THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Date: June 2007
Ref: 07-380

REPORT ON CESR MEMBERS' POWERS UNDER THE MARKET ABUSE DIRECTIVE AND ITS IMPLEMENTING MEASURES

IMPORTANT NOTICE

In the interest of transparency and in order to inform interested parties, CESR is publishing this document relating to CESR Member's responses to a questionnaire regarding the nature and extent of powers in relation to the Market Abuse Directive and its implementing measures, together with a correspondence table for ease of reference.

This document and the correspondence table have no legal effect, they do not present or represent any interpretation of or definitive position regarding existing laws, regulations or other forms of legislation in any jurisdiction. This document and the correspondence table should and cannot be relied upon for any purpose other than for the purposes for which they were prepared. In particular, they should not be relied upon as a substitute for, or as guidance on, any aspect of the supervisory practices or regulatory systems of any Member State.

In addition, when reading this report, there may be occasions where reference has been made to "all authorities" or "all jurisdictions" but not all CESR members are referred to in the text following these statements. This is because in some cases, not all members responded to the question being discussed.

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Executive summary

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EXECUTIVE SUMMARY

OF THE REPORT (07-380) ON CESR AUTHORITIES' POWERS UNDER THE MARKET ABUSE DIRECTIVE AND IT'S IMPLEMENTING MEASURES

Introduction- Comparison with the previous mapping exercise

1. As a general comment it should be noted that the mapping exercise of CESR Members' supervisory powers which was conducted in 2006 refers to a different number of jurisdictions (namely 27 jurisdictions) comparing to the mapping exercise which was undertaken by CESR in the course of 2004 (namely 17 jurisdictions). It should be also noted that the exercise was done before Romania and Bulgaria became members of CESR.

Impact of the transposition of MAD on powers

2. In the mapping exercise the member states did not explicitly indicate any further constitutional interpretative constraints regarding sanctions, investigation and rulemaking. Conflicts of constitutional nature in the exercise of respective powers were not highlighted by the member states. Generally, member states are enabled to exercise the powers to be given to them according to the relevant provisions of the directives. However, the mapping has shown a very diverse picture regarding the degree of experience member states have in the application of respective powers so far and it can be assumed that the variety of cases and respective administrative practices could shed light on problems of a constitutional nature as well.

Market Abuse

3. In relation to administrative measures and sanctions, nearly all authorities are now empowered to take appropriate measures or impose sanctions. All the authorities responded that they have the necessary powers to take administrative measures or sanctions. At the time of the previous mapping exercise in 2004, which covered 17 authorities, 62% had the power directly to impose administrative sanctions, 22% could do so in conjunction with another authority (or delegated the power to another authority) and 16% had no powers in this area at all.

Outcome of the mapping exercise

4. The outcome of the original exercise (in 2004) showed a lack of powers in the field of rulemaking and with respect to international cooperation. The implementation of the Market Abuse Directive seems to have addressed certain of these issues since it provides the competent authority with the power to request information from any person and to have access to any document.

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5. As far as rulemaking powers are concerned, the situation improved due to the implementation of the Market Abuse Directive. As illustrated in the excel tables on supervisory powers nearly all the authorities declare that they have the power to adopt regulations in the fields covered by the MAD.

1. Accepted Market Practices (Article 1.5)

6. The accepted market practices ("AMP") have been introduced by the EC directive 2003/6/EC as an exception to market manipulation when there have been legitimate reasons. CESR has issued level 3 guidance (CESR/04-505b) in order to ensure proper operation of the regime of AMP in relation to market manipulation.

7. All authorities (except NL where the regulator has the power to advice the relevant Minister of the acceptability of a market practice) have directly the power to accept market practices in accordance to the guidelines issued by the European Commission. All the authorities comply with the consultation and disclosure requirements as provided for by the directive 2004/72/EC and with the Level 3 procedure set up by CESR.

8. Until now there has been little experience to report with regard to accepting market practices. Few requests for such Amps have been referred to by the market to the relevant competent authority and only a handful of practices have been accepted so far by the competent authorities. Typically, the market tries to broaden the scope of AMP. However the authorities try to avoid broadening too much the scope of the AMP as broad and numerous AMP are not in line with the purpose of article 1.5 of the directive 2003/6/EC.

2. Inside Information (Article 2)

9. All authorities, with the exception of NO and SE, have directly the power to establish whether or not an individual has access to inside information and to ascertain whether or not relevant persons do not misuse inside information. It is only in SE that the authority does not have the power to decide whether or not an individual has access to inside information as the decision is left to the criminal authority. The powers of the SE competent authority are limited in this matter to the investigation. While the IE regulator retains full responsibility for all functions of the competent authority it has delegated some supervisory functions to the Irish Stock Exchange. NO exercises this power with application to judicial authorities.

10. The supervisory methods and criteria used to establish whether or not an individual has access to inside information / to ascertain whether or not relevant persons misuse inside information and to ensure that the prohibition of insider dealing specified in Article 2.1 applies to the person(s) described in Article 2.2 are quite similar across Europe. In general the methods include scrutinising of all public information (e.g. newspapers, Bloomberg/Reuters, directors dealings, publication of price sensitive information, regulated information published by the issuers), analysing confidential information obtained by other competent authorities, insiders lists, suspicious transactions reports, information gathered through on-site inspections and off-site reviews, analysis of the transactions reported, surveillance of the markets, investigation and monitoring false and misleading information. All information received or obtained is analysed by the competent authorities in order to establish if a person has access to inside information and has committed an insider dealing. In addition to the supervisory methods as described above, some countries have developed a special IT supervisory tool in order to monitor and to prevent market abuses. Some other countries are now in the process of developing / upgrading such IT surveillance systems. Other countries have some well developed methods and internal procedures in place in order to gather all relevant information and to make an extensive analysis thereof.

3. Disclosure to Third Parties (Article 3)

11. All authorities, except EE have the power to evaluate the application of the provisions of the MAD related to the disclosure of inside information to third parties.

12. EE states that it uses this power with application to the judicial authorities. In addition to direct supervision by the competent authority, AT utilises its power with application to the judicial authorities and NO in collaboration with the regulated market. One authority (IE) retains full responsibility for all functions of the competent authority but it has delegated some supervisory functions to the Irish Stock Exchange. Finally, in SE monitoring is undertaken by the competent authority while prosecution is left to the Economic Crime Bureau.

13. The supervisory tools, methods and criteria used are the same as those used to establish individual access to inside information (see paragraph 5).

4. Secondary Insiders (Article 4)

14. All authorities have the power to apply Articles 2 and 3 to any person, specifically referred to in those articles, who possess inside information while that person knows or ought to have known that it is inside information. AT and NO also utilise application to the judicial authorities while in SE this power is left to the criminal authority. One authority (IE) retains full responsibility for all functions of the competent authority but it has delegated some supervisory functions to the Irish Stock Exchange in this area. IE may also utilise this power by application to the Irish Court, if necessary.

15. The supervisory tools, methods and criteria used are the same as those used to establish individual access to inside information.

5. Market Manipulation (Article 5)

16. AT, BE, CY, CZ, DE, EL, ES, FR, HU, IS, IE, IT, LT, LU, NL, PL, PT, SK and UK) have the supervisory tools to directly monitor and prevent market manipulation. Seven authorities (FI, DK, LV, MT, NO, SE and SI) have that power in collaboration with the stock exchange. FI and SE exercise this power also with application to judicial authorities. While the IE regulator retains full responsibility for all functions of the competent authority it has delegated some supervisory functions to the Irish Stock Exchange in this area. IE may also utilise this power by application to the Irish Court, if necessary. Some authorities (AT, DE, ES, FR, HU, IE, IT, LT, NL, PL and UK) have developed a special IT supervisory tool in order to monitor and to prevent market manipulation.

17. In UK and SE there is to some extent a reliance on the role played by the regulated markets which refer cases to the competent authority. In LU, IE and IT the *stock exchange* has to structure its markets so as to prevent and/or detect on a best effort basis, market manipulation and to report on suspicious cases to the competent authority. IN IE, the Stock Exchange must report to the IE authority on a regular basis the operation of such systems and controls. In EL the authority has developed specific applications in order to perform its surveillance and investigatory activities and is planning to obtain a more sophisticated system quite shortly.

6. Publication of Inside Information (Article 6.1)

18. According to Article 6.1, issuers should inform the public as soon as possible of inside information. All authorities (except SE. and DK) state they have directly the power to monitor whether or not an issuer publicly discloses inside information as soon as possible. One member (FI) exercises this power in collaboration with the relevant exchange and DK delegates this power. While the IE regulator retains full responsibility for all functions of the competent authority it has delegated some supervisory functions to the Irish Stock Exchange in this area. SE does not have the direct power since monitoring is undertaken by the regulated markets.

19. Certain jurisdictions (e.g. DE, PT, AT, NO) use real time surveillance systems to monitor for breaches and one (UK) uses a combination of proactive and reactive tools, attempting to identify sectors where issuers may be more likely to delay disclosure.

7. Delay of Disclosure (Article 6.2)

20. According to Article 6.2, an issuer may delay the public disclosure of inside information in certain circumstances and Member States may require an issuer to inform the competent authority of such a delay. Just over half of all authorities (AT, BE, CY, CZ, FI, ES, HU, IT, LT, LV, NO, MT, PL, SI, SK) require issuers to inform them of any delay in disclosure of inside information and at least one (SI) require that issuers must make an application to withhold

disclosure of inside information. A significant minority of authorities (DE, DK, FR, EL, IS, IE, LU, NL, PT, SE and UK) do not, therefore, require such notification. However, in the case of DE, issuers are required to notify the authority of the grounds for delay together with the finally disclosed information.

8. List of Insiders (Article 6.3)

21. Seventeen authorities (AT, CZ, DE, DK, EL, ES, FI, FR, IS, IE, IT, LT, SI, MT, NO, LU, UK) issue rules or regulations with respect to the list of insiders. NO does so with application to judicial authorities. Ten authorities (BE, CY, EE, HU, 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.

22. Interestingly, in AT, according to the regulation, the confidentiality of inside information can be assured by means of so called "institutionalized information channels" which have to be laid down by issuers in their list of insiders. These channels should provide constant documentation regarding the time at which and the person(s) to whom an inside information is disseminated.

9. Notification of Transactions (Article 6.4)

23. All the authorities require the notification of the transactions of persons discharging managerial responsibility (PDMR) by the issuer. In AT, BE, FR, DE, IE, IT, LT, LU, LV, MT, NL, PT, SK, ES, SE and UK notification shall be made to the regulator within 5 working days. In IS, HU, NO and PL notification has to be made immediately, in DK and SI within 1 day, in EL within 3 days, in FI within 7 days - either directly or indirectly (the insider notifies the issuer which has to notify the regulator).

24. Interestingly, IT extends the implementation of the list of insiders to controlling and controlled undertakings. Persons inserted in the list must notify to the regulator their transactions, such notifications are reviewed by the regulator and the regulator may use all investigatory tools (in particular, on-site inspections, examination of phone records). It only requires notification of the list of insiders when necessary for investigation/enforcement purposes.

10. Publication and Dissemination of Research (Articles 6.5 and 6.10)

25. In some countries journalists are regulated by self regulatory bodies recognized by the respective supervisory authorities.

26. The supervisory tools regarding the publication and dissemination used by all the authorities are quite similar. The jurisdictions state that information regarding the verification of compliance with respective regulations is obtained by periodic and systematic review of relevant sources like newspapers, and bulletins containing recommendations as well as by contact with the main websites and sector organizations of journalists and analysts and examination of the relevant documents. Supervision is conducted by on-site inspections, special audits, examination of investment service enterprises by external auditors providing reports to the authority and other appropriate actions as well as by ad-hoc supervision and random checks.

11. Structural Provisions (Article 6.6)

27. All the authorities apart from CY have the power to regulate / supervise the structural provisions adopted by the regulated market aimed at preventing and detecting market manipulation practices. IN CY this is due to the fact that the stock exchange is set up by law as a public administrative body.

28. In general, the supervisory methods that are followed are quite similar. They include the initial examination when the regulated market is recognised/approved, regular/ongoing supervision (e.g. review and approval of amendments of regulated market regulations, review of structural measures applied, compliance visits), supervision of the trade control system of the stock exchange and the trading regulation of the stock exchange, supervising the trading on a continuous basis via an automated system and the exercise of investigatory powers.

12. Provisions for Informing the Public (Article 6.7)

29. Thirteen authorities (EL, AT, ES, FR, MT, PT, IT, LU, LT, HU, IE, NL) apply directly the measures in place to ensure that the public is correctly informed.

30. These measures are relatively consistent: supervising the requirement in collaboration with the stock exchanges by checking continuously whether the information is correctly published and effectively disseminated, analysing the information in mass media, giving concrete orders or recommendations for correct publication, disclosing the relevant information itself, suspending trading and finally, imposing sanctions that may be published.

13. Publication and Dissemination of Statistics (Article 6.8)

31. Most authorities (BE, DE, EL, DK, AT, FR, MT, PT, ES, LV, IS, SK, IT, CZ, CY and UK) do have power to ensure that public institutions that disseminate statistics liable to have a significant effect on financial markets disseminate them in a fair and transparent way. It should also be noted that in countries where the regulator does not have such power, some do have other controls in this area.

14. Suspicious Transaction Reporting (Article 6.9)

32. Concerning the Suspicious Transaction Reporting (STR's), most of the authorities assess whether the requirements of article 6.9 are met by utilising their investigative and supervisory powers such as on-site inspections (IT, FI, NO, MT, PL and UK) and market abuse investigations (IT, FI, LT, IE, LU, NL, NO, and SI). Ad-hoc on–site inspections are usually used to test procedures for

detecting suspicious transactions and investigations on market abuse cases can reveal failure in the behaviour of the intermediaries. Some of the authorities may also impose sanctions, if the intermediary has failed to comply with its obligation to notify the suspicious transaction (IT, FI, IE, NL, NO, PT, SI).

15. Exemptions (Article 7)

33. The legislation implementing MAD in all the Member States ensures that the exemptions listed in Article 7 are in place in almost all Member States.

34. AT, BE, CY, DE, EL, FI, HU, IT, LT, LU, NL, NO, PT and SK have the direct power to supervise the exemptions of Article 7. IT specifies that they control these exemptions by supervising the market and by applying the exemption should a case occur. AT, NO and PT supervise the exemptions by the surveillance of the market together with the stock exchange and by applying the exemption should a case occur and finally by observing the market with the normal supervisory tools. PL implemented the exemptions listed in Article 7 of the Market Abuse Directive and the authority indirectly monitors these exemptions by supervising the market.

35. CZ, DK, EE, ES, IE, FR, IS, LV, MT, PL, SI, SE and UK do not have the power direct to supervise the exemptions directly. In SI the national bank (monetary policy) and the Ministry of Finance (public debt) notify to the authority their securities issues but are not subject to its prior approval. Therefore the authority does not monitor exemptions. However, FR says that if these exemptions listed in Article 7 have not been listed as such in the law, the French "legal system" makes them applicable. In DK, the prohibition on insider trading does not apply, according to the legislation, to the subjects mentioned in Article 7.

36. LU, HU and SI have the power directly to supervise the exemptions by a central bank of the Member State, by the European System of Central Banks, Agency for Debt and Liquidity Management or by other institution designated by a Member State or by a person acting on their behalf in pursuit of monetary, exchange-rate or public debt-management policy or activity in buy-back programs of own shares or in price stability of financial instruments under conditions pursuant to a regulation of the European Union.

37. When certain suspicious cases are determined in LT, it should be verified if the subject involved does not fall under the exemptions.

16. Safe Harbour Exemptions (Article 8)

38. Some authorities (AT, FR, IS, IE, IT, HU, LT, LU and UK) do check directly whether or not trading activities fall under the exemption according to Article 8 and EU Regulation 2273/2003 and can take administrative measures or impose sanctions where this exemption is improperly applied.

39. Supervisory tools used for this purpose include monitoring and receiving information on buyback programs and transactions in own shares. Ongoing market surveillance allows

authorities to detect and monitor these operations, together with requesting information from the issuer and all other relevant persons and scrutinizing the prospectuses.

