COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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Review Panel report

MAD
Options and Discretions

2009

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Member States	CESR Member (CA)	Abbreviation	Country code
Austria	Financial Market Authority	FMA	AT
Belgium	Commission Bancaire, Financiere et des Assurances / Commissie voor het Bank, Financie- en Assurantiewezen	CBFA	BE
Bulgaria	Financial Supervision Commission	FSC	BG
Cyprus	Cyprus Securities and Exchanges Commission	Cysec	CY
Czech Republic	Czech National Bank	CNB	CZ
Denmark	Finanstilsynet	Finanstilsynet	DK
Estonia	Estonian Financial Supervision Authority	EFSA	EE
Finland	Finanssivalvonta	Finanssivalvonta	FI
France	Autorité des Marchés Financiers	AMF	FR
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht	BaFin	DE
Greece	Capital Market Commission	HCMC	EL
Hungary	Hungarian Financial Supervisiory Authority	HFSA	HU
Ireland	Financial Regulator	FR	IE
Iceland	Financial Supervisory Authority	FME	IS
Italy	Commissione Nationale per le Società e la Borsa	Consob	IT
Latvia	Financial and Capital Markets Commission	FCMC	LV
Lithuania	Lithuanian Securities Commission	LSC	LT
Luxembourg	Commission de Surveillance du Secteur Financier	CSSF	LU
Malta	Malta Financial Services Authority	MFSA	MT
Netherlands	Autoriteit Financiële Markten	AFM	NL
Norway	Kredittilsynet	Kredittilsynet	NO
Poland	Polish Financial Supervision Authority	PFSA	PL
Portugal	Comissão do Mercado de Valores Mobiliários	CMVM	PT
Romania	Romanian National Securities Commission	CNVMR	RO
Slovakia	National Bank of Slovakia	NBS	SK
Slovenia	Securities Market Agency	SMA	SI
Spain	Comision Nacional del Mercado de Valores	CNMV	ES
Sweden	Finansinspektionen	Finansinspektionen	SE
United Kingdom	Financial Services Authority	FSA	UK

I. INTRODUCTION

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Background

It is acknowledged that the use of discretions within MAD is fully legitimate. At the same time, it is worthwhile highlighting the Ecofin Council conclusions of December 2007, which aim at reducing discretions and May 2008 and June 2009 which aim at enhancing European supervisory convergence. Together with the recent decision establishing the objective of a single rule book[1], they form the essential background against which CESR work is carried out going forward. The purpose of a mapping is to provide insight into the extent to which supervisory convergence has been achieved until now. It will highlight differences, issues of interest, as well as the challenges encountered in the application of the respective Community legislation in giving a 'snapshot' of the degree of harmonisation in a given area.

CESR has taken account of these documents in its work programme together with the EU roadmap, as well as the Communication of the European Commission of 4 March 2009. The Roadmap of December 2007 *"invites Member States to keep under review the options and discretions implemented in their national legislation, limit their use (wherever possible) and report to the Commission on these findings, and invites the Institutions to introduce a "review clause" in future EU legislation on all options and discretions included in the respective acts. When this review clause comes into effect after a specified time, the necessity and use of the options and discretions should be reviewed and, where necessary, abolished where there is no demonstrated need*." The EC communication stresses the particular interest of the de Larosière Group's *"recommendation on the need to develop a harmonised core set of standards to be applied throughout the EU. Key differences in national legislation stemming from exceptions, derogations, additions made at national level or ambiguities in current directives should be identified and removed"*.

On the basis of one key conclusion indicating that CESR should enforce its peer review findings, but also the findings of the recent consultation with the market, it was decided that the Review Panel will undertake a detailed overview of the options, discretions and possible gold plating practices, including those applied by its members within the framework of the Market Abuse Directive.

