the supplement to the prospectus is produced and published in accordance with Art. 16	100
43 ... accept the validity of the prospectus and any supplements thereto approved by the home MS (Art. 17.1)	100
45 ... require the publication of a supplement when significant material mistakes or inaccuracies arise	100
46 ... provide the host CESR member with a certificate of approval and with a copy of the said prospectus	100
56 ... approve prospectuses ... issuers having their registered office in a third country	98 MT

Figure 6. CESR Members's powers set out in Art. 21 and sanctions

CESR Members have the power to ...	% Members with no power
63a ... require issuers etc. to include in the prospectus supplementary information for investor protection	100
63d ... suspend a public offer or admission to trading for a maximum of 10 consecutive working days	100
63e ... prohibit or suspend advertisements for a maximum of 10 consecutive working days	98 EE
53f ... prohibit a public offer if they find that the provisions of the Directive have been infringed	98 EE
63g ... suspend or ask relevant regulated markets to suspend trading for a maximum of 10 consecutive days	93 DE, EE
63h ... prohibit trading on a regulated market if it finds that the provisions of this Directive have been infringed	93 CZ, DE
63i ... make public the fact that an issuer is failing to comply with its obligations	100
64d ... carry out on-site inspections in order to verify compliance with provision of this Directive	85 DK, DE, NO, PL
67 ... render assistance to other CESR members when the approval of prospectus was transferred	98 NO
73 ... impose administrative sanctions or measures with respect to violations of this Directive	100 Infringements Note that ES is unable to impose sanctions for serious infringements
76 ... disclose to the public every measure or sanction that has been imposed	96 DK