17. Scope of Application (Article 10)

40. In all jurisdictions the prohibitions and requirements provided for in MAD directly apply to actions carried out on their territory or abroad concerning financial instruments that are admitted to trading on a regulated market situated or operating within their territory or in another Member State or for which a request for admission to trading on such markets has been made. Some jurisdictions note that they adopt a "proactive" notification procedure regarding foreign authorities.

41. Member states indicate that this includes the analysis of transactions reported by the stock exchange and the professionals of the financial sector (on exchange and OTC) relating to transactions executed in that jurisdiction or abroad on financial instruments admitted to trading on the stock exchange.

18. Supervisory and Investigatory Powers (Article 12)

42. All CESR members have the supervisory and investigative powers mentioned in Article 12 (2). For instance, all members (except FI, ES and NO) have the power to require existing telephone and existing data traffic records. However, there are differences in the detailed use of such powers and some issues of interest in practice.

43. DE states that in manipulation cases dealing with false or misleading information provided via the internet, Bafin usually asks the relevant internet service provider (ISP) to store the information and, after a report to public prosecutor; the German criminal authorities request that the ISP inform them. In trade based cases, Bafin often receives telephone records (content of communication) established by the trading company or the exchange. However, this is not using MAD but on other legal grounds (exchange and labor law). France states that it has wide ranging powers to obtain data traffic records including recording of telephone conversations from professionals, data trafficking records from internet access providers and telecommunications companies.

44. In NO there is still an ongoing dialogue between Kredittilsynet, the Ministry of Finance and the Norwegian Post and Telecommunications Authority regarding their access to telephone and data traffic records. They do still not get access to this information, but hope that the situation may be solved shortly. In the cases where access has been denied to telecommunication data, NO has reported the suspicious trading to the police, which has obtained telecommunication data. NO has worked closely together with the police.

45. PFSA (PL) can request telecommunications service providers only for data traffic records. The telecommunications services providers are obliged to store such information for 2 years. The recording of conversation can be obtained from supervised entities however they are not obliged to record all conversation but client's orders.

46. ES states that the CNMV obtains information from the companies providing telephone and Internet services, such as, for example the identity of the holder of a particular telephone number, telephone numbers from which someone has accessed to the Internet, bank accounts through which the telephone bills are paid, etc.

47. In EL, while there has not been a problem in obtaining existing telephone records from supervised entities, telephone service providers have refused to provide requested exiting data traffic records alleging that such a request is against personal data protection and constitutional provisions.

48. In HU the public prosecutor's prior consent is needed to acquire data of the telephone conversations (name, address, telephone number of the calling and called person, time of calling, and duration of the conversation) from the telecommunication service providers.

49. LT has no successful practical experience of obtaining the telephone numbers from providers of telecommunication services. However the LT authority has a right upon producing a reasoned decision of the LSC, to receive from the banking institutions data, certificates and copies of documents concerning financial transactions related to the object under inspection.

19. Administrative Measures and Sanctions (Article 14)

50. Member States are required to ensure that effective, proportionate and dissuasive administrative measures can be taken or administrative sanctions imposed against those who do not comply with the provisions adopted in the implementation of MAD. All authorities stated that they are directly empowered to take, in conformity with national law, appropriate administrative measures, or to impose administrative sanctions. Limitations have been observed with respect to EE, DK, FI, LV, NO and SE.

51. SE has the power to impose administrative measures or sanctions only in respect of violation of reporting obligations and in DK, the regulator has the power to give orders and impose day fines but the orders are enforced by the police.

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52. In addition, four authorities (FI, IE, LV, and NO) exercise their power, to varying degrees, in conjunction with a judicial authority. In FI, the Market Court has the power to impose a financial penalty on a proposal from the competent authority. In IE, the authority can impose administrative sanctions (ranging from reprimands to financial penalties) and seek Court confirmation to enforce such sanctions if required. LV can only impose appropriate administrative measures not administrative sanctions, which is the responsibility of the police. In NO, only the police can impose fines but the competent authority may issue a corrective order, withdraw authorisation or issue a decision ordering the surrender of gain resulting from negligent or willful violation.

53. One authority (UK) can impose unlimited financial penalties whereas an upper limit of fines (of varying size) is in place across many jurisdictions. In addition to the imposition of fines, a range of other sanctions are available, such as injunctions, restitution orders and public statements.

20. Co-operation in Investigations (Article 14.3)

54. Twenty-one authorities (BE, CY, CZ, DE, DK, EE, EL, ES, FR, HU, IS, IT, LT, LU, MT, NL, PT, SE, SK, SI, and UK) have the power to directly impose sanctions for failure to cooperate in an investigation under article 12 of the Directive. Further details on the powers of members are provided in the table below:

Authority	Co-operation in Investigations
AT	The authority has delegated this power, having to apply to the District Administrative Agency for execution of orders.
FI	Can only fine regulated entities
IE, LV, NO and PL	Have to apply to judicial authorities.
DK	Has the power to give orders to persons who do not comply with the provisions, but the orders are enforced by the police.
FR, IT and NL	In addition to direct sanctioning, can refer the matter to the public prosecutor.

55. The issue of self-incrimination is cited by one authority (FI) as something that may (in criminal or "quasi criminal" administrative cases) be a problem in the context of compelling a person to give all relevant information. On the other hand, the Finnish penal code prohibits the submission of false information to the competent authority and the public court will impose a criminal sanction.

21. Disclosing to the Public Measures and Sanctions (Article 14.4)

56. BE, CZ, EL, ES, FR, HU, IE IS, IT, LT, LU, LV, MT, NO, PL, SK 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

57. AT, CY, DE, DK, EE, FI, NL, SE, PT and UK stated that they do have the power to disclose to the public every measure and sanction imposed for infringement of the provisions adopted in the implementation of MAD , but do not always make such disclosure.

58. The authorities have also discretion, whether they in practice do publish every measure and sanction. There were also differences concerning the form and the content of a published sanction or measure. This may depend e.g. on the gravity of the case or it may be done by on an anonymous basis or by disclosing only the summary of the case. There were also varying approaches concerning the publication of the sanction or measure under appeal.

22. Exchange of information and international cooperation (Article 16.2-16.4)

Ability to render assistance to competent authorities of other Member States as prescribed in article 16 (1) regarding the exchange of information and the cooperation in investigation activities.

59. All authorities have the powers to 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.

60. 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 also exercise the power to render assistance by requiring existing telephone and existing data traffic records with application to judicial authorities.

61. All the authorities have the power to render assistance by ***carrying out on-site inspections***. BE and IS have also the power to render assistance by carrying out on-site inspections with application to judicial authorities

62. 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

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

64. AT, CZ, FR, DE, EL, EE, HU, IS, IT, IE, 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, LU, MT and SE have the power to render assistance by requesting the freezing and / or sequestration of assets with application to judicial authorities. CY has the 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).

65. FI, ES, NL and SI do not have the power to render assistance by requesting the freezing and / or sequestration of assets.

66. All the authorities, except DK and SI, have the power to render assistance by requesting ***temporary prohibition of professional activity***. IT has the also the power in collaboration to render assistance by requesting temporary prohibition of professional activity. BE and IS have also the power to render assistance by requesting temporary prohibition of professional activity with application to judicial authorities.

67. IE, in addition to direct application of its powers, can, if necessary also render assistance to competent authorities of other Member States, by application to judicial authorities.

68. UK considers problematic the fact that sometimes requests from other competent authorities may be drafted without regard to the CESR agreed standard so that also insufficient information may be provided by the requested authority to the requesting authority.

Ability to open an investigation solely on a request of a foreign authority (Article 16, 2)

69. 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).

70. One authority (SI) does not have this power.

Ability to allow personnel of the requesting foreign authority to participate during the investigation (Article 16.2)

71. All authorities except DK, IS and SI allow personnel of the requesting foreign authority to participate in the investigation.

72. One authority (EE) can do so in collaboration. The competent authority of a member state carrying out supervision of a financial institution operating in EE via a branch has the right to carry out an on-site inspection of the branch after notifying EFSA. EFSA has the right to participate in the inspection. In market abuse cases EFSA leads the procedure.

Ability to (a) on request, immediately supply any information required and (b) when receiving any such request, immediately take the necessary measures in order to gather the required information (Article 16.2)

73. All authorities have the ability 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. All the authorities endeavour to revert with information to the requesting authority as quickly as possible.

74. Six authorities (CY, FI, MT, NL, NO and PL) mention that there is not a definitive timeframe in the Market Abuse Directive apart from "immediately" and that national definitions vary from "as soon as possible" to "without delay" to "soon as practicable".

Ability to provide assistance to a competent authority of another Member State, regardless of whether they have an independent interest in the matter (Article 16.2)

75. All the authorities have the ability to provide assistance to a competent authority of another member, regardless of whether the home authority has an independent interest in the matter.

Requirement to notify the requesting competent authority of the reasons if unable to supply the required information immediately (Article 16.2)

76. Twenty-three authorities (AT, BE, CY, CZ, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NO, PL, PT, SE, SK and UK) have the requirement to notify the requesting competent authority of the reasons for inability to supply the required information immediately and would provide the required notification in practice.

77. Four authorities (DE, IS and NL) do not have any express requirement to provide the abovementioned notification but would do so in practice anyway.

Whether the information supplied is covered by the obligation of professional secrecy to which the persons employed or formerly employed by the competent authorities receiving the information are subject (Article 16.2)

78. 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.

Consultation with other competent authorities on the proposed follow-up to their action (Article 16.2)

79. Nineteen authorities (BE, DE, EE, EL, ES, FI, FR, IS, IE, IT, LT, LU, LV, NL, NO, SE, SK, PT and UK) stated that they would consult with other competent authorities on the proposed follow-up to their action.

80. One authority (EL) does not have any provision in law to this effect but would do so in practice. In PL there has been no such case so far.

81. Five authorities (AT, CY, DK, MT, and SI) do not have this obligation but they would do so in practice.

82. Two authorities (CZ, HU) would only do so if requested.

Right of the authority to deny cooperation according to Article 16.2

83. All the authorities, IS and CY excepted, have (directly) the right to deny acting on a request for information if the communication might adversely affect the sovereignty, the security or the public policy of the Member State addressed.

84. All the authorities, IS, CY and SE excepted, have (directly) the right to deny acting on a request for information when judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities. In NL, when judicial proceedings have been initiated, it is no longer up to the AFM to decide on information exchange since it needs to get approval from the Public Prosecutors office. In NO when judicial authorities have been involved, the police are responsible for handling over the case. Should the authority receive a request, it would consult the police before eventually handing over the information.

85. All the authorities, except CY, DK and SE have directly the right to deny acting a request for information where a final judgement has already been delivered in relation to such persons for the same actions in the Member State addressed. NL does not refuse to act on a request for information. However, it will indicate that a final judgment has been delivered and will provide the information in possession of the authority (i.e. exclude the information that has been collected in the criminal proceedings). CY legislation does for the time being not provided for a situation stated in article 16.2 of the directive 2003/6/EC but an amendment to the legislation is under consideration.

86. The understanding of the term "reasonable" to act on a request for information differs in the relevant CESR Member States. A reasonable time for the authorities to act on a request for information is evaluated on a case by case basis and depends on the complexity of the requested information. The understanding of "reasonable" timeframe's varies from 1 month to 2-3 weeks and even to "immediately".

87. As there have been no cases thus far of a denial to act on a request for information, the competent authorities of the CESR Member States cooperate where possible.

Notification of MAD infringements to the competent authority of another Member State where such infringements have taken place (Article 16.3)

88. All the authorities except SE and SI have the ability to proactively notify the competent authority of another Member State of acts contrary to MAD that are being or have been carried out on the territory of another Member State. They are able to take appropriate action and have the power to be informed and the ability to inform the notifying authority of the outcome or any significant interim developments relating to the action taken. SI has no provisions in place and the case remains for them theoretical.

89. AT, CZ, FI, FR, DE, HU, IT, LU, MT, NL, PL, ES and SE report that there have been a few cases thus far in the context of notification of suspicious transactions.

Denying cooperation (Article 16.4)

90. All the authorities, CY and SI excepted, have directly the right to deny acting on a request for investigation as provided for under article 16 (4) where such an investigation might adversely affect the sovereignty, security or public policy of the State addressed and to notify the requesting authority accordingly and to provide information, as detailed as possible, on those

proceedings or judgment. In CY the legislation does not provide for such a situation but an amendment to the legislation is under consideration. SI has no legal provisions and no experience in this matter.

91. As there have been no cases thus far, it clearly shows that competent authorities cooperated where possible.

Notification of detailed information while acting as a requested authority in the case of Article 16.4 (Article 16.4)

92. All the authorities have (directly) the power, when acting as a requested authority in the three cases of article 16.4, to notify the requesting authority accordingly, providing information, as detailed as possible.

93. None of the Member States have had practical experience of this so far.

Notification of the reasons to the requesting authority for the denial of the request for the personal of the requesting Authority to accompany its own personal (Article 16.4)

94. All the authorities have (directly) this power in the context of article 16.4 namely that when a request for the personnel of a competent authority to be accompanied by personnel of the competent authority of another Member State (as provided for in article 16 (2) to deny on one of the three grounds set out in the said article and provide information as detailed as possible on the proceedings or judgment).

95. There have been no cases so far.

Referral of non cooperation to CESR (Article 16.4)

96. All the authorities have (directly) the power in the context of article 16.4.).

97. None have felt it necessary to bring such a case to CESR so far. Given the fact that there has been no need to refer any case to CESR for arbitration, it clearly shows that competent authorities are cooperating with each other where possible.

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Final report

INTRODUCTION ON CESR MEMBERS' POWERS UNDER THE MARKET ABUSE DIRECTIVE AND ITS IMPLEMENTING MEASURES

1. CESR's Review Panel has completed a mapping of Members' supervisory powers following implementation of the Market Abuse Directive (MAD). This report provides a summary of the Panel's findings. It reports on the degree of convergence in respect of Members' powers and highlights issues of particular interest. The findings are presented below in twenty-two sections which follow closely the order of the articles of the MAD. It is important to note that while this review of Members' powers has been conducted independently of CESR-Pol's recent work on MAD[1], the Review Panel has kept CESR-Pol informed of the progress of its work and provided a full report of its findings.

2. In most cases, the Review Panel ascertained that almost all the authorities have the ***powers*** provided for in the Directive and its implementing measures with only some exceptions. It is notable that a small number of authorities exercise their powers in collaboration with the Stock Exchange or with application to judicial authorities or they have delegated the power to the local Stock Exchange.

3. In relation to ***supervisory practices*** many authorities employ similar tools and approaches. For example, in respect of detecting whether relevant persons misuse inside information Members' typically deploy a number of tools including monitoring of published information, suspicious transaction reports, insiders lists, information gathered from other competent authorities and through on-site inspections and off-site reviews. Some authorities have also developed special IT surveillance tools. Similarly, Members use a very similar range of tools to detect market manipulation with quite a number of authorities having also developed sophisticated IT tools. Notwithstanding the use of similar tools, it is evident that there is some variation in the degree of reliance placed on proactive and reactive tools, reflecting different supervisory models.

4. One area where there is a more significant divergence of practice is in respect of whether authorities require issuer to notify them of any delay in disclosure of inside information (Article 6.2). Just over half of all authorities require issuers to inform them of any delay, and so a significant minority does not require such notification.

5. In relation to ***administrative measures and sanctions***, nearly all authorities are empowered to take appropriate measures or impose sanctions. Around three-quarters of authorities can do so directly and the remaining quarter of authorities can do so in conjunction with a judicial authority. At the time of the previous mapping exercise in 2004, 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.

6. Nearly all authorities are equipped with adequate powers to ***exchange information and co-operate internationally***, such as to open an investigation solely on the request of a foreign authority or to allow personnel of the requesting foreign authority to participate in an investigation (although four authorities do not currently have this power). Competent authorities cooperate where possible.

[1] Including a 'Call for Evidence' on the functioning of the EU market abuse regime (which closed on 31 October 2006) and the publication (in November 2006) of a second set of draft guidance on the operation of MAD.