CESR is thereby continuing its efforts to prepare ground for convergent implementation and application of the Market Abuse regime by ensuring that a common approach to the operation of the Directive takes place throughout the EU amongst supervisors. To this end, in mid 2006, CESR already launched a mapping, through its Review Panel, which assessed the supervisory powers that had been given to CESR Members following the entry into force of the Market Abuse. The purpose of that study was to assess whether the competent authorities benefit from equivalent supervisory powers. The capacity to act on an equal footing when performing cross-border investigatory, supervisory and sanctioning activities is considered by CESR as a precondition to a credible EU supervisory system and fundamental to delivering supervisory convergence. The CESR mapping, however, not only took the powers themselves into account, but also examined how these powers were exercised in practice by the competent authorities (i.e. in their day-to-day application). CESR considered that the mapping of national supervisory practices contribute to a better understanding between the EU supervisors and ultimately enhance supervisory convergence as CESR members compare supervisory practices and try to benefit from each others' best experiences. It also provided

[1] Proposal for a regulation of the European Parliament and of the Council establishing an European Securities and Markets Authority, dated 3rd December 2009.

valuable insight as to where further work can be undertaken by CESR in order to develop common standards and where this may face limits due to national implementation.

CESR Chairs approved at their 12 May 2009 plenary meeting in Prague a mandate to conduct a survey for the Review Panel regarding the Market Abuse Directive and its implementing legislation – the MAD regime. The survey should look into the options and discretions used by Member States of the MAD regime.

Scope

The purpose of the work is to analyse the reasons why some CESR members have opted for one option and some for another and to try to provide as much insight as possible into how these options are working in practice. The work has been based on the findings of the 2006 mapping of MAD on options and discretions, which have been confirmed and developed.

The ultimate target of this exercise is to draft a proposal where there is room for further harmonisation of national implementing measures for narrowing the gap among members for further consideration by the relevant expert group (namely CESR-Pol).

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The Executive summary of this report includes a number of recommendations or observations as appropriate on the basis of the results of the survey. As a general observation the Review Panel considers that the capacity to act on an equal footing when performing their powers is a precondition for the Member States to benefit from a credible EU supervisory system and to deliver convergence between them.

II. EXECUTIVE SUMMARY

A. Options and discretions in relation to the scope of MAD on MTFs

1. Legislators in the Member States (hereinafter **MS**) obviously made use of their many options in respect of the scope of the MAD regime on MTFs. Therefore a remarkably heterogeneous picture emerges. All five possible options identified were chosen by the legislators. Those are the full MAD regime applicable to all MTFs (A), part of the MAD regime to all MTFs (B), the full MAD regime to some MTFs (C), part of MAD regime to the some of the MTFs (D), and finally the MTFs not covered by the MAD regime at all (E). Especially within the options B and D there are again several possible sub-options (compare question A 4) which also have been very differently chosen by legislators.

2. As a consequence of the various options and sub-options chosen, there are also reasons for many different possible scenarios. Therefore the possibility to summarize and categorize the reasons is naturally limited. Sometimes the same reasons are given to argue for quiet different options.

Reasons for MAD regime in full on all MTFs (option A) (ES, HU, IS, NL)

3. For the reasons set out in the recitals of the preamble to the Directive 2003/6/EC the MAD regime in full would apply to all MTFs (**ES**). Also the seriousness of market manipulation would require the application of MAD regime on all MTFs (**IS**). Besides, the interpretation that the MAD regime already required application on MTFs led to such a domestic transposition of the MAD regime (**IS**). In one Member State (**NL**) the explanatory memorandum of the law implementing MiFID would consider that Article 43 extends the prohibition of market abuse to all MTFs. In another Member State (**HU**) the reason to apply the MAD regime in full on all MTFs was that the scope of the application of market abuse provisions has not been limited to specific kind of MTFs.