Comparison with the mapping exercise conducted by CESR in 2004

7. As a general comment it should be noted that the mapping exercise of CESR Members' supervisory powers which was conducted in 2006 refers to a different number of jurisdictions (namely 27 jurisdictions) compared to the mapping exercise which was undertaken by CESR in the course of 2004 (namely 17 jurisdictions). It should be also noted that the exercise was done before Romania and Bulgaria became members of CESR.

Impact of the transposition of MAD on powers

8. In the mapping exercise the member states did not explicitly indicate any further constitutional interpretative constraints regarding sanctions, investigation and rulemaking. Conflicts of constitutional nature in the exercise of respective powers were not highlighted by the member states. Generally, member states are enabled to exercise the powers to be given to them according to the relevant provisions of the directives. However, the mapping has shown a very diverse picture regarding the degree of experience member states have in the application of respective powers so far and it can be assumed that the variety of cases and respective administrative practices could shed light on problems of constitutional nature as well.

Market Abuse

9. In relation to administrative measures and sanctions, nearly all authorities are now empowered to take appropriate measures or impose sanctions. All the authorities responded that they have the necessary powers to take administrative measures or sanctions. At the time of the previous mapping exercise in 2004, which covered 17 authorities, 62% had the power directly to impose administrative sanctions, 22% could do so in conjunction with another authority (or delegated the power to another authority) and 16% had no powers in this area at all.

Outcome of the mapping exercise

10. The outcome of the original exercise (in 2004) showed a lack of powers in the field of rulemaking and with respect to international cooperation. In particular, reference was made to areas considered to be particularly critical such as accounting, auditing and corporate governance. The implementation of the Market Abuse Directive seems to have addressed certain of these issues since it provides the competent authority with the power to request information from any person and to have access to any document.

11. As far as rulemaking powers are concerned, the situation improved due to the implementation of the Market Abuse. As comes out from the detailed charts nearly all the authorities declare that they have the power to adopt regulations in the filed covered by the Market Abuse.

1. Accepted Market Practices (Article 1.5)

12. This section deals with the powers of the authorities to accept market practices in accordance with the guidelines issued by the European Commission.

Powers

13. All the authorities, except NL have (directly) the power to accept market practices in accordance with the guidelines issued by the European Commission.

14. All the authorities comply with the consultation and disclosure requirements as provided for in the directive 2004/72/EC. They consult the relevant parties while assessing the acceptability of a market practice. More specifically, the authorities will consult among others market participants, investors and other competent authorities. All the competent authorities comply with the Level 3 procedure set up by CESR and consult CESR through CESR-Pol which exchanges views on both existing and emerging AMP's in order to ensure that European market integrity is maintained

15. Only the NL has no direct power here. The Dutch regulator only has the power to advise the Minister of Finance on the suitability of accepting a particular market practice.

16. LU consults nationally its internal committees, which have a consultative mission and that it consults specialists in the area concerned.

17. Seven countries (DK, IE, IT, LU, NO, SE and UK) may consider other factors than those listed in the directive 2004/72/EC as being relevant when assessing whether or not a market practice can be accepted.

Issues of Interest

18. The factors are assessed on a case by case basis. AT has assessed one of the factors through a study of market liquidity and efficiency before issuing a relevant market practice. In IT, the authority analyses the implications for the market as a whole, monitors market trading in real time and its surveillance experts are able to evaluate the impact deriving from the acceptance of a given market practice. Italian law states that when investigatory actions concerning suspected abuses and related to a particular market practice have been initiated, the consultation procedures may be delayed until the end of the said investigation and the imposition of possible related sanctions. Finally, IT publishes an updated list of practices admitted in Italy and an updated list of accepted market practices in other Member States. The published lists contain also a section on practices that IT considers unacceptable after the consultation procedures have been completed.

19. There has been little experience to report with regard to accepting market practices. Few requests for such an acceptance have been referred by the market to the relevant competent authority and only a handful of practices have been accepted so far by the competent authorities. Typically, the market tries to broaden the scope of an AMP. The authorities however try to avoid broadening the scope of an AMP and numerous AMPs are not in line with the purpose of article 1.5 of the directive 2003/6/EC. AT has accepted one market practice, FR has accepted two and the UK has accepted one market practice dealing with a commodity market (LME aberrations). The NL is consulting about accepting a market practice relating to the liquidity enhancement contracts.

Problems

20. DE raises the following issues:

(A) Market participants sometimes ask for practices to be accepted as AMPs yet they do not fit the definition of market manipulation. Therefore, this is not possible.

(B) Market participants consider the safe harbour regulation 2273/2003 too narrow and try to extend it via proposals for AMPs in the context of share buy backs. This issue has also been raised by FR.

(C) If an AMP is only accepted for specific markets / participants the problem could arise that there is, or should be, a single definition of market manipulation which could be compromised.

(D) Market participants who propose the acceptance of an AMP use prior acceptance(s) in other jurisdictions in order to influence regulators. However, acceptance of an AMP is a matter of national discretion. This may cause pressure for jurisdictions to accept a practice just because it was done by another member.

21. FR noted that the recitals 3 and 4 of the MAD provide that AMP of a given market should not put at risk market integrity of others and that consultation should take place when competent authorities are accepting an AMP particularly when comparable markets exist.

22. Particular market practices in a given market should not put at risk market integrity of other, directly or indirectly, related markets throughout the Community, whether those markets be regulated or not. Therefore, the higher the risk for market integrity on such a related market within the Community, the less those practices are likely to be accepted by competent authorities.

23. Competent authorities, while considering the acceptance of a particular market practice, should consult other competent authorities, particularly for cases where there exist comparable markets to the one under scrutiny. However, there might be circumstances in which a market practice can be deemed to be acceptable on one particular market and unacceptable on another comparable market within the Community. With regard to their decisions about such acceptance, competent authorities should ensure a high degree of consultation and transparency vis-à-vis market participants and end-users.

2. Inside Information (Article 2)

24. This section deals with the powers of the authorities to establish whether or not an individual has access to inside information and to ascertain whether or not relevant persons do not misuse inside information.

Powers

25. All the authorities, with the exception of SE and NO, have (directly) the power to establish whether or not an individual has access to inside information and to ascertain whether or not relevant persons do not misuse inside information.

26. In SE that the authority does not have the power to decide whether or not an individual has access to inside information since the decision is left to the criminal authority. However, the authority may investigate if that person has had access to such information. It is then up to the prosecutor and, ultimately, the court to make the decision. The authority's assessment is done after consultation with the Economic Crime Bureau (ECB) and the ECB will prosecute any violations.

27. NO exercises this power with application to judicial authorities.

28. While IE has (directly) the relevant powers, and retains full responsibility for all functions of the competent authority it has delegated some supervisory functions to the stock exchange. It can also exercise these powers with application to the Judicial Authorities if deemed necessary.

Supervisory methods and criteria

29. The supervisory methods and criteria used to establish whether or not an individual has access to inside information to ascertain whether or not relevant persons misuse inside information and to ensure that the prohibition of insider dealing specified in Article 2.1 applies to the person(s) described in Article 2.2 are quite similar in the authorities.

30. The following common methods are used by the competent authorities:

- surveillance of financial market activities via analysis of reported transactions (real time systems or otherwise);
- all other relevant market information gathered (e.g. newspapers, Bloomberg);
- the notification of suspicious transactions, directors dealings, insider lists and examination of the professional and personal relationships of insiders and other persons;
- the information obtained from other competent authorities;
- investigations to check the prohibition e.g. a request to the investment firms to supply information about whether the relevant person has entered into a transaction or has given an order concerning the financial instrument in respect of which the relevant person is an insider;
- on-site inspections and off-site reviews;
- discussion and collaboration with the compliance officer of investment firms;
- access to the public register of business enterprises and analysis of annual company reports;
- asking the issuer, at any point to provide information about its insiders and about time lines regarding the existence of inside information within the issuer;
- trading reviews following public announcements by issuers or unusual patterns of trading;
- complaints by members of the public or by other market participants;
- alerts and any information received from the stock exchange; and
- monitoring of false and misleading information.

Issues of Interest

31. Some countries (AT, DE, ES, FR, HU, IE, IT, LT NL, PL and UK) have a special IT supervisory tool. In EL the authority has developed specific applications in order to perform its surveillance and investigatory activities and is planning to obtain a more sophisticated system quite shortly. Details of the approaches of the said authorities, which were described in the survey, are outlined under section 5a below. Even if some countries (CY, LU and SI) do not have a special IT surveillance system or are now developing /upgrading such an IT surveillance system (ES, PT), they have some methods and internal procedures in place in order to establish whether or not an individual has access to inside information / to ascertain whether or not relevant

persons misuse inside information and to ensure that the prohibition in Article 2.1 applies to the person(s) described in Article 2.2.

32. In LU, a team supervises closely the transactions reported according to the requirements of the ISD/MIFID, all information gathered through e.g. the newspapers, Bloomberg, internet, regulated information communicated to the authority, directors dealings, notification of suspicious transactions and information obtained by foreign competent authorities. If some abnormalities have been detected, a preliminary report is made. If there are sufficient signs of insider dealing and/or market manipulation, an investigation is launched by another team within the authority. The authority asks from the relevant financial institutions and the competent authorities (if foreign financial institutions are involved) all necessary information (e.g. identity of the client, motivation, details of the orders and the transactions) and analyses the gathered information. If there are sufficient clues of an insider dealing and/or market manipulation, the authority undertakes the necessary steps (administrative proceedings, hand over the file to the public prosecutor).

33. In SI surveillance of market activities is possible by on-line connection to the stock exchange electronic trading system (real time) and direct access to the register of dematerialized securities kept and run by the KDD (Central Securities Clearing Company). The authority is able to obtain all trading data in order to exercise supervision over investment firms/brokers' activities on the market.

Problems

34. DE notes that if an individual has no direct connection to the issuer it can be difficult to prove whether or not there was access to inside information.

35. BE raises the question as to what criteria have to be used to impute market abuse to the company rather than (or as well as) to natural persons.

36. FI states that whether to use administrative or criminal sanctions in concrete insider trading case could be problematic.

3. Disclosure to Third Parties (Article 3)

37. This section deals with the power of the authorities to evaluate the application of the provisions of the MAD related to the disclosure of inside information to third parties.

Powers

38. All authorities have the power to evaluate the application of the provisions of the MAD related to the disclosure of inside information to third parties.

39. One authority (EE) uses this power with application to the judicial authorities. In addition to direct supervision by the competent authority, one country (NO) utilises collaboration with the regulated market and one country (AT) also utilise application to the judicial authorities. While one country (IE) has (directly) the relevant powers, and retains full responsibility for all functions of the competent authority, it has delegated some supervisory functions to the stock exchange and may also utilise application to the Courts if necessary.

40. In one country (SE) monitoring is undertaken by the competent authority while prosecution is left to the Economic Crime Bureau. However in SE market surveillance is done primarily by the exchanges and other authorised markets. The authority has a special department responsible for market surveillance. That department has a very fruitful cooperation with the markets and the public prosecutor.

Issues of interest

41. The supervisory tools, methods and criteria are the same as those used to establish individual access to inside information. However, not all the countries provided information on the tools, methods and criteria that they employ.

42. The following specific supervisory tools were referred to:

- monitoring media releases
- investigating the connections between people on insider lists and third parties ;
- requesting trading information from the Stock Exchange ;
- requiring announcements/disclosures from issuers and/or confirmations from issuers in the case of market rumours ;
- use of integrated analysis system
- supervision of the market activities and checking in a given case if there have been appropriate Chinese Walls;
- asking the issuer, at any point to provide information about its insiders and about time lines regarding the existence of inside information within the issuer;
- trading reviews following public announcements by issuers or unusual patterns of trading;
- complaints by members of the public or by other market participants ; and
- monitoring telephone calls & on site inspections;

43. The selection of issuers to be monitored is in certain countries done in accordance with the principles of the particular regulator' s general risk based approach to supervision.

4. Secondary Insiders (Article 4)

44. This section deals with the powers of the authorities to apply Articles 2 and 3 to any person, other than the persons referred to in Articles 2 and 3, who possess inside information while that person knows or ought to have known that it is inside information.

Powers

45. All the authorities have the power to apply Articles 2 and 3 to any person, other than the persons specifically referred to in Articles 2 and 3, who possess inside information while that person knows or ought to have known that it is inside information.

46. One authority (IE) has (directly) the relevant powers, and retains full responsibility for all functions of the competent authority, but it has delegated some supervisory functions to the stock exchange and can, if necessary, utilise application to the Courts. One country (AT) also utilises application to the judicial authorities. As for SE see above also paragraph 26 and as for NO paragraph 27.

Issues of interest

47. The supervisory tools, methods and criteria used, for those who provided information on them, would appear to be the same as those used to establish individual access to inside information.

48. In FR the competent authority will investigate a case if suspicious transactions are detected by the automated system. If relevant thresholds are exceeded then the competent authority will establish the persons behind the trade (the beneficial owners) and investigate those with high open positions including any possible links with insiders. ES uses a similar approach to

ascertain which secondary insiders could appear behind the trade and their links to primary insiders.

5. Market manipulation (Article 5)

Powers

49. AT, BE, CY, CZ, DE, EE, EL, ES, FR, HU, IS, IE, IT, LT, LU, NL, PL, PT, SK and UK) have the supervisory tools to directly monitor and prevent market manipulation. Seven authorities (DK, FI, LV, MT, NO, SE and SI) have that power in collaboration with the stock exchange. IE has also delegated some supervisory functions to the Irish Stock Exchange and can, if necessary, utilise application to the Courts. SE has delegated this power to the regulated market and other market places. FI and SE exercise this power also with application to judicial authorities.

Supervisory tools

50. Some countries (AT, DE, IE, ES, FR, HU, IT, LT NL, PL and UK) have a special IT supervisory tool in order to supervise market manipulation and some examples of the IT supervisory tools as they were described in the survey, are taken under section 5a below. In EL the authority has developed specific applications in order to perform its surveillance and investigatory activities and is planning to obtain a more sophisticated system quite shortly.

51. In UK and SE there is some reliance on the regulated markets which refer cases to the competent authority. The legal/practical regimes and arrangements however appear to be different in the two cases. For the UK, reference is also made to the role played by STR (suspicious transactions reports) in monitoring market manipulation.

52. HU monitors on a daily and continuous basis the transactions carried out on the regulated market. Additionally, the regulator in HU has the power to ascertain whether the preventative measures are followed and may impose administrative sanctions for the breach of the same.

53. DE has a database containing all executed trades in financial instruments (on exchange and off exchange) and the data relating to the trades contains also a client identification code. The authority has access to the order book data through the trading surveillance offices at the exchanges and the legal duty of the exchanges to cooperate and notify suspicions transactions. All this data is the source for market surveillance activities in order to filter unusual trading activities. The regulator has also access to a comprehensive media database which is used to check the information situation on the market in terms of a specific financial instrument. In addition there is a system called "Swap" that filters unusual changes in price and/or volume of financial instruments on the basis of statistical figures.

54. In LU, IE and IT the stock exchange has to structure its markets so as to prevent and / or detect on a best effort basis, market manipulation and to report on suspicious cases to the competent authority.

55. In FR, the regulator is vested with the power to monitor market manipulation which is expressly prohibited by the General Regulation. Clear criteria are defined to assess and characterise a market manipulation practice. The supervision by the authority enables detection of market manipulation practices. More than 70 statistical tests are run on day +1 basis some of which specifically relate to the detection on market manipulation practices (A typical activity of intermediaries, orders on fixing, abnormal gains, atypical volatility of a financial instrument for instance).

56. In IE the authority investigates all possible cases of market manipulation brought to its attention by the Irish Stock Exchange and all other possible contraventions brought to its attention from either market/other sources using its powers under the regulations.

57. In SI, the supervision by the authority is supported by its direct access by on-line connection to the stock exchange electronic trading system (real time), by the access to central registry of dematerialized securities run by the Central Securities Clearing Company (KDD), and by the obligatory reporting of suspicious trades (in practice done by the stock exchange) and possibilities to request all data, documents and information from stock exchange, KDD and market participants.

58. In EL the authority has developed specific applications in order to perform its surveillance and investigatory activities and is planning to obtain a more sophisticated system quite shortly.

5a. IT supervisory tools used within the scope of inside information, disclosure to third parties, secondary insiders and market manipulation

59. In addition to the supervisory tools and criteria as described under section 2, some countries (AT, DE, ES, EL, IE, IT, FR, HU, LT, NL, PL and UK) have a special IT supervisory tool in order to monitor and to prevent market abuse. Some examples of the IT supervisory tools as they were described in the survey are taken below.

60. In **IT**, the authority supervises the transactions executed on listed financial instruments on a continuous basis through an automated system called "SAIVIM". This system is built upon specific algorithms that are able to detect possible market abuses in real time by elaborating the prices and volumes exchanged on the market on each security traded. If the observed behaviour of a financial variable is not consistent with the predictive hypotheses of the underlying reference model, the system generates an alert. The case is assigned to a responsible person who by using the code of the intermediary is able to track the person/entity beyond the trade (more information on the "SAIVIM" system can be found at www.consob.it under the section publications: "The detection of market abuse on financial markets: a quantitative approach", Quaderni di Finanza n. 54, 2003).

61. In **DE** the authority has a database containing all executed trades in financial instruments (on exchange and off exchange) with a client identification code. The access to order book data is in place through trading surveillance offices at the exchanges and their legal duty to cooperate and to notify suspicions. Direct access to order book data will be implemented. This data is the source for market surveillance activities. The authority has access to a comprehensive media database which can be used to check the information situation on the market in terms of a specific financial instrument. In addition there is a system called "Swap" to filter unusual changes in price and / or volume of financial instruments on the basis of statistical figures.

62. In **EL** the authority has developed specific applications in order to perform its surveillance and investigatory activities and is planning to obtain a more sophisticated system quite shortly.

63. **ES** utilises automated systems which set certain thresholds, which when, breached, are used as an alarm as to transactions which might possibly be related to market abuse, in particular to the misuse of inside information. In ES, the Secondary Market Division conducts an initial investigation of the transactions highlighted by the alarm system and, should there be signs of market abuse, the investigation will then be transferred to the Market Monitoring Unit which will perform a detailed analysis of the specific conduct involved in the affected transactions. The Market Monitoring Unit can utilise investigative tools such as requests for information and on-site inspections to enquire further and if necessary the case will then be transferred to

Enforcement. Connected to a real time transactions control system, the authority developed an automated system to detect and give a warning sign when breaches of certain threshold occur. The Secondary Markets Division makes a first analysis of the transactions signalled in order to check signs of possible breach of the market rules. In a positive case, further analysis of the process is transferred to the Market Monitoring Unit.

64. In **IE**, ISE Xetra® is the electronic trading system of the Irish Stock Exchange which facilitates trading in Irish equities, ETFs and covered warrants. IE utilises customised IT surveillance systems and the Xetra Observer functionality in order to detect unusual events and trends with respect to prices, orders and trade volume. Trading in other securities such as Irish Government Bonds are also monitored using customised IT systems and other market abnormalities in relation to these securities.

65. **FR** has a surveillance system "SESAM" that processes all the electronic data related to orders and transactions on Euronext and Euroclear. SESAM runs an automatic program which seeks to detect abnormalities by utilising more than seventy sets of statistical tests. 90% of the cases under investigations by the authority originate from surveillance activities performed by SESAM. Fifteen individuals are employed in running the system.

66. The monitoring and analysing IT tool that **HU** uses for detecting market manipulation or insider trading is called SAI. SAI was worked out by the Budapest Stock Exchange. It monitors both the prompt and the derivative markets. Transactions appear on T+1 day in the database. It sends a signal when an unusual transaction is executed on the basis of absolute and relative criteria. For instance when the price of the financial instrument increases more than 10% (absolute criterion). The user also has the possibility to determine the criterion how much movement in the price he considers significant to qualify it as „unusual" (relative criterion). It monitors both the transactions executed and the orders entered in the trading book. SAI also monitors concentration of financial instruments at intermediaries. Beyond this, HU monitors press releases, recommendations of intermediaries, disclosures of issuers.

67. The **LT** authority does not operate an automatic program specifically designed for trading surveillance. However, as the authority obtains information on client identification codes that enables it to carry out the periodical queries. These periodic queries are performed in a Microsoft Access environment and are designed to find out the trades by management staff or the persons listed as insiders. The signals triggering a more detailed inquiry include the following situations: management or potential insiders concluded trades, when the material event was announced; an investor received the extraordinary gains or avoided losses. The cases involving the investigation of potential market manipulation can be started as a response to signals from the Vilnius stock exchange or market participants. An announcement in the news can also constitute a basis for a more detailed investigation.

68. In **NL** the authority monitors the Euronext Amsterdam stock market via real time exchange trading data; a special dedicated IT Tool "Aramis-Iris", which is an application that checks all cash transactions and orders and automatically applies alert filters. Examples of alert filters: securities that are suspended/reserved/frozen automatically by passing through specific thresholds; when orders are altered or cancelled in a way that causes the theoretical opening price and/or the theoretical opening volume to change in a conspicuous way. During trading hours, the authority gets alerts on the status of a share (e.g. "frozen" as a consequence of a large market order). The authority also receives alerts on cross transactions that create the highest or lowest price in a share during the trading day and alerts on conspicuous price or volume fluctuations. Furthermore, within the data vendor application Thomson Financial, additional alerts can be made. By checking news events via the usual data vendors, chat sites etc. the authority detects possible cases of market abuse. At t + x the authority can run queries on a database of historical order and transaction data for the cash market. For the derivatives

market, only transaction data are available.

69. The **PL** authority is currently working on launching IT surveillance system ANG (Aplikacja Nadzoru Giełdowego) which will cover all the electronic data related to the orders and transactions on Warsaw Stock Exchange and MTS-CeTO and also detected abuses. 6 persons do the market surveillance work.

70. The **UK** receives notifications from the Recognised Investment Exchanges regarding inside information and market manipulation. The authority then makes preliminary enquiries into the relevant trading for each of those notifications. Those enquiries are made using the authority power to gather information from the firms that it regulates. These enquires enable the authority to determine the identity of the client behind the trade. The authority is also able to obtain timetable information and lists of insiders among other information. The authority's SABRE system also has statistical tools that assist during these preliminary enquiries. The authority is in the process of building a new system (SABRE II) that will include a greater range of tools and functionality than the current system. The underlying application of the new system is the integration of real-time exchange trading data together with transactions reports, which are reported to us by the close of business the next working day. This system will: generate alerts by the application of algorithms; generate order book replays; allow in-depth statistical analysis; and have interrogation tools. The UK has adopted a general risk based approach to supervision including monitoring the conduct of issuers in this area using a combination of proactive and reactive measures. The selection of issuers to be monitored is therefore done in accordance with the principles of this approach.

6. Publication of Inside Information (Article 6.1)

71. This section addresses the powers that Members have to ensure that issuers inform the public as soon as possible of inside information in accordance with Article 6.1.

Powers

72. All authorities (except SE and DK) have (directly) the power to monitor whether or not an issuer informs the public as soon as possible of the publication of inside information that concerns that issuer.

73. Furthermore, all jurisdictions state that they have the power to supervise whether the provisions regarding the public disclosure provided for in the Commission Directive 2003/124/EC are followed.

74. SE does not have the direct power to monitor whether or not an issuer informs the public as soon as possible of the publication of inside information; instead monitoring is undertaken by the regulated market. The stock exchange is required by the 1992 Stock Exchange and Clearing Act to have market surveillance. The Act gives the SE regulator the right to require on-line access to the market surveillance system. In EE this power is exercised directly and in collaboration with the stock exchange. Similarly, FI exercises this power in collaboration with the stock exchange and with application to the judicial authority. In DK this power is delegated. IE has (directly) the relevant powers and retains full responsibility for all functions as the competent authority, but it has delegated some supervisory functions to the stock exchange in this area.

Supervisory tools, methods and criteria

75. Common supervisory tools used include the monitoring and review (either continuously, daily or only if necessitated) of publicly disclosed information (e.g. announcements), as well as a review of information published on the internet or other media for possible leaks of inside information. Tip-offs and complaints are also a fertile source of information. Other tools include reviews of trading statements published by issuers which lead to significant price movements.

76. In IT and IE, Market Abuse Rules have been issued that set out among other things, the requirement that relevant issuers publicly disclose information electronically via a regulatory information service (if such service is provided by the regulated market in question). Announcements thus transmitted are disseminated to the various financial data vendors/news wires. Breaches of the Market Abuse Rules are sanctionable offences.

77. According to Members' responses, the general form of any supervisory intervention, should it be necessary, would be to contact the issuer to discuss the episode and to obtain the necessary information. The issuer may be required to disclose the inside information as soon as possible either by an announcement or an amendment. It is possible that trading may be suspended (e.g. NL, ES, IT, EE), or that the exchange will issue a release (e.g. FI). Sanctions may also be imposed, warning letters issued or the issuer may be required, at its own expense, to provide copies of all relevant documents. In the UK, the regulator may issue a letter of best practice or consider other forms of educating the market / issuer through face to face meetings or by publishing articles in its regular newsletter. In PL and EE, an issue may be required to give oral and written reports that enable the supervisory authority to assess whether or not the disclosure requirements have been fulfilled.

Issues of Interest

78. A number of issues of interest were identified in Members' questionnaire responses.

79. EL requires issuers to write to either confirm or deny the truth of the information published.

80. In BE, the regulator normally exercises *a posteriori* control of the publication of inside information (i.e. independent of evidence) but if necessary a priori control may be imposed as a sanction.

81. In FR, the regulator may directly impose an administrative injunction or seek an injunction order from the court with a daily penalty imposed for each and every day that the injunction is not complied with by the issuer.

82. In IT, DE and LU, if the issuer does not comply, the regulator can publish the information at the issuer's expense.

83. In SI, the authority may publicly disclose the fact that a public company failed to comply with the authority's order to eliminate irregularity in reporting and that it does not, therefore, comply with the law. This action is possible only after the decision is final.

84. In EE there is some overlapping of responsibilities of the authority and the operator of the regulated market since the latter is also supervising the disclosure of inside information.

Problems

85. A few problems were identified by members but it is understood that these are already being addressed by CESR-Pol.

86. EL commented that it is very difficult to define what is meant by the publication of inside information "as soon as possible" when the issuers are in the middle of negotiations. Issuers often claim that they do not want to disclose some specific elements of the inside information such as the price of a transaction to be concluded because of competition. Also, they do not disclose certain inside information in a timely fashion because they are not sure whether a particular event/transaction will be concluded or not.

87. In SI the fact that a company is in the middle of negotiations could be why a public company could ask for a delay of publication (Article 66, par. 3 of the Securities Market Act) and the authority would decide after all the requirements defined by the law and the authority's by-law are fulfilled.

7. Delay of Disclosure (Article 6.2)

88. This section examines whether regulators require issuers to inform them, without delay, of a decision to delay public disclosure of inside information, in accordance with Article 6.2.

Powers

89. Fifteen authorities (AT, BE, CY, CZ, ES, FI, HU, IT, LT, LV, NO, MT, PL, SI, SK) require that issuers inform the authority without delay should they decide to delay the public disclosure of inside information. In NO and FI the issuers are obliged to inform both the authority and the stock exchange.

90. CY, DE, FI, MT and IT also require notification of the grounds for exemption

91. The relevant legislation for DE, DK, FR, EL, IS, IE, LU, NL, PT, SE, UK does not require that issuers inform the authority without delay should they decide to delay the public disclosure of inside information. However, in the case of DE, issuers are required to notify the authority of the grounds for delay together with the finally disclosed information. In SE, the issuer, in the case of a delay must inform the regulated market in accordance with the provisions of the listing agreements (there are no provisions in the law/regulations).

Issues of interest

92. The majority of jurisdictions monitor what issuers do to ensure the confidentiality of delayed information. EL for example monitors this as well as whether or not issuers inform the public should they fail to keep the information confidential. SK requires an application from the issuer to withhold confidential information in which they state their reasons for not publishing immediately and the regulator must give their prior approval. Not only do issuers in SI need to inform the regulator about their decision, but they need its approval to carry out the decision. Approval or non-approval is on the basis of a substantiated application from the issuer.

93. In PT, ES and SI the authority may exempt an issuer from the obligation to disclose inside information whenever the publication is such that disclosure would be contrary to the public interest and would negatively affect the issuer. In ES, the relevant security is monitored and, if necessary, trading suspended.

94. The nature of a jurisdiction's supervisory response would depend on whether or not the regulator must be informed. 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 necessitated. 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.

Problems

95. A few problems were identified by members but it is understood that these are already being addressed by CESR-Pol.

96. If there is a delay in publication, what would constitute an appropriate or inappropriate delay is still unclear and varies across Europe.

97. SI noted that in some cases it is problematic to define the issuer's legitimate interests. Sometimes the interests in question are interests from a third party. Another problem is the need to ensure that such an omission would not be "likely to mislead the public" because every important and price sensitive piece of "hidden" information for the market might be "misleading" for the market.

98. EE states that the market operator and the authority sometimes have different views on whether information qualifies as inside information. In such a case, the authority consults the operator and if necessary formal percept is issued to the issuer for immediate disclosure.

8. List of Insiders (Article 6.3)

99. This section describes supervisory powers regarding the requirement for issuers, or persons acting on their behalf or for their account to draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information.

Powers

100. Seventeen authorities (AT, CZ, DE, DK, EL, ES, FI, IE, FR, IS, IT, LT, SI, MT, NO, LU, UK) issue rules and/ or regulations with respect to the list of insiders. NO does so with application to judicial authorities.

101. All the authorities assess directly, whether or not the provisions of Article 6.3, relating to public disclosure of inside information which has been disclosed by an issuer to a third party, are being adhered to.

102. 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.

103. LU will issue a circular probably before the end of 2006. MT has the power to issue such regulations. The requirements for the list of insiders are set out in secondary legislation (Regulations in the form of a Legal Notice), issued by the Minister of Finance following advice from the authority. The authority is directly responsible for enforcing such requirements set out in the Regulations. HU did not issue regulation since the matter is entirely dealt with by the law – just like in SE. MT has published a circular (sent to all issuers) to clarify all the issues which could have been causing problems. EE has issued a circular to draw the attention of the issuers to the requirement.

104. IE assesses whether or not the provisions of Article 6.3, relating to public disclosure of inside information which has been disclosed by an issuer to a third party, are being adhered to both directly and by delegation of certain supervisory functions to the stock exchange.

Issues of Interest

105. In AT, according to the regulation, the confidentiality of inside information can be assured by means of so called "institutionalized information channels" which have to be laid down by issuers in their list of insiders. These channels should provide constant documentation regarding the time at which and the person(s) to whom an inside information is disseminated.

106. ES, based on the powers conferred by its legislation, when conducting an investigation, requests additional information to the one contained in the insider list.

107. UK does not monitor on a continuous basis whether issuers comply with the Disclosure Rules that govern the maintenance of insider lists. However the authority may consider reviewing compliance with these provisions as part of some future thematic work.

108. In SI, persons who provide certain services to the issuer (legal, consulting, accounting, auditing etc) are considered as insiders and should be identified as such. Public companies should comply with SONI reporting system. A list of persons who have direct access to inside information should be filed with the names of companies and individuals performing those services, their functions, time of provision of those services (for example when advising on a special project) and the exact data about the access to information they have. SONI reporting is due only upon the authority's request, otherwise companies have to update those forms and keep them. At the same time those persons would be obliged to report on the purchase/sale of this public company' securities, if relevant (INS reporting).

Problems

109. EL has received a number of queries related to determining whether or not a person (especially person(s) providing legal services to issuers) should be considered as an insider.

9. Notification of Transactions (Article 6.4)

110. This section refers to supervisory powers regarding the obligation of persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them to notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them. This section furthermore refers to the supervisory powers regarding the public access to that information.

Powers

111. All the authorities require the notification of the transactions of persons discharging managerial responsibility (PDMR) by the issuer.