Reasons for MAD in some parts on all MTFs (option B) (AT, DK, LT, LU, NO, PL, PT, SE, SK)

4. In order to enhance investors' confidence and trust in financial markets (e.g. by means of transparency), the scope of MAD was extended in some Member States (**LT, LU, NO, PL, PT**). The scope was extended to preserve the market integrity of the MTFs (**DK**, **LU, PT**) and to ensure the proper functioning of the MTFs (**PL**). The preventive effect of the market abuse prohibitions was also stated as a reason to extent the scope of MAD (**NO**). The extension was chosen to supply the regulator with sufficient information and enable him to supervise and enforce possible market manipulations effectively (**LT, NO**). Also in order to have continuity with the legislation before MAD, a wider scope was maintained (**SE**).

5. However, the extension of all obligations of the MAD regime was considered too burdensome and that costs would outweigh benefits (**LU**).

Reasons for MAD regime in full on some MTFs (option C) (EL, MT)

6. In order to expand supervision over all trading platforms and also to ensure and promote market integrity and protect investors' interests the MAD regime in full would apply to some MTFs explained one Member State (**EL**). Another Member State (**MT**) argued that the MAD applies to all transactions in financial instruments which are traded on a regulated market, irrespective of whether the said transactions is executed through the market or off-exchange (including through the systems of an MTF). Therefore, as long as, the financial instruments which are traded on an MTF are also traded on a regulated market, the transactions on the

MTF fall within the scope of the PFMA. All other transactions fall outside the scope of the Maltese law which transposes the MAD.'

Reasons for MAD in some parts on some MTFs (option D) (BE, DE, FI, FR, IT, UK)

7. For reasons of market and investor protection (**DE, FIN, FR, UK**) application of MAD on at least some MTFs was regarded as necessary. Since within one exchange there can be regulated markets and MTFs, the same standard of protection against market abuse should apply. Different levels of protection could adversely affect investors' confidence in the integrity of the whole exchange including the regulated markets (**DE**). Also for credibility reasons the MAD regime would apply to some MTFs (**FI**) and in order to guarantee proper information of the market (**FR**).

8. In order to contain costs of a regime which is not harmonised at EU level, the MAD regime applies only in some parts on some MTFs (**IT**).

Reasons for MTFs not covered (option E) (BG, CY, CZ, EE, IE, LV, RO, SI)

9. The application of the MAD regime on MTFs would produce costs that outweigh the benefits (especially in the case of insider trading) (**CZ**) and in order to offer issuers an additional cheaper option with minimum regulation the MAD regime would not cover MTFs (**EE**). The application of the MAD regime on MTFs would also hamper potential future development and overall liquidity of capital markets (**SI**). Since the MAD regime applies also on MTFs, as long as the concerned financial instrument is also listed on a regulated market, there would be no need to expand the scope of MAD on MTFs (**BG**). Other reasons stated are that there were (so far) no MTFs in the concerned Member State (**BG, CY, LV**) and that the Member States (**RO**) had chosen to implement the MAD (and MiFID) regulation on a rather minimum basis. Another reasons mentioned was that it would be not reasonable to apply the same criteria for regulated markets and MTFs (**LV**).

Reasons for not applying publication (and notification) of inside information on MTFs (sub-option)

10. Since on MTFs financial instruments can be admitted and traded without consent of the issuers, it would be inappropriate to burden these issuers and their managers with additional publication obligations (**DE**). Another CESR Member argued that generally for companies listed on MTFs there should be fewer requirements for information disclosure than for issuers in regulated markets (**LT**).

Reasons for not applying publication (and notification) of managers' transactions on MTFs (sub-option)

11. Since on MTFs financial instruments can be admitted and traded without consent of the issuers, it would be inappropriate to burden these issuers and their managers with additional publication obligations (**DE**).

Reasons for not applying STRs (Suspicious Transaction Reports) on MTFs (sub option)

12. In order to minimise cost of brokerage activity, the requirement of STRs would not apply for MTFs (**PL**).

13. Like the reasons, also the problems that were encountered, depend a lot on the options (and sub-options) chosen.

Problems with MAD regime in full on all MTFs (option A)

14. One Member State considers the application of the full MAD regime on all MTFs would not be very effective due to the special characteristics of these markets and of the financial instruments admitted to trading in these markets. Therefore, a simplified regime with only Article 2 – 5 (but not Art. 6) of MAD applicable would be more suitable for MTFs.

Problems with MAD in some parts on all MTFs (option B)

15. One Member State (**LU**) which had chosen the (sub-)options not to apply the requirements of publication of insider information and the requirement of STRs to MTFs, encountered the following problems: the publication of insider information and STRs would be both indeed important means for detecting, preventing and investigating market abuses conducted on MTFs. Since financial institutions often also have difficulties to identify whether financial instruments are admitted to trading on regulated markets or on MTF, an extension of the scope of MAD on MTFs regarding STRs should be therefore not too burdensome.

16. Another Member State (**PT**) reported the problem that on MTFs where both financial instruments listed on regulated markets (MAD applicable) and instruments not listed on regulated markets (MAD not applicable) are traded, different rules apply in the same negotiation platform. This would be not beneficial in respect of a level playing field between markets and clarity of rules applicable. Furthermore, Article 26 of MiFID would already require MTF's operators to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. The MAD regime would include not only the prohibitions of insider dealing and market manipulation but also rules (namely, transparency rules) which constitute preventative measures against market abuse. Therefore it would seem incoherent that, on one hand, MTFs should control breaches against market abuse but, on the other hand, the preventative measures against market abuse would not apply. The existence of different rules applicable in the same MTF platform could also cause cross border arbitration, particularly when an unlisted financial instrument is traded in MTFs located in States with different laws and, consequently, when the same practice would constitute market abuse in a State and not in the other.

Problems with MAD regime in full on some MTFs (option C)

17. No problems were reported in relation to option C. However, it should be taken into consideration that only relatively few - only two countries (**EL, MT**) - have chosen this option.

Problems with MAD in some parts on some MTFs (option D)

18. One Member State (**UK**) reported problems with a MTF where companies would provide sometimes insider lists of relatively poor quality because they were not obliged to keep a contemporary record of events. As the lists were compiled retrospectively they may contain errors and omissions.

Problems with MTFs not covered (option E)

19. One Member State (**IE**) pointed at the problem that they were unable to pursue under their legislation possible cases of market abuse that were brought to their attention.

20. Regarding possible plans for changes, three Member States (**IE, LU, and PT**) explained that they want to wait for the outcome of the MAD Review of the European Commission.

21. One Member State (**UK**) believes that the scope of MAD should be extended to cover all instruments admitted to trading on securities MTFs and instruments whose value depends on an instrument admitted to trading on an MTF (i.e. instruments which are not separately traded on a regulated market). Such a change would recognise the ability of a number of MTFs to admit securities to trading as a primary market.

22. According to the findings of this Section A. of the survey, it is obvious that there is not any tendency of convergence on the option/discretion to apply the MAD regime on MTFs. The survey undertaken reveals a remarkable divergent and heterogeneous picture regarding the scope of the MAD regime on MTFs in the different Member States. This is valid not only for the different legal arrangements in the Member States, but also for the different reasons which led to different transpositions of the MAD rules. Consequently also the different problems encountered are depended of the various situations in the Member States. Also most Member States in the different groups of options seem to be rather satisfied with the option they have chosen and the majority did not express any plans to proceed to changes into their legislation. This leads to the résumé that there seems to be so far no room for common conclusions.

23. However it became clear that the vast majority of 20 Member States (**AT, BE, DE, EL, ES, FI, FR, HU, IS, IT**, **LT, LU, MT, NL, NO, PL, PT, SE, SK**, **UK**) extended (at least some parts of) the MAD-regime to (at least some) MTFs.