112. In AT, BE, FR, DE, IE, IT, LT, LU, LV, MT, NL, PT, SK, ES, SE and UK notification shall be made to the regulator within 5 working days. In IS, HU, NO and PL notification has to be made immediately, in DK and SI within 1 day, in EL within 3 days, in FI within 7 days - either directly or indirectly (the insider notifies the issuer which has to notify the regulator) in MT notification should be made within five (5) working days. Managers' transactions have to be notified in CY before the commencement of the stock exchange meeting on the working day following the day during which the transaction was effected.

113. In EL issuers are obliged to issue a list of their persons discharging managerial responsibility (PDMRs) and persons connected with them, submit the same to the regulator and update it. The PDMRs and the persons closely connected with them have to notify their transactions to the issuer within two working days following the date of each transaction. The issuer is then obliged to transmit within the next working day, the notification to the regulator and the public. Notification to the public has to be made through the internet site of the Regulated Market, the internet site of the issuer and the Daily Official List.

114. AT and PT ensure that the relevant transactions are notified by reviewing documents, checking the notifications, penalizing the breaches and in collaboration with the stock exchanges who report to their authority any possible breach. EL has imposed administrative sanctions (fines and reprimand) for failure to notify transactions.

115. The UK's Listing Rules require issuers to adopt a Code of Dealing (The Model Code) which must be observed by all PDMRs and all employees with access to inside information (employee insiders). This Code, amongst other things: 1. prohibits any dealings by PDMRs or employee insiders at a time when they have or could be perceived to have inside information; 2. requires all dealings in the issuer's securities conducted by PDMR's or employee insiders to be cleared by the Chairman or by a director designated by the Board.

116. In FI the transactions have to be notified to the public insider register (within seven days of the trade).

Issues of Interest

117. In AT the list is submitted together with the annual report.

118. IT extends the implementation of the list of insiders to controlling and controlled undertakings. Persons inserted in the list must notify to the regulator their transactions, such notifications are revised by the regulator and the regulator may use all investigatory tools (in particular, on-site inspections, examinations of phone records etc). It requires the notification of the list of insiders only when necessary for investigation/enforcement purposes.

119. NO requires the notification of the list of insiders on a regular basis (as well as when it is needed in connection with the investigation of suspicious transactions).

120. In the UK a dealing announcement by a PDMR generates an electronic alert on the database. The date of the dealing is then manually entered into the database. The database compares the dealing date to dates of ad hoc announcements (such as trading statements) and when issuers are expected to announce their half yearly and annual financial statements. Where the dealing is within close proximity to such events a further alert is generated and an associate will open a case if it appears the dealing has taken place at a time when the PDMR may have had inside information.

Problems

121. DE has found that sometimes people are unaware of their obligations. An example would be where a wife is separated (not divorced) from her husband and living apart from him. She does not know that he is a person discharging managerial responsibilities in a stock company and so the wife buys this stock. DE also considers the threshold of EUR 5,000 to be too low.

122. In EE the authority has recently issued administrative sanctions to improve adherence to the reposting obligation. However, in most of these cases the obligation is not fulfilled because of lack of awareness (thus without intention).

10. Publication and Dissemination of Research (Articles 6.5 and 6.10)

123. This article refers to supervisory powers which shall ensure that persons who produce or disseminate research concerning financial instruments or issuers of financial instruments and persons who produce or disseminate other information recommending or suggesting investment strategy, intended for distribution channels or for the public, take reasonable care to ensure that such information is fairly presented and disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.

Powers

124. All the authorities have the power to monitor whether or not the provisions of article 6.5 relating to the production and dissemination of research and other information are adhered to. However in the case of SE it appears that regulation and monitoring of research occur only with regard to research made by investment firms as a part of an investment service.

125. 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.

126. CY declares that it monitors all the research and other relevant material which is relayed to the public by the media (as opposed to all research in general). In this case, the authority can point out how research should be presented in a fair way.

Journalists and recognised self regulatory bodies

127. In AT, CY, CZ, FI, HU, LT, LU, MT and PT journalists are not under self-regulatory provisions recognized by the respective supervisory authorities. However, in several countries self-regulatory bodies exist and journalists are subject to self-regulatory provisions. For example the UK has self regulatory provisions under the Press Complaints Commission, which is charged with enforcing the Code of Practice. This contains a provision on financial journalism and the industry has made a binding commitment to it. These arrangements have been established by the UK Treasury and the Code is recognised by the regulator. In some countries (AT) there are negotiations taking place regarding the recognition of respective self regulatory provisions. In LU the respective provisions are under examination by the regulator.

128. In DE, EL, PL journalists are under self regulatory provisions recognized by the respective supervisory authority. In DE a journalist who produces or disseminates research can choose to either set up a self regulatory regime himself, or to join a self regulatory system established by a professional association, which sets up rules that are comparable to the general legal provisions, including effective enforcement mechanisms. Self regulatory regimes are not formally approved by the regulator. Only if it was informed of a malfunctioning of such a system, would the regulator potentially exercise its supervisory powers.

129. In IT journalists are subject to equivalent self-regulatory rules on the production or dissemination of researches, provided that their application achieves similar effects compared to the general legal provisions. The IT authority shall evaluate, preliminary and on a general basis, that such conditions are satisfied. At any time, IT authority may propose supplements and amendments to the aforesaid self- regulatory rules to the professional association (Consiglio Nazionale degli Ordini dei Giornalisti).

Supervisory tools, methods and criteria

130. The supervisory tools used by all the authorities are quite similar. Information regarding the verification of compliance with respective regulations is obtained by periodic and systematic review of relevant sources like newspapers, and bulletins containing recommendations as well as by contact with the main websites and sector organisations of journalists and analysts and examination of the relevant documents. Supervision is conducted by on-site inspections, special audits, examination of investment service firms by external auditors providing reports to the authority and other appropriate actions as well as by ad hoc supervision and random checks.

Issues of Interest

131. IT has set up a special market surveillance office which receives the texts of the research and analyses them as well as their possible impact on the market. In DE analysts that are not investment services firms, investment companies or investment stock corporations have to notify the regulator if they prepare or disseminate financial analyses.

Problems

132. DE and FI advise that there are issues with regard to some of the indefinite legal terms within Dir 2003/125/EC. The specific meaning of some of these terms has not been clarified. e.g. “related legal person”, details of the calculation of a "major shareholding" [Art. 6 1. (b) Dir 2003/125/EC] "other significant financial interests" [Art. 6 1. (b) Dir 2003/125/EC].

11. Structural Provisions (Article 6.6)

133. This section refers to the adoption of structural provisions aimed at preventing and detecting market manipulation practices.

Powers

134. All the authorities apart from CY, state that they have the power to regulate supervise the structural provisions adopted by the regulated market aimed at preventing and detecting market manipulation practices.

135. All countries except AT, CY, CZ and DE require notification of structural provisions.

136. CY does not have the power to regulate / supervise the structural provisions adopted by the regulated market aimed at preventing and detecting market manipulation practices. This is due to the fact that the stock exchange is set up by law as a public administrative body. FR is able only indirectly, through the stock exchange rulebook, to regulate/supervise the structural provisions adopted by the regulated market. In DE the respective power lies within the competence of the exchange supervisory authority (state authority). Should a specific rule legalise a manipulative practice, say, then DE authority can issue orders to the exchanges and the respective rule making bodies to make them change those rules which are not compatible with the market abuse prohibition.

Issues of Interest

137. ES states that the decisions taken by the stock exchange management company in the exercise of its functions must be notified to the authority. The authority has the power to cancel or to suspend such decision when it considers that the decision is against the law or damages the correct formation of prices or the protection of the investors.

138. FR, for example, supervises the structural provisions of market operators through suspicious transactions reporting. In FR, two professional associations (FBF-AFEI) have published a guide on the reporting of suspicious transactions which is based on the CESR guidance for market manipulation detection, in particular the training of staff.

139. PT points out that in that jurisdiction the board of directors of the market operator is responsible for adopting any measures necessary to prevent fraudulent practices. These measures and the justification shall be immediately reported to the authority, who may decide to revoke them, if it considers them inadequate or not consistent with the justification presented. The authority can also take measures on behalf of the managing entities of markets in case they do not adopt the necessary measures to regularise anomalous situations that put the regular functioning of the market or the interest of investors at risk.

Supervisory tools, methods and criteria

140. The supervisory methods that are followed appear to be quite similar. They include the initial examination when the regulated market is recognised/approved, regular/onward supervision (e.g. review and approval of amendments of regulated market regulations, review of structural measures applied, compliance visits), supervision of the trade control system of the stock exchange and the trading regulation of the stock exchange, supervising the trading on a continuous basis via an automated system and the exercise of investigatory powers.

12. Provisions for Informing the Public (Article 6.7)

141. This section addresses the powers and the measures that members have in order to ensure that the public is correctly informed.

Powers

142. Thirteen authorities (EL, AT, ES, FR, MT, PT, IT, LU, LT, HU, IE, NL, FI) use and supervise directly the measures in place to ensure that the public is correctly informed.

143. In some jurisdictions the measures were (also) delegated (DK, IE certain measures), used in collaboration (NO, FI) or with application to judicial authority (DK, IE).

Issues of interest

144. These measures are relatively consistent: supervising the requirement in collaboration with the stock exchanges by checking continuously whether the information is correctly published and effectively disseminated, analysing the information in mass media, giving concrete orders or recommendations for correct publication, disclosing the relevant information itself, suspending trading and finally, imposing sanctions that may be published.

145. For example, FR lists the relevant steps:
    (A) Contact (by telephone) of the issuer concerned.
    (B) Letter sent to the issuer.
    (C) Power of injunction of the regulator to urge for remedial action to be taken.
    (D) Investigations
    (E) Sanctions if necessary

146. In addition, the FR regulator may ask the court to order the person responsible for the practice to comply with the laws or regulations and end the irregularity or eliminate its effects. The judge may automatically take any protective measure and impose a fine.

147. In IT and EE, issuers are obliged to disclose whatever information is deemed necessary. If this cannot be achieved, the trading can be suspended. In case of rumours and relevant price changes the issuer is requested to comment.

148. In ES, issuers are obliged to monitor the trading of their securities in the market as well as any news that financial experts or media can release affecting the relevant issuer. In addition, should an unusual progression of the trading volumes or prices occur, being there rational signs that such progression is taking place as a consequence of a premature, partial or distorted release of information, the issuer must immediately release a report informing, in a clear and precise manner, of the status of the relevant transaction or an anticipation of the information to be eventually provided.

149. In LU a regulation and a circular establish the methods of publishing price sensitive information that are considered to constitute an appropriate dissemination.

150. In IE the Market Abuse Rules inter alia require public disclosures via regulatory information service provided by or approved for use by the Regulated Market on which the relevant financial instrument is admitted to trading.

13. Publication and Dissemination of Statistics (Article 6.8)

151. This section examines whether regulators ensure that public institutions disseminating statistics liable to have significant effect on financial markets disseminate them in a fair and transparent way.

Powers

152. Sixteen authorities (BE, DE, EL, DK, AT, FR, MT, PT, ES, LV, IS, SK, IT, CZ, CY and UK) do have direct power to ensure that public institutions that disseminate statistics liable to have a significant effect on financial markets disseminate them in a fair and transparent way.

153. SE and HU use the power in collaboration with others.

154. Nine authorities EE, LU, FI, NL, NO, LT, IE, SI and PL do not have such powers.

Issues of interest

155. There is a clear division with regard to this question. However, it should be noted that in countries where the regulator doesn't have such power, some do have other controls in this area.

14. Suspicious Transactions Reporting (Article 6.9)

156. This section examines whether regulators have powers to issue regulations with respect to the notification of suspicious transactions. This section also deals with the timeframe for such transactions to be notified and examines how regulators assess whether or not the requirements for the notifications are being met in practice.

Powers

157. Twenty three authorities issue regulations with respect to the notification of suspicious transactions (AT, CZ, BE, EE, FR, FI, HU, MT, NL, NO, PT, CY, ES, DE, EL, UK, DK, LT, IE, SI, IS, LU and IT). AT and SK state that they have the power but have not issued a regulation. In EE and PT, the obligation is provided by law

158. SE, LV, PL do not issue such regulations either because they do not have these powers or because they do not deem it necessary. LU and EE are to issue a circular. BE has issued a circular.

Issues of interest

159. The authorities have a similar approach to the question of when the transaction should be notified but diverge in the wording. For example in AT and NO the suspicious transactions should be notified "without negligent delay" and in IE, DK and SK without (undue) delay. In NL, HU, SI, PT and DE the notification should be done "immediately"; as soon as reasonable suspicion arises or whenever there is evidence that market abuse has been committed (IT). In ES the notification should be done "as quickly as possible" and in EL "within the objectively necessary time after the conclusion of the relevant transactions". In LT the information concerning transaction should be reported as soon as suspicious transaction is detected.

160. As to the question of the definition of "delay", the answers were also pretty much the same. For example in FI and LV it was interpreted "as soon as possible", in MT without delay would normally mean within one working day and in IS within the day. In IE the delay would be determined on a case by case basis. BE has not further defined "delay".

161. Authorities assess whether the requirements of article 6.9 on suspicious transaction reporting (STR's) are met by utilising their investigative and supervisory powers such as on-site inspections and market abuse investigations. Ad hoc on–site inspections are usually used to test procedures for detecting suspicious transactions and investigations of market abuse cases can reveal failure in the behaviour of the intermediaries (and the market operators).

162. The measures used were ad hoc on–site inspections (IT, FI, NO, MT, PL and UK), market abuse investigations (IT, FI, LT, IE, LU, NL, NO, and SI), the prudential supervision (BE), periodical request and review information on the procedures & controls with STR's (IE), supervising the transactions reported according to ISD/MIFID and the analysis of press releases and information obtained through foreign authorities (LU, IT), guidance to the market intermediaries (MT, NL, NO, UK), supervising the normal trading activity via an automated system (IT) and looking each case and notification individually (PL, IS)

163. Sanctions may also be imposed in some jurisdictions, if the intermediary has failed to comply with its obligation to notify the suspicious transaction (IT, FI, IE, NL, NO, PT, SI)

164. In LT on more than one occasion the intermediaries have also improved their surveillance system on STR's after inquiries by the regulator and e.g. in MT a circular has been send to remind persons professionally arranging transactions of their obligations.

165. The UK regulator monitors the quality of suspicious transaction reporting through proactive review, a comparison with the routine transactions reporting obligations and visits to firms to assess relevant systems and controls. It has found the STR regime to be an extremely helpful tool and has completed a specific project looking at how well firms have implemented into their systems and controls the requirement to produce STRs. The aims of the project were to:

- visit those firms who appeared to be outliers in their peer group for the number of STRs submitted; and
- visit firms who had not submitted STRs to discuss the training that they have given staff and the materiality thresholds that they have applied.

166. The conclusions of the project are that the large firms all had good systems and controls. However, firms were sometimes reluctant to report without a firm suspicion due to the need to balance regulatory obligations against their commercial interests. They also raised concerns that clients could take action against them for breach of client confidentiality or if it turned out that a suspicion was not warranted. In regard to training the authority found a range of different approaches to education, from clearly inadequate to super equivalent. The authority would expect large investment banks to have more sophisticated training than small retail brokers because they have economy of scale and can afford off the shelf systems. It was interesting that staff often automatically connect STRs to insider dealing and would not immediately think of market manipulation. Good practice for training is a combination of computer based training (done annually) and class based training and the use of actual examples to make the training real.

167. Regulators such as the UK, FI and IE are working with and consulting the financial services industry to ensure that the industry is aware of its STR obligations and to improve the system and quality of reporting.

Problems

168. There might be a perceived problem in striking a balance between ensuring genuinely "suspicious" transactions are reported without being inundated with false reports.

15. Exemptions (Article 7)

169. This section examines whether the legislation implementing MAD of the Member States ensures that the exemptions provided for in Article 7 are in place and the powers of the competent authorities within this context.

Powers

170. The legislation implementing MAD in all the Member States ensures that the exemptions listed in Article 7 are in place.