Recommendation

24. CESR has in its contribution to the MAD review expressed that CESR generally would support an extension of the MAD to MTFs. It is however not a common CESR view that the full MAD should be extended to all MTFs in general. It might therefore be useful to wait for the outcomes of the review of the MAD by the European Commission, who tackled the issue 'scope of MAD' already in the MAD-Review-Call for Evidence, before undertaking any work on the area and expressing a firm position the issue of scope to MTFs.

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B. Information of decision to delay public disclosure of inside information – Art. 6.2 of Directive 2003/6/EC

25. According to the findings of this survey it is obvious that there is not any tendency of convergence on the option to require (or not) that an issuer informs without delay a competent authority of a decision to delay the public disclosure of inside information, as sixteen Member States use of the option to require such notification, whereas eleven are not. In addition, most Member States in both groups are satisfied with the option they have chosen and are not willing to proceed to any changes into their legislation.

26. Sixteen Member States **(AT, BE, BG, CY, CZ, ES, Fl, HU, IT, LV, LT, MT PL, RO, SI, SK)** replied that their legislation provides for the requirement that issuers inform the competent authorities without delay should they decide to delay the public disclosure of inside information. Most Member States selected this option in order to prevent the delay of public disclosure of inside information and in order to enhance the effectiveness of their supervisory powers. Out of them, thirteen Member States **(AT, BE, CY, CZ, Fl, HU, IT, LT, LV, PL, RO, SI, SK)** are satisfied with the practical application of their option whereas, two Member States **(BG** and **ES)** are not satisfied, and one Member State **(MT)** reported that this option has not been availed of in practice. Thirteen Member States **(AT, BE, CY, CZ, Fl, HU, IT, LT, LV, PL, RO, SI, SK)** consider this option effective in its application, whereas two Member States **(BG**, and **ES)** do not consider this option effective in its application. Out of them, three Member States **(AT, BE, ES,)** encountered problems but they have not any concrete plans to change their option, whereas, one Member State **(BG)**, has replied that has encountered problems and has some plans for changes.

27. Eleven Member States **(DE, DK, EE, EL, FR, IE, IS, LU, NL, PT, UK)** replied that their legislation does not provide for the requirement that issuers inform the Authorities without delay should they decide to delay the public disclosure of inside information. Most Member States mentioned that they adopted the relevant option because they believe that the issuers should be responsible for the correct and timely public disclosure of inside information. Out of them, seven Member States **(DE, DK, EL, FR, IE, LU, UK)** are satisfied with the practical application of their option whereas, four Member States, **(EE, IS, NL, PT)** are not satisfied with the practical application of their option. Eight Member States **(DE, DK, EL, FR, HU, IE, LU, UK)** consider this option effective in its application, whereas, four Member States **(EE, IS, NL,** and **PT)** do not consider this option effective. Out of them, two Member States **(EE, NL)** have encountered problems but replied that they do not have any plans to change their option, whereas, two Member States **(IS** and **PT)** have encountered problems and they have some plans for changes.

28. Two Member States **(NO** and **SE)** have replied that their legislation provide for the requirement that issuers inform their regulated market without delay. **NO** and **SE** are satisfied with their option and consider it effective in its application. In addition, they have reported that they have not encountered any problems.

C. Notification of transactions by persons discharging managerial responsibilities

29. The outcome of the present survey is that there are divergences in some areas ("policy issues") that do not leave room for further harmonization whereas great commonalities could be noted in technical issues. These communalities could even serve as basis for some further level 3 guidance in order to reach a greater convergence in the application of the MAD throughout all the Member States.

30. Divergences on "policy issues" can be identified in the fields whether managers' transactions have to be notified only the competent authority or / and to entities other than the competent authority, whether the managers' transactions are notified directly or indirectly to the competent authority and finally whether the option relating to the threshold of five thousand Euros has been implemented in the respective national legislation.

31. Eleven Member States **(AT, BE, BG, CZ, EE, HU, LV, MT, NL, SE and SI)** provide that the manager's transactions have only to be notified to the competent authority. In ten Member States (**CY, DE, ES, FR, IT, LU, PL, PT, RO** and **SK)** managers transactions have to be notified to the competent authority as well as to another entity / other entities than the competent authority. In seven Member States **(EL, FI, IE, IS, NO, LT** and **UK)** the managers' transactions have to be notified only to another entity other than the competent authority. In one Member State **(DK)** only the persons discharging managerial responsibilities have to notify their transactions to the issuer whereas the persons closely associated to persons discharging managerial responsibilities have to notify their transactions to the persons discharging managerial responsibilities who in turn must notify the transactions to the competent authority.

32. In nineteen Member States (**AT, BE, BG, CY, CZ, EE, FR, DE, HU, IT, LU, LV, MT, NL, PL, RO, SE, SI and SK)** the mangers' transactions are directly notified to the competent authority whereas in nine Member States **(DK, EL, IE, IS, LT, LU, (issues of third countries) PT, ES** and **UK)** the managers' transactions are notified to the competent authority indirectly. In one Member State (SI) managers' transactions are notified directly to the competent authority and are also notified indirectly to the competent authority under the provisions on qualifying holdings.

33. Concerning the aforementioned issues, all Member States except **DK** are satisfied with the option chosen which also encountered problems or have thoughts / plans to change the option **(DK)**.

34. Fifteen Member States **(AT, BE, BG, CZ, DE, DK, EL, FI, FR, NL, IT, LV, MT, PL, and SK)** have decided that, until the total amount of transactions has reached five thousand Euros (5.000€) at the end of a calendar year, no notification is required or notification may be delayed until 31 January of the following year. **BG** however has set another threshold namely 2500€. In one Member State **(PT),** the time reference is not the end of the calendar year, but the date of the last disclosure: every time a disclosure is made, the five thousand Euros limit is reset. Thirteen Member States **(CY, IE, EE, ES, HU, IS, LT, LU, NO, RO, SE, SI and UK)** have not decided that, until the total amount of transactions has reached five thousand Euros at the end of a calendar year, no notification is required or notification may be delayed until 31 January of the following year

35. Four Member States **(BE, BG, ES and IT)** reported to have problems with the option chosen (where they have or have not implemented the option of the threshold of 5000 €). Only two Member States **(BE and LU)** plan / have thoughts to make a change in their managers' transaction regime currently in place but both Member States wait for the outcome of the MAD review. There is also no common view on any other threshold to be adopted during the MAD review. Two Member States **(CZ and DK)** suggest a threshold of 10 000 €. DK specifies

that such a threshold would reduce the number of notifications up to 50 %. **LU** has not a precise threshold in mind. Nevertheless, in the opinion of the competent authority the threshold should be a relative one taking into account share options received by managers and significant market operation in such shares. Three Member States **(CY, IS and UK)** are of the opinion that no other threshold should be fixed. **NO** wants that all the managers' transactions have to be notified and disclosed.

36. The more or less great communalities on "technical issues" relate to the specific guidance on how the notification of managers' transactions should be done, a specific standard format, whether the notification period includes those days necessary to receive the information from the intermediary responsible for executing the order, the additional guidance issued by certain Member States on the meaning of giving public access "as soon as possible" and the adequate methods / means of public disclosure of managers' transactions.

37. All Member States except seven **(BG, DK, FI, HU, IT, LT and SK)** have issued specific guidance on how the notification of managers' transactions should be done. Seven Member States **(EL, ES, FR, IE, IS, LU and UK)** have set up a specific standard format that has to be filled in and specify the relevant detailed information the notification of managers' transactions should contain and one Member State **(SE)** is in process in setting up such a format.