171. AT, BE, CY, DE, EL, FI, HU, IT, LT, LU, NL, NO, PT and SK have the direct power to supervise the exemptions of Article 7. IT supervises the market and by applying the exemptions should a case occur.

172. AT, NO and PT supervise the exemptions by the surveillance of the market together with the stock exchange and by applying the exemption should a case occur and finally by observing the market with the normal supervisory tools. PT implemented the exemptions listed in Article 7 of the Market Abuse Directive and the authority indirectly monitors these exemptions by supervising the market. When certain suspicious cases are determined in LT, it should be verified if the subject involved does not fall under the exemptions. LU, LT and SI have the power directly to supervise the exemptions by a central bank of the Member State, by the European System of Central Banks, Agency for Debt and Liquidity Management or by other institution designated by a Member State or by a person acting on their behalf in pursuit of monetary, exchange-rate or public debt-management policy or activity in buy-back programs of own shares or in price stability of financial instruments under conditions pursuant to a regulation of the European Union.

173. CZ, DK, EE, ES, IE, FR, IS, LV, MT, PL, SI, SE and UK do not have such a direct power. However, FR says that if these exemptions listed in Article 7 have not been listed as such in the law, the French "legal system" makes them applicable. In SI the national bank (monetary policy) and the Ministry of Finance (public debt) notify to the authority their securities issues but are not subject to its prior approval. Therefore the authority does not monitor exemptions.

174. DK and SE do not have the power to supervise the exemptions. In DK, the prohibition on insider trading does not apply, according to the legislation, to the subjects mentioned in Art. 7.

16. Safe harbour exemptions (Article 8)

175. This section deals with power of the authorities to check whether or not trading activities fall under the exemption according to Article 8 and EU Regulation 2273/2003 and whether the authorities can take administrative measures or impose sanctions in cases of wrong application of this exemption (e.g. administrative proceedings or impose sanctions).

Powers

176. Some authorities (AT, FR, IS, IE, IT,LT, HU, LU, and UK) do check directly whether or not trading activities fall under the exemption according to Article 8 and EU Regulation 2273/2003 and can take measures in cases of wrong application of this exemption (e.g. administrative proceedings or impose sanctions).

177. In EL during a preliminary examination of a possible market manipulation case, the authority may check whether or not trading activities fall under the exemption of article Article 8 of EC Regulation 2273/2003. In case of wrong application, the exemption shall not apply.

178. HU, LT, LU directly supervise all transactions. HU and LU authorities do check directly whether or not trading activities fall under the exemption according to Article 8 and EU Regulation 2273/2003 and can take measures in cases of wrong application of this exemption. Supervisory tools used for this were monitoring official disclosure places of issuers or monitoring the notification received.

179. In LT as the buy-back programs and stabilisation of financial instruments are not widely prevalent in the country, they do not have any specific supervisory tools.

180. In respect of buy-backs, MT's regulator checks whether or not trading activity falls under the exemption of Article 8. No special tools are used.

181. The regulator checks in IS whether or not trading activities fall under the exemption of Article 8. No special tools are used other than those mentioned in previous questions and within the context of article 12.

182. In IE while it is a matter for the relevant issuer to ensure compliance with the conditions set out in Commission Regulation 2273/2003, the regulator will monitor notifications received to ensure compliance with the required disclosures and timelines involved. Misrepresentation of the exemption may be investigated by the authority and may fall to be sanctioned under its administrative sanction regime.

183. In SI the buy-back programs and stabilisation of financial instruments are eligible to the exemptions provided for under the law but there is no description of the tools for the correct application of such exemptions, except on-site and off-site inspections. Buy-back programs and stabilisation of financial instruments are not supervised by the authority and do not fall

within its competence, as this issue is dealt with under company law. As the decision to buy back is in the hand of the general assembly of the company, the decision is made public and the agency is only notified. With regard to trading on own shares a special ticket on the electronic trading system can be monitored by the agency in real time.

Supervisory tools

184. Supervisory tools used for this purpose include monitoring and receiving information on buyback programs and transactions in own shares. Ongoing market surveillance allows authorities to detect and monitor these operations, together with requesting information from the issuer and all other relevant persons and scrutinising the prospectuses. AT compares the information ("buy-back" and stabilisation programs) provided to them to the daily market monitoring information and through an internal data base system for "buy-back" programs where all relevant information is collected. IT specifies that it receives the notifications with respect to the exempted transactions and checks whether they are compliant with the conditions established in the EU regulation. Supervisory tools used for this is the combination of information obtained from the notification of the transactions and the obligation to disclose to the market and of the information obtained from the automated surveillance system.

Problem

185. FI is of the opinion that in order that a buy-back program falls within the scope of safe harbour, there should not be inside information when the issuer makes the decision to start a buy-back program or in case there is, the issuer shall disclose the inside information before it starts to execute the buy-backs. Thus, the problem is that this is not required by the EU Regulation 2273/2003 as a condition for a buy-back program.

17. Scope of Application (Article 10)

186. This section refers to the range of application of the prohibitions and requirements provided for in this Directive by the member States.

Powers

187. In all jurisdictions the prohibitions and requirements provided for in MAD directly apply to actions carried out on their territory or abroad concerning financial instruments that are admitted to trading on a regulated market situated or operating within their territory or in another Member State or for which a request for admission to trading on such markets has been made. Some jurisdictions note that they adopt a "proactive" notification procedure regarding foreign authorities.

188. Jurisdictions indicate that this proactive approach includes the analysis of transactions reported by the stock exchange and the professionals of the financial sector (on exchange and OTC) relating to transactions executed in that jurisdiction or abroad on financial instruments admitted to trading on the stock exchange.

18. Supervisory and Investigatory Powers (Article 12)

189. This section refers to the supervisory and investigatory powers of the authorities that are necessary for the exercise of their functions (e.g. access to documents, demanding information, telephone and data traffic records, cessation of practices, suspend trading, freezing/sequestration of assets, prohibition of professional activity).

190. Overall Member States have transposed all the powers that MAD requires competent authorities to have.

Access to any document

Powers

191. All jurisdictions have access to any document in any form whatsoever, and power to receive a copy of it.

Issues of Interest

192. There is a disparity in experience in utilising these powers. For example, one respondent (NO) said that there have been numerous cases.

193. For example CY and IT can require and obtain any document deemed to be relevant for a case and failure to provide the requested information can be punished by administrative sanctions. IT can use the Italian Financial Police which will act according to its instructions and report only to the authority.

194. CY and IS will either send a letter and demand certain documents or if there is a danger of the documents being destroyed or altered the authority can show up on the premises and demand a copy of the respective document(s).

195. Regarding the powers according to Article 12 para 2 a) IE for example details that the powers of authorised officers include (a) the power to search and inspect premises, (b) to require any relevant person to produce relevant records,(c) inspect and take copies of such records, and (d) remove and retain relevant records. However authorised officers cannot enter private dwellings without the occupier's consent unless a warrant is obtained from a judge of the district court. The authorised officer can if deemed necessary, be accompanied by a member of the Irish Police Force. To date the regulator has mainly used its powers to access documentation under rules in written requests for info to issuers and regulated entities.

Demanding information from any person

Powers

196. All the authorities have, either directly or in collaboration with judicial authorities the power to demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person.

Problems

197. In ES the power of the authority to summon and hear any such persons is not specifically stated in the legislation, but the authority considers that art. 85 of the SMA enables it to do so. In FI there is also the problem that an oral hearing is not mandatory and they cannot compel a person to give an oral statement if a person does not want to. However, this is not a problem in cases where such statement could eventually be used as a self-incrimination.

On-site inspections

Powers

198. All jurisdictions declare that they can perform on-site inspections on authorised persons, intermediaries, operators of regulated markets, persons who control issuers, etc

Issues of Interest

199. With regard to IT, in case of natural persons not providing investment services and not already subject to Consob supervision on site inspections require application to the Public Prosecutor for authorisation.

Telephone- and data traffic records

Powers

200. All member states (except FI, ES and NO) have the power to require existing telephone and existing data traffic records. In NO there appear to be disputes about the use of such power.

201. In FI only the police have the power to require the existing data traffic records from the operator and with the permission of the public court. The authority only has the right to require the tape recordings of telephone conversations by its supervised entities. In the UK, the FSA can require tapes of all recorded telephone conversations.

202. In SI according to Article 278, paragraph 3 of the Securities Market Act the Agency may, in the course of its supervision, request records on telephone calls made and received. Those data can in accordance with paragraph 4 of the same Article, be obtained also from the telecommunication services provider.

Issues of Interest

203. In DE manipulation cases dealing with false or misleading information provided via the internet, DE authority usually asks the relevant internet service provider (ISP) to store the information and, after a report to public prosecutor; the German criminal authorities request that the ISP inform them.

204. In FR the authority has wide ranging powers to obtain data traffic record including recording of telephone conversations from professionals, data trafficking records from internet access providers and telecommunications companies.

205. In NO there is still an ongoing dialogue between the authority, the Ministry of Finance and the Norwegian Post and Telecommunications Authority regarding their access to telephone and data traffic records. They do still not get access to this information, but hope that the situation may be solved shortly. In the cases where access has been denied to telecommunication data, NO has reported the suspicious trading to the police, which has obtained telecommunication data. NO has thereafter worked closely together with the police.

206. PL can request data traffic records from telecommunications service providers only for data traffic records. The telecommunications services providers are obliged to store such information for 2 years. The recording of conversation can be obtained from supervised entities however they are not obliged to record all conversation but client's orders. ES states that the authority obtains information from the companies providing telephone and Internet services, such as, for example: identity of the holder of a particular telephone number, telephone numbers from which someone has acceded to the Internet, bank accounts through which the telephone bills are paid, etc.

207. In IE there have been no issues encountered to date regarding compelling existing records from regulated entities. The issue of compelling such information from 3rd parties such as

telecommunication providers has not yet arisen or been tested in Irish Law.

208. In IT, the authority may request tape records or phone conversations and traffic data. In case of natural persons not subject to Consob direct supervision requests are subject to application to the Public Prosecutor for authorisation. The judicial authorities can provide the regulator with transcript of phone conversations when necessary.

209. In EE as a result of a telecommunication company's refusal to provide telephone records to the authority, a draft law was issued changing the legal powers of the authority according to which the authority must apply to the court's order to receive telecommunication data (this provision only applies to telecommunication information and not to other information which the authority may require directly from any person). Moreover, in EE, the authority may organise long-distance hearings (using telephone or other technical equipment) with the consent of the participant in the proceedings or the witness.

210. In HU the public prosecutor's prior consent is needed to acquire data on the telephone conversations (name, address, telephone number of the calling and called person, time of calling, and duration of the conversation) from the telecommunication service providers. The content of the conversation cannot be obtained.

211. LT has no successful practical experience of obtaining the telephone numbers from providers of telecommunication services. However the authority has a right upon producing a reasoned decision of the authority, to receive from the banking institutions data, certificates and copies of documents concerning financial transactions related to the object under inspection.

Cessation of practices

Powers

212. Most authorities have the power to require the cessation of activities.

Issues of Interest

213. In EL the regulator may send a reprimand against any person for infringements of art. 10-18 of law 3340/ 05 (prudential rules).

214. In IE the regulator may issue a direction to any person not to engage in any practice that contravenes a provision of the rules or another provision of Irish market abuse law. If in the opinion of the regulator, the direction is not complied with, the regulator may apply to the Court for an order to enforce the direction.

Suspension of trading

Powers

215. All member states have the power or to suspend trading of the financial instruments concerned. In SI the suspension of trading is made in collaboration with the stock exchange. EL further specifies that the suspension of trading of a financial instrument is mandatory for the Athens Exchange if relevant request is submitted by the regulator. In addition the stock exchange can also suspend trading of a financial instrument for other specific reasons.

Issues of Interest

216. LU said this power has already been exercised on several occasions, mostly in relation to the publication of inside information.

217. DE advised that usually trading halts only last for a short period such as few hours as this is a very strong measure.

Freezing/sequestration of assets

Powers

218. Most members replied that yes, they either directly have the power to request the freezing and/or sequestration of assets or they have it with application to judicial authority. FI, DE, ES, NL, SE do not have this power. In FI only the police have the power to request the freezing and/or sequestration of assets in criminal investigations.

Issues of Interest

219. PL specifies that for freezing and/or sequestration of assets, the head of the supervisory authority notifies the Public Prosecutor of the suspected offence, enclosing information and documents concerning the blocked account. This authority specifies that there has been such a case in the context of a notification of a suspicious transaction.

220. In ELHCMC may also apply to the Public Prosecutor requesting the freezing and/or sequestration of assets. Additionally freezing or sequestration of assets may also be imposed by the National Commission for Money Laundering.

Prohibition of professional activity

Powers

221. With regard to the temporary prohibition of professional activity, all member states except DK, DE, NL, SE member states can intervene either directly or send a request to the relevant association.

19. Administrative Measures and Sanctions

222. This section addresses the powers that Members have to take administrative measures or impose sanctions against those who do not comply with the relevant provisions, in accordance with Article 14.

Power to take administrative measures/sanctions

Powers

223. Not all authorities are empowered to take, in conformity with national law, appropriate administrative measures, or to impose administrative sanctions against those persons who are responsible for but who do not comply with the provisions adopted in the implementation of the MAD. Limitations have been observed with respect to SE, NO, EE, FI, DK and LV.

224. SE does not have the power to impose administrative measures or sanctions except for violation of reporting obligations. In LV, the regulator can impose only appropriate administrative measures not administrative sanctions. Responsibility for financial crime is determined by the Criminal Law and criminal cases on insider dealing are investigated and decisions in these cases are made by the police. If the regulator possesses information on an eventual financial crime, it forwards this information to the police. In EE, only breaches different from insider dealing and market manipulation can be punished by administrative sanctions issued by the authority.

225. In NO, only the police can impose fines but the competent authority may issue a corrective order, withdraw authorisation or issue a decision ordering the surrender of gain resulting from negligent or wilful violation.

226. In IE, the authority can impose administrative sanctions (ranging from reprimands to financial penalties) and seek Court confirmation to enforce such administrative sanctions if necessary.

227. In FI, the Market Court has the power to impose a financial penalty on a proposal from the competent authority.

Issues of Interest

228. DE advises that, in cases where a market manipulation (according to the definition in MAD) has taken place but did not influence the exchange price, the case can be sanctioned with an administrative fine (it is a criminal offence only if an influence on the price can be proven). They cite the examples of false /misleading statements made by a professional investor or a company, which did not influence the price because the company simultaneously issued a press release clarifying the false statements and of wash trades which were not executed due to an automatic trading interruption in the XETRA system and thus did not lead to a manipulated exchange price.

229. In IS the authority is obliged to inform the police of serious violations.

230. In EE the authority has imposed administrative sanctions on issuers for breach of requirements concerning disclosure of inside information. The authority has forwarded to the police cases of possible insider dealing. However, so far, none of these cases has been sent to the court.

Effectiveness of the measures in place

Powers

231. All authorities (except LV) directly have in place effective, proportionate and dissuasive measures as required by Article 14.

232. As noted above, in LV, the regulator can impose only appropriate administrative measures not administrative sanctions. LV also stated that according to their criminal law there is criminal liability if the person does not reply to them twice a year

Issues of Interest

233. Administrative sanctions that are possible range from a public or private reprimand or caution through to monetary penalties and disqualification from the management or ownership of a regulated entity.

Power to determine the measures/sanctions imposed

Powers

234. All authorities stated that they do have the power to determine the measures and/or sanctions that could be imposed. However in NO the sanctions can be imposed only by the police (see table). In EE, only breaches different from insider dealing and market manipulation can be punished by administrative sanctions issued by the authority.

235. As noted above, in LV, the regulator can impose only appropriate administrative measures (e.g. suspend trading). In IS, the regulator has the power to determine measures and sanctions directly and also in collaboration. Similarly, in NO the regulator exercises this power partly in collaboration and also with application to judicial authority. NO noted that there has recently been a motion put forward to increase the power to take administrative sanctions. Currently, the authority does not have the power to impose fines for minor breaches of the law and so smaller cases have also to be sent to the police. A new proposal will enable the authority to impose smaller fines for minor infringements.