38. Twenty-two Member States **(AT, BE, BG, CZ, DE, EE, ES, FR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK and SI)** require that the notification of the managers' transactions should be made within five working days. In twenty-two Member States (**BE, BG, CZ, EE, ES, FI, FR, DE, EL, HU, IE, IS, IT, LT, LU, LV, MT, PT, RO, SE, SI and UK)** the notification period includes those days necessary to receive the information from the intermediary responsible for executing the order. In four Member States **(AT, NL, PL and SK)** those days necessary to necessary to receive the information is not included in the five-day period. Three Member States **(CY, DK and NO**) have a more specific approach.

39. The competent authority of eleven Member States **(CY, DE, IE, EL, ES, NO, IT, LT, PT, RO and UK)** has issued further guidance on the meaning of giving public access "as soon as possible". No further guidance on this matter has been issued by the competent authority of seventeen Member States **(AT, BE, BG, CZ, DK, EE, FI, FR, HU, IS, LU, LV, MT, PL, SE, SI and SK)**.Twenty-one Member States **(AT, BG, CY, DE, IE, EL, ES, FI, FR, IS, IT, LT, LU, MT, NO, PL, PT, RO, SE, SI and UK)** have issued further guidance on the methods / means of an adequate public disclosure of managers' transactions whereas seven Member States **(BE, CZ, DK, EE, HU, NL, LV and SK)** have not issued such further guidance.

40. All the Member States are satisfied with the adoption and the practical application of their further internal guidance on how managers' transactions should be notified, the delay within the notification of managers' transactions should be done, the meaning of giving public access "as soon as possible" and on the methods /means of an adequate public disclosure. Even so one Member State considers making a clarification regarding "transaction date": a) from which the 5 day period should be counted, b) whether it should be the transaction date or the settlement date as well as whether certain kind of derivatives should also be included.

41. The guidance of those Member States could serve as a basis for further work on additional level 3 guidance in order to have a more convergent application of the MAD.

42. Finally, it should be mentioned in this context that the principle of the threshold as well as the threshold itself are among the topics under the current review of the MAD by the EC Commission. Therefore CESR should wait for the outcome finally adopted by the EC institutions before it considers undertaking any further work in this matter

D. Measures to ensure that the public is correctly informed – Article 6.7 of Directive 2003/6/EC

43. In fifteen Member States **(AT, CZ, EL, ES, FI, FR, IE, HU, MT, PT, IT, LU, LT, HU, RO)** Authorities use and supervise directly the measures in place to ensure that the public is correctly informed under Article 6.7 of MAD.

44. The specific measures that Member States have declared to be available to the Authorities for the purposes of Article 6.7 of MAD are the request to publish the relevant information **(13: CY, CZ, DK, ES, FR, IT, LT, LU, NO, PL, PT, SK, UK)**, halting trading in the financial instrument concerned in the case information is not published **(9: DK, ES, IT, LT, LU, NO, PL, PT, SI)**, and the publication of the information themselves in the case the issuer does not fulfil his obligations **(6: DK, IT, LT, LU, SK, UK)**. Five Member States **(AT, BG, EL, FI, IT)** have declared generally that the Authorities can take all measures which are possible in the normal course of supervision and four Member States (**AT, BG, IT and LU**) can impose administrative fines for non-compliance. In order to contain costs of a regime which is not harmonised at EU level, the MAD regime applies only in some parts on some MTFs (**IT**).

45. Only some Member States have commented on how the Authorities monitor that the public is correctly informed. Reference is made to the continuous check of media, including issuers' web-sites **(DK, IT, SE)**, also in cooperation with the stock exchange **(NO)**, to contacts with issuers (**PT, FR**) or to the normal supervisory activity **(DK, EL, IT, NO, SE, RO)**. In **NO** the supervision is conducted in close cooperation with the regulated market.