236. In IE, the regulator can determine the sanction to be imposed and seek Court confirmation to enforce such sanction if necessary. DK has (directly) the power to give orders to persons who do not comply with the provisions but the orders are enforced by the police. DE can impose administrative sanctions (e.g. fines of up to EUR1 million).

237. FI has the power to issue a public reprimand or warning or administrative fine and the Market Court has the power to impose a penalty payment if proposed by the authority. In more serious cases, when the authority has a suspicion that there might be a breach of the criminal code, the authority will refer the case to the police for a criminal investigation. FI considers that the administrative fine and the penalty payment are too lenient.

238. In EE misuse of inside information is a criminal offence and therefore the authority has no power to impose administrative sanctions in cases of insider dealing, unlawful dissemination of inside information to a third party or recommending/ inducing to make transactions on the basis of inside information. In other cases relating to breach of market abuse regulation the competent authority has the power to impose administrative sanctions.

Issues of Interest

239. There is presently quite a divergence in the administrative sanctions available to authorities – see table below. One authority (UK) can impose unlimited financial penalties whereas an upper limit of fines is in place across many jurisdictions.

240. Other sanctions possible elsewhere are to:

- request that participants of the market cease any actions that are contrary to the provisions of the law;
- suspend trading in financial instruments;
- order credit institutions and investment brokerage firms to suspend debit operations in respect of financial instruments in an investor's account or the movement of funds in an investor's account for the specified time period, but not for more than six months;
- restrict the business of a participant of the market for a period of up to six months.

TABLE: ADMINISTRATIVE AND CRIMINAL SANCTIONS

	Type of case	Administrative Sanction	Criminal Sanction
Belgium		Range from €2,500 to €2,500,000. Where the infringement has resulted in the offender obtaining a capital gain, that maximum shall be raised to twice the capital gain and, in the event of a repeat offence, to three times the capital gain	

Cyprus	Issuers Obligations, Delay in Publishing Inside Information, Code of Conduct of Directors and Officials, and Publication of Information (violations of section 9)	Administrative fine of up to CY£500.000. In case of repetition the upper limit is doubled. Furthermore, in case the gain made through the violation exceeds the upper limits then the find imposed can be up to an amount twice the gain made	Imprisonment of up to 10 years, or by a fine of up to CY£100.000, or by both of these penalties. Furthermore there might be an up to five years suspension of the right to transact in financial instruments
	Issuers Obligations, Delay in Publishing Inside Information, Code of Conduct of Directors and Officials, and Publication of Information (violation of sections 11, 12, 13, 14)	Administrative fine of up to CY£200.000. In case of repetition the upper limit is doubled. Furthermore, in case the gain made through the violation exceeds the upper limits then the find imposed can be up to an amount twice the gain made	Imprisonment of up to 5 years, or by a fine of up to CY£50.000, or by both of these penalties
	Market Manipulation (Part IV)	Administrative fine of up to CY£500.000. In case of repetition the upper limit is doubled. Furthermore, in case the gain made through the violation exceeds the upper limits then the find imposed can be up to an amount twice the gain made	Imprisonment of up to 10 years, or by a fine of up to CY£100.000, or by both of these penalties. Furthermore there might be an up to five years suspension of the right to transact in financial instruments
	Dissemination of Research and Recommendations(Part VI)	Administrative fine of up to CY£300.000. In case of repetition the upper limit is doubled.	
	Persons professionally arranging transactions (Part VII)	Administrative fine of up to CY£300.000. In case of repetition the upper limit is doubled.	
Czech Republic		Administrative sanctions up to €600,000	Loss of whole property; up to 12 years of imprisonment for insider trading; and up to 5 years for market manipulation (loss of property and imprisonment can be combined)
Estonia		A fine to a legal person of up to 50,000 EEK and to individuals of up to 18,000 EEK. The fines will be increased to 500,000 EEK hopefully in the near future (the relevant law amendment is underway)	
Finland		The range of fines (penalty payment) is for a natural person	

		from €100 to €10,000 and for legal person the range is from €500 to €200,000	
France		The amount of pecuniary sanctions that can be imposed by the AMF varies according to the nature of person and the infringement: For individuals: A)Up to €300.000 or five times the profits realised in the case of professional failure, B)Up €1,500,000 or ten times the profits realised in case of market manipulation For legal entities: A)Up to €1,500,000 or ten times the profit realized	
Germany		Administrative fines up to €1 million; publication of measures. Withdrawal of licence if offender is a licenced investment firm or bank is possible. Special audits can be conducted in order to follow closely the subsequent behaviour of the firm and the implementation of preventative measures.	Imprisonment up to 5 years or unlimited fine acc. to Section 38 para 1 Securities Trading Act for anyone who commits insider trading, and for primary insiders if they disclose inside information to any other person or if they recommend/induce others on the basis of inside information. Imprisonment up to 5 years or unlimited fine for any kind of market manipulation if an impact on the exchange or market price can be proven, section 38 para 2 Securities Trading Act. Confiscation of gained profits is possible."
Greece		The HCMC can levy (depending on the nature of offence) fines of between €3,000 and €2,000,000. The upper limit may be tripled in case of a further offence. The HCMC can also impose fines for obstruction etc of between €3,000 and €500,000 depending on the specific circumstances of the contravention. It can also: (a) suspend temporarily and for a period of time not exceeding one year the operation, in whole or in part, of the legal entities that are authorized and supervised by the HCMC or the exercise of the profession of the natural persons	Articles 29 to 31 of Law 3340/2005 provide the criminal sanctions that are imposed by criminal authorities. Article 29 of Law 3340/2005 provides: 1. With imprisonment of at least one year is punished, whoever, with the intention to acquire himself or a third person financial benefits, uses, having the knowledge, inside information in order to acquire or to provide, himself or via another person, financial instruments related to the inside information. 2. With imprisonment up to 10 years is

		that are certified or authorized by the HCMC, (b) forbid the exercise of professional activity by natural persons certified or authorized by the HCMC.	punished whoever, as a profession or by habit, commits the crime described in the previous paragraph and as long as: (a) the value of the illicit transactions is over € 1,000,000, or (b) acquires himself or a third person financial benefit over € 300,000. 3) Penal sanctions are imposed in the cases specifically described in articles 29 and 30 of Law 3340/2005. Article 30 of Law 3340/2005 provides: 1. With imprisonment of at least 1 year is punished, whoever, with the intention to influence technically the price or the volume of a financial instrument in order to acquire himself or a third person financial benefits: (a) concludes transactions by using, having the knowledge, misleading practices or fraudulent means, or (b) disseminates having the knowledge by mass media, or via the internet or via other means misleading or false information, news or rumors. 2. With imprisonment up to ten years is punished whoever, commits by profession or by habit the crime of the previous paragraph and as long as: (a) the value of the illicit transactions is over € 1,000,000 or (b) acquires himself or a third person financial benefits over € 300,000.
Hungary		The range of fine for insider dealing and market manipulation is between €400 and €400,000, or maximum 400% of the benefit that can be proved in the investigation.	Imprisonment up to three years for – direct or indirect - insider trading, disclosing inside information to a third party for personal profit. Imprisonment up to three years for inducing someone to enter into transaction by disseminating false or misleading information about

			an issuer or its financial instrument.
Ireland		Administrative sanctions that may be imposed under the Market Abuse Directive (Directive 2003/6/EC) Regulations 2005 by the Financial Regulator in relation to prescribed contraventions of those regulations of those Regulations are as follows: (a) a private caution or reprimand, (b) a public caution or reprimand, (c) a direction to pay the Financial Regulator a monetary penalty (but not exceeding Euro 2.5 million in any case), (d) a direction disqualifying the person from being concerned in the management of, or having a qualifying holding in, any regulated financial services provider for such time as is specified in the order, (e) if the person is continuing to commit a prescribed contravention, a direction ordering the person to cease committing the prescribed contravention and (f) a direction to pay the Financial Regulator all or a specified part of the costs incurred by the Financial Regulator in investigating the matter to which the assessment relates and in holding the assessment (including the costs incurred by authorized officers).	<u>Summary Conviction</u> A person who contravenes certain provisions of the Market Abuse Directive (Directive 2003/6/EC) Regulations 2005 is guilty of an offence and is liable on summary conviction to a fine not exceeding Euro 5,000 or imprisonment for a term not exceeding 12 months or both. Where a contravention is in respect of which a person is convicted of an offence under the Market Abuse Directive (Directive 2003/6/EC) Regulations 2005 is continued after the conviction, the person shall be guilty of a further offence on every day on which the contravention continues and liable on summary conviction to a fine not exceeding Euro 5,000 or imprisonment for a term not exceeding 12 months or both for each such further offence. <u>Indictment Conviction</u> A person who is guilty of an offence created by Irish Market Abuse Law … shall, without prejudice to any penalties provided by that law in respect of summary conviction for the offence, be liable, on conviction on indictment, to a fine not exceeding Euro 10,000,000 or imprisonment for a term not exceeding 10 years or both.
Italy	Abuse of inside information	Pecuniary administrative sanction of between €100,000 and €45,000,000 and can be increased up to 10 times the profit or the product of the offence.	Imprisonment for between one and six years and a fine between 20.000 and 3.000.000 Euros. Courts may increase the fine up to three times or up to a larger amount of ten times the product of the crime or the profit there from when, in view of the particular seriousness of the offence, the personal situation of the guilty party or the magnitude of the

			product of the crime or the profit there from, the fine appears inadequate even if the maximum is applied.
	Market manipulation	Pecuniary administrative sanction of between €100,000 and €75,000,000 and can be increased up to 10 times the profit or the product of the offence.	Imprisonment for between one and six years and a fine of between 20.000 and 3.000.000 Euros. Courts may increase the fine up to three times or up to a larger amount of ten times the product of the crime or the profit there from when, in view of the particular seriousness of the offence, the personal situation of the guilty party or the magnitude of the product of the crime or the profit there from, the fine appears inadequate even if the maximum is applied.
		Furthermore, the following administrative measures can be taken: a. Application of pecuniary administrative sanctions shall imply the temporary non-fulfillment of the integrity requirements for corporate officers and shareholders of authorised intermediaries, market management companies, auditors and financial salesmen and, for corporate officers of listed companies, temporary disqualification from taking up administrative, management or supervisory positions in listed companies or companies belonging to the same group as listed companies. b. In the measure imposing pecuniary administrative sanctions, Consob may order authorized intermediaries, market management companies, listed issuers and auditing firms not to use the offender in the exercise of their activities for a period of not more than three years and ask the competent professional associations to suspend the registrant from practice of the profession. c. Liability of the entity	

		(company) - Entities are liable for payment of a sum equal to the amount of the administrative sanction imposed for offences committed in their interest or to their advantage, unless they demonstrate that the persons acted exclusively in their own interest or in the interest of third parties. d. Confiscation - the imposition of pecuniary administrative sanctions always entails the confiscation of the product of the offence or the profit there from and the property used to commit it.	
Lithuania		Can impose pecuniary penalties on legal persons up to €29,000, where the amount of the illegally received income is up to €29,000, and up to threefold the amount of the illegally received income, where the amount of the illegally received income is in excess of €29,000. The LSC has the right to impose administrative sanctions. Administrative measures or administrative sanctions are imposed in case the violations of legal acts are detected upon a decision of the LSC. The amount of the sanction varies from €290 to €2,900.	
Luxembourg		Administrative fine: €125 - €125,000, €125 - €25,000, temporary prohibition of professional activity for at most 5 years, publication of administrative measures.	
Malta		Can impose an administrative sanction (without recourse to a court hearing) consisting of a fine which may not exceed 40,000 Maltese Liri (approx. 90,000 Euros). Any administrative sanction imposed may be appealed to the Financial Services Tribunal. A person whose actions are found to amount to market abuse whether under criminal or administrative proceedings is	Anyone found guilty of an offence under the PFMA shall be liable on conviction to: (a) a fine of not less that Lm 1,000 Maltese Liri (approx. 2300 Euros) and not exceeding 400,000 Maltese Liri (approx. 900,000 Euros) or up to three times the profit made or the loss avoided by virtue of the offence, whichever is the greater; or (b) to imprisonment for a term not exceeding seven years; or (c) to both fine and

		liable to pay compensation to any person suffering a loss from his/ her action in the amount as may be determined by the Financial Services Tribunal	imprisonment. A person whose actions are found to amount to market abuse whether under criminal or administrative proceedings is liable to pay compensation to any person suffering a loss from his/ her action in the amount as may be determined by the Financial Services Tribunal
Netherlands		Administrative fines up to EUR 96.000 Public warnings Publication of measures	When the offence is considered as a criminal offence, insider trading and market manipulation may be punished with imprisonment (up top two years)
Norway		Kredittilsynet does not have the power to impose fines. Fines are imposed by the police. There is no upper limit.	
Poland		The maximum administrative sanction is equivalent of ~ €260,000. (There is no minimum level)	For a criminal offence, the maximum fine is equivalent of ~ €1,300,000. (There is no minimum level)
Portugal		Types of infractions and fines applicable: Very serious - between €25,000 to €2,500,000. Serious - between €12,500 to €1,250,000. Less serious - between €2,500 to €25,000. Also additional sanctions, besides the application of fines may be applied, including disclosure of infractions. For very serious offences, immediate publication of the sanction is allowed.	When the offence is considered as a crime, insider trading and market manipulation may be punished with imprisonment.
Slovakia		The National Bank of Slovakia may take the following steps, according to on the gravity, extent, duration, consequences, and nature of the shortcomings: impose measures on the stock brokerage firm or foreign stock brokerage firm designed to eliminate the shortcomings; require the stock brokerage firm or foreign stock brokerage firm to adopt remedial measures; require the stock brokerage firm or foreign stock brokerage firm	

		to supply special statements, reports and information; require the stock brokerage firm or foreign stock brokerage firm to discontinue an unauthorised activity; charge the stock brokerage firm or foreign stock brokerage firm a fine of between SKK10,000 and SKK 20,000,000; restrict or suspend some of the licensed activities of the stock brokerage firm or foreign stock brokerage firm; revoke the stock brokerage firm's or foreign stock brokerage firm's license for a certain investment service; order a reconciliation of accounts or other records according to the findings of the National Bank of Slovakia or an auditor; order the publication of a correction of incomplete, incorrect or untrue information published by the stock brokerage firm or foreign stock brokerage firm under an obligation imposed by law; require that business losses be covered by equity, following settlement of losses with retained profits, profit-generated funds and capital funds; impose compulsory administration on the stock brokerage firm; revoke its license to provide investment services.	
Spain		Economic penalties for very serious offences: a fine of no less than the amount of the gross profit obtained as the result of the actions or omissions of which the infringement consists and no more than five times that amount; or, in the event that this criterion is inapplicable, up to the greatest of the following	A higher penalty (i.e. 4 to 6 years imprisonment and a fine of 12 to 24 months) can be imposed should the offender carry out these practices in a usual manner, has obtained a significant benefit or has caused great damage to general interests.

		amounts: 5% of the offender's own funds, 5% of the total funds used in the infringement, whether own or borrowed funds, or €300,000. For serious offences, the fine can be up to the greater of the following amounts: 5% of the total funds used in the infringement, whether own or borrowed funds, or € 300,000.	
UK		The civil disciplinary regime allows for a wider range of penalties to be imposed (than for the criminal regime). The FSA may impose a financial penalty (up to an unlimited amount) or make a public statement about the behavior. Also, it can apply for an injunction restraining market abuse or an order for restitution. Although there is no limit on penalties a statement of policy is required to be issued with respect to the imposition of penalties and determining the appropriate level of penalties. To note FSMA states that the penalties cannot take account of the expenses the FSA incurs or expects to make in discharging its functions.	The criminal offences of making misleading statements or engaging in a course of misleading conduct are punishable by a maximum of 7 years imprisonment or an unlimited fine.

241. This is without prejudice to the legal provisions providing for criminal sanctions imposed by the criminal authorities.

242. A number of jurisdictions (e.g. CY, CZ, DE, IE, EL, IT, HU, 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.

20. Co-operation in Investigations (Article 14.3)

243. This sections deals with the powers of the authorities to directly impose sanctions for failure to cooperate in an investigation under article 12 of the Directive.

Powers

244. Twenty-one authorities (BE, CY, CZ, DE, DK, EE, EL, ES, FR, HU, IS, IT, LT, LU, MT, NL, PT, SE, SI, SK and UK) have the power to directly impose sanctions for failure to cooperate in an investigation under article 12 of the Directive.

245. One authority (FI) can only fine regulated entities. Four authorities (IE, LV, PL and NO) apply to judicial authorities. In IE it would be 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. In NO, the competent authority has to apply to the judicial authorities. The competent authority will seek assistance from the police should a person not cooperate in an investigation. This has already happened in practice.

246. In AT the authority has delegated this power. The competent authority has to apply to the District Administrative Agency for execution of orders.

247. 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.

248. Three authorities (FR, IT and NL), in addition to direct sanctioning, can refer the matter to the public prosecutor.

Problems

249. The issue of self-incrimination is cited by one authority (FI) as something that may (in criminal or "quasi criminal" administrative cases) be a problem in the context of compelling a person to give all relevant information. On the other hand, the Finnish penal code prohibits the submission of false information to the competent authority and the public court will impose a criminal sanction.

21. Disclosing to the Public Measures and Sanctions (Article 14.4)

250. This section deals with the power of the authorities to 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.

Powers

251. BE, CZ, EL, ES, FR, HU, IE, IS, IT, LT, LU, LV, MT, NO, PL, SK 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.

252. AT, CY, DE, DK, EE, FI, NL, SE, PT and UK stated that they do have the power to disclose to the public every measure and sanction, but do not always make such disclosure. DK and CY added that the decision to disclose is made on a case by case basis. As a rule in CY, fines of CYP 5.000 or more are disclosed to the public. AT stated that it may disclose such measures.

253. NO stated that they also disclose sanctions in collaboration as most criminal cases are handled by the police and so the police are responsible for making public the outcome of the cases.

254. In the FI and NL not all measures or sanctions imposed are made public. The regulator has a policy that gives guidelines as to when publication is an option. In NL. This policy is regulated in the law.

255. The CZ stated that they have the power to disclose not the whole decision but only a summary of it containing the ruling of the case, the person, the act of the person, the law breached and the fine imposed.

Issues of interest

256. There were differences concerning the form or the content of a published sanction or measure. For example in BE, the publication will describe the facts, but may be done on a no-name basis. In DK disclosure of the name of the company can be made by the regulator after a decision to give an order has been made. In EL the general practice, in the case of a supervised or not supervised entity or individual is to issue a press release, which includes the sanction imposed. The full text of the decision is disclosed only to the entity or individual concerned. LU publishes sanctions on an anonymous basis in its annual report. In FR the commission of sanction has only in one single case decided not to publish the identity of a person sanctioned (Mr. X). In IS if the regulator has applied administrative fines it will give a summary of the facts, the conclusion and the name of the relevant party if the party falls under the definition of management. IT discloses to the public in an abridged form in its bulletin every measure or sanction that will be imposed. SE publishes only sanctions and measures of public interest.

257. There were also varying approaches to publishing the sanction or measure under appeal. In some countries the assessment of the publication is also done on the basis of the gravity of the case. For example in ES the procedure is that sanctions imposed on serious and very serious offences will be published in the Official Gazette once they are concluded in the administrative process. SI stated that only final decisions can be publicly disclosed and the authority is responsible to comply with the law on data protection of individuals. In FR the main exception to the general rule of publication is when the interested party introduces immediately an appeal and a fast track procedure in order to obtain from the judge an order to delay the publication of the sanction.

258. In PT very serious offences will be disclosed to the market even if pending judicial review. In addition, publication can always be imposed as an additional sanction. In administrative cases of very serious infractions in which a fine has been applied, the rule is that of publication, except if decided in a particular case. In summary for proceedings in which a warning sanction has been applied publication is decided on a case-by-case basis.

259. FI states that minor measures or sanctions (private warnings) are not disclosed whereas all official sanctions are. In IE the only sanction that is not publicly disclosed is a private caution or reprimand. CY only discloses to the public fines of CYP 5.000 or more. A brief announcement mentions the name of the person concerned, the fine and the law violated.

22. Exchange of information and international cooperation (Article 16.2-16.4)

260. This section deals with the powers of the authorities to cooperate with other competent authorities as well as with the right to deny cooperation.

Ability to render assistance to competent authorities of other Member States as prescribed in article 16 (1) regarding the exchange of information and the cooperation in investigation activities.

Powers

261. All the authorities have the powers to 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. IT can

exercise the power to render assistance by requesting information from any person, including those who conduct the operations concerned, as well as their principals.

262. 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 also exercise the power to render assistance by requiring existing telephone and existing data traffic records with application to judicial authorities.

263. All the authorities have the power to render assistance by ***carrying out on-site inspections***. BE and IS have also the power to render assistance by carrying out on-site inspections with application to judicial authorities.

264. 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.

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

266. AT, CZ, FR, DE, EE, EL, HU, IS, IT, IE, 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, LU, MT and SE have the power to render assistance by requesting the freezing and / or sequestration of assets with application to judicial authorities. CY has the 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).

267. FI, ES, NL and SI do not have the power to render assistance by requesting the freezing and / or sequestration of assets.

268. All the authorities, except DK and SI, have the power to render assistance by requesting ***temporary prohibition of professional activity***. IT has the also the power in collaboration to render assistance by requesting temporary prohibition of professional activity. BE and IS have also the power to render assistance by requesting temporary prohibition of professional activity with application to judicial authorities.

269. IE, in addition to direct application of its powers, can, if necessary also render assistance to competent authorities of other Member States, by application to judicial authorities.

Issues of interest

270. UK considers problematic the fact that sometimes requests from other competent authorities may be drafted without regard to the CESR agreed standard so that insufficient information may be provided by the requested authority to the requesting authority. BE notes that specific agreements exist for multiple listings via Euronext but there have been no such cases thus far.

Ability to open an investigation solely on a request of a foreign authority (Article 16.2,)

Powers

271. 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).

Ability to allow personnel of the requesting foreign authority to participate during the investigation (Article 16.2)

Powers

272. All authorities except DK, IS and SI allow personnel of the requesting foreign authority to participate in the investigation.

273. One authority (EE) can do so in collaboration. The competent authority of a member state carrying out supervision of a financial institution operating in EE via a branch has the right to carry out an on-site inspection of the branch after notifying EFSA. EFSA has the right to participate in the inspection. In market abuse cases EFSA leads the procedure.

Ability to (a) on request, immediately supply any information required and (b) when receiving any such request, immediately take the necessary measures in order to gather the required information (Article 16.2)

Powers

274. 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.

Problems

275. Six authorities (CY, FI, PL, MT, NL, and NO) mention that there is not a definitive timeframe in the Market Abuse Directive apart from "immediately" and that national definitions vary from "as soon as possible" to "without delay" to "soon as practicable".

276. All the authorities endeavour to revert with information to the requesting authority as quickly as possible.

Recommendation

277. CESR members should remain cognisant of the provisions of the CESR-Pol 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.

278. It should be recommended that CESR (possibly through CESR-Pol) should keep a statistical information database regarding the requests for information and resultant responses under Article 16. It is understood that a similar database is maintained by IOSCO regarding requests for information under the IOSCO MMOU.

Ability to provide assistance to a competent authority of another MS, regardless of whether they have an independent interest in the matter (Article 16.2)

Powers

279. All the authorities have the power to provide assistance to a competent authority of another MS, regardless of whether the home authority has an independent interest in the matter.

Problems

280. One authority (IE) points out that requests are sometimes received from other CESR members regarding transactions on markets which fall outside MAD's scope. This may lead to problems providing assistance (as such markets are not within the Irish market abuse regime) unless the information can be requested from regulated entities under general supervisory powers.

Requirement to notify the requesting competent authority of the reasons if unable to supply the required information immediately (Article 16.2)

Powers

281. Twenty-three authorities (AT, BE, CY, CZ, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NO, PL, PT, SE, SK and UK) have the requirement to notify the requesting competent authority of the reasons for inability to supply the required information immediately and would provide the required notification in practice.

282. Three authorities (DE, IS, and NL) do not have any express requirement to provide the abovementioned notification but would do so in practice anyway.

283. One authority (SI) advises that there is no special provision in the law that would require the respective competent authorities to notify the requesting competent authority of the reasons.

Whether the information supplied is covered by the obligation of professional secrecy to which the persons employed or formerly employed by the competent authorities receiving the information are subject (Article 16.2)

Powers

284. 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.

Consultation with other competent authorities on the proposed follow-up to their action (Article 16.2)

Powers

285. Nineteen authorities (BE, DE, EE, EL, ES, FI, FR, IS, IE, IT, LT, LU, LV, NL, NO, SE, SK, PT and UK) stated that they would consult with other competent authorities on the proposed follow-up to their action.

286. One authority (EL) does not have any provision in law to this effect but would do so in practice. In PL there has been no such a case so far.

287. Five authorities (AT, CY, DK, MT, and SI) do not have this obligation but they would do so in practice

288. Two authorities (CZ, HU) would only do so if requested. When another member state's authority is competent (art. 10 MAD) and when CZ detects the case, CZ will inform the other competent authority with a proposal (based on efficiency criteria – registered office/ domicile of the person suspected, place of committing the act, location of the market etc.), concerning which of the authorities would be best placed to lead the investigation.

Issues of interest

289. One authority (LU) suggests the utilisation of the urgent issues group ("UIG") of CESR-Pol. AT, IE, EL, and SI would also endorse the utilisation of UIG where applicable.

290. Until now no foreign authority has informed the PL authority about any acts infringing MAD. Neither has the authority as provided for by article 16.3. The PL authority has neither informed foreign authorities about such acts. Regarding article 16.2 there are no regulations in Polish acts concerning consultation process however it is possible in practice.

(A) the right of the authority to deny cooperation according to article 16.2

Powers

291. All the authorities, except CY and IS, have (directly) the right to deny acting on a request for information if the communication might adversely affect the sovereignty, the security or the public policy of the Member State addressed.

292. The CY legislation does not provide for such a situation; however an amendment to this effect is under consideration. SI states that there are no such provisions in place but the case remains theoretical. However, a legal amendment to this effect is under consideration.

293. DK specifies that it will not provide information in conflict with fundamental legal principles (i.e. self-incrimination) but that other information will be provided.

Issues of Interest

294. The understanding of the term "reasonable" differs. A reasonable time for authorities to act on a request for information is evaluated on a case by case basis and depends on the complexity of the requested information. LU specifies in addition that intermediaries normally respond to these requests within 1 to 2 weeks.

295. In IE, if the information is not to hand, the regulator will act immediately to gather such information. The regulator will in such circumstances adhere as a minimum to the principles and timelines outlined in the Service Level Agreement underpinning the CESR Multilateral Memorandum of Understanding. If the subject of the request for information advises that extra time may be required to gather the information requested, the regulator would inform the requesting authority immediately.

296. For BE the average delay to collect information and send it to the requesting authority is one month whereas for IS reasonable means as soon as possible. DE considers 2 to 3 weeks as reasonable time to act and would strive for 4 to 48 hours in urgent cases. PL considers "reasonable" as being immediately.

(B) The right to deny acting on a request for information when judicial proceedings have already been initiated

Powers

297. All the authorities, except CY, IS, and SE, have the right to deny acting on a request for information when judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities.

298. NO and UK will act with application to judicial authorities. NO specifies that when judicial proceedings have been initiated, the police are responsible for handling the case. Should the authority receive a request, it would consult the police before eventually handing over the information.

299. In NL, when judicial proceedings have been initiated, it is no longer up to the authority to decide on information exchange since it needs to get approval from the Public Prosecutors office.

300. NO specifies that when judicial proceedings have been initiated, the police are responsible for handing over the case. Should the authority receive just a request, it would consult the police before handing over the information.

301. In CY the legislation does not provide for such a situation. However, a legal amendment to this effect is under consideration.

Issues of Interest

302. LU specifies that it will inform the requesting authority that there is a judicial procedure and provide other useful information as far as possible in compliance with the general principle of the secrecy of investigation.
303. The understanding of the term "reasonable" differs. NL considers two weeks as being a reasonable time to act on a request for information. However, it might be influenced by the laboriousness of the information requested or the extension of the information. PL considers "reasonable" as being immediately.

304. Answers with regard to what could be considered a reasonable timeframe are similar to those to (A).

(C) The right to deny acting on a request for information where a final judgement has already been delivered

Powers

305. All the authorities, except CY, DK and SE have directly the right to deny acting on a request for information where a final judgement has already been delivered in relation to such persons for the same actions in the Member State addressed.

306. DK and SE do not have this power. NL will not deny providing information and AT may only deny when a final judgement has already been delivered. CY has no specific provision in its legislation.

Issues of Interest

307. The information that authorities would provide in such a case would be detailed information with regard to the reasons for denial together with a copy of the sentence.
308. NL does not deny acting on a request for information. However, it will indicate that a final judgment has been delivered and will provide the information in possession of the authority (i.e. exclude the information that has been collected in the criminal proceedings).
309. Answers with regard to what could be considered a reasonable timeframe are similar to those under (A) and (B).

Notification of MAD infringements to the competent authority of another Member State where such infringements have taken place (Article 16.3)

Powers

310. All the authorities, except SE and SI, have (directly) the power to notify the competent authority of another Member State about the fact in as specific manner as possible in case of being convinced that acts contrary to the MAD are being or have been carried out on the territory of another Member State.

311. SI does not have such provisions in place and has not provided a specific answer with regard to possession of the power but it states that it would inform the competent authority of another Member State if it is convinced that acts contrary to the MAD are being or have been carried out on the territory of another Member State.

Issues of Interest

312. Where DE receives unsolicited information in a letter that also contains information that is not relevant to related proceedings, DE may not use the letter for any enforcement action, since it cannot prevent the suspect from inspecting the file including the letter (as a matter of procedural fairness).

Information by the competent authority of another Member State of the outcome and of any significant developments (Article 16.3)

Powers

313. The question asked to CESR members was in relation to how they apply Article 16. 3 in practice, and not about their powers.

Issues of Interest

314. In the context of notification of suspicious transactions and their investigations, NO discusses the cases on a regular basis with foreign financial supervisory authorities. Should NO receive information from other authorities, it would strive to inform them about the outcome of the case. IT has consulted via CESR-Pol on such incidents in the past.

Denying cooperation (Article 16.4)

Powers

315. All the authorities, CY and SI excepted, have directly the right to deny acting on a request for investigation as provided for under article 16 (4)) and to notify the requesting authority accordingly and to provide information, as detailed as possible, on those proceedings or judgments.

316. In CY the legislation does not provide for such a situation; however an amendment to this effect is under consideration. In SI there are no legal provisions and there is no practical experience.

317. In SI there are no legal provisions and there is no practical experience.

318. In IE reciprocal obligations for the other Member State would be dependant on the governing legislation of the Member State in question.

Notification of the reasons to the requesting authority for the refusal of the request for the personal of the requesting authority to accompany its own personal (article 16.4)

Powers

319. All the authorities have (directly) this power in the context of article 16.4 namely that when a request for the personnel of a competent authority to be accompanied by personnel of the competent authority of another Member State as provided for in article 16 (2) is denied on one of the three grounds set out in the said article, to provide information as detailed as possible on the proceedings or judgment.

Referral of non cooperation to CESR (Article 16.4)

Powers

320. All the Member States have (directly) the power in the context of article 16.4.

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ANNEX

COUNTRY CODES

Country name	Code
Austria	AT
Belgium	BE
Czech Republic	CZ
Cyprus	CY
Denmark	DK
Estonia	EE
Finland	FI
France	FR
Germany	DE
Greece	EL
Hungary	HU
Iceland	IS
Ireland	IE
Italy	IT
Latvia	LV
Lithuania	LT
Luxembourg	LU
Malta	MT
Netherlands	NL
Norway	NO
Poland	PL
Portugal	PT
Slovenia	SI
Slovakia	SK
Spain	ES
Sweden	SE
United Kingdom	UK