46. All 29 Member States declare that the Authorities are satisfied with their practical application of the measures they have available to ensure that the public is correctly informed, with the relevant exception for where experience is lacking because an options has not been used, and they have not encounter any problems in the application of those measures and have not plans to change those measures. **MT** is satisfied with the measures taken to ensure that the public is correctly informed, with the exception of the requirements on the delay of disclosure of inside information as this option has not been availed of in practice.

47. Twelve Member States **(AT, DE, EE, EL, FR, IS, IT, LV, MT, NL, NO, UK)** indicate that the Authorities have experiences of enforcement actions regarding Article 6.7 MAD. In particular, in their examples given, six Authorities (**AT, EE, IS, LV, MT, NO, UK**) quoted the application of fines, 3 Member States **(EL, FR, IT)** the request to provide the necessary information to the public, and 1 Member State **(EL)** the suspension of trading. The type of infringements quoted by the aforesaid Member States pertain to delay in disclosing information under Article 6.1, breach of information requirements in take-over cases, breach of manager's reporting obligations or other infringements. The enforcement cases quoted under sections B regarding Article 6.2 and C regarding Article 6.4 (see above) are also of relevance for a reading of the cases in relation to Article 6.7.

Observation

48. The findings of the survey show that there is no convergence regarding the measures available to the authorities to ensure that the public is correctly informed under Article 6.7 of MAD. It is noted that, in some Member States, those measures include the power to require the publication of the relevant information, to suspend trading in the financial instrument concerned and to publish the information themselves in the case the issuer does not fulfil his obligation

E. Content of a Suspicious Transaction Report (STR) – Article 6.9 of Directive 2003/6/EC & Articles 7, 8, 9 and 10 of 2004/72/EC

49. Two Member States, (**DE** and **MT)**, require extra information to be submitted in writing in addition to what is required in the standard report format set out in the Level 3 set of CESR guidance. No Member State submitted a definition as to what constitutes "reasonable ground for suspicion". Seven Member States (**CZ**, **EE**, **FI**, **MT**, **NO**, **PT** and **ES)** have issued guidance on the assessment of reasonable grounds for suspicion. No Member State has set any materiality threshold for suspicious transaction reports. Seventeen Member States (**BE**, **CZ**, **FI**, **DE**, **DK**, **HU**, **IE**, **IT**, **LT**, **LU**, **NL**, **NO**, **PL**, **PT**, **ES**, **SE** and **UK)** do require/receive STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market. Nine Member States, (**CY**, **DK**, **EE**, **FR**, **IT**, **LT**, **NL**, **PT** and **SI)**, require and nine Member States, (**BE**, **EL**, **ES, HU**, **IE**, **IS**, **NO**, **SE** and **UK)** encourage persons to voluntarily report suspicious unexecuted orders to trade. One Member State, (**CZ)**, has issued guidance in relation to reporting suspicious unexecuted orders to trade and one Member State, (**DE)**, refers to the CESR guidance. Nine Member States (**BE**, **CZ**, **EE**, **FI**, **FR**, **IT**, **LU**, **ES** and **UK)** have issued guidelines to firms in relation to the systems and controls they should have in place to identify suspicious trades.

50. One Member State, (**FR)**, has encountered problems with the option they had chosen not to require STRs for OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market. One Member State, (**PL)**, noted the importance of information on derivative financial instruments to Competent Authorities.

51. Six Member States, (**EL**, **HU**, **LT**, **MT**, **PL** and **PT)**, stated that the low number of STRs received is an issue. Three Member States, (**BG**, **EE** and **FI)**, noted the difficulty in proving the liability of the investment firm if a transaction or order is not reported. One Member State, (**CY)**, noted that there is no formal system to assess whether or not the 'requirement to report' is being met in practice. One Member State, (**LU)**, notes that financial institutions have encountered problems differentiating between financial instruments that are only admitted to trading on a regulated market from those who are only admitted to trading on an MTF. One Member State, (**DK)**, notes the need to gather more information than that provided in the STRs. One Member State, (**NL)**, notes that investment firms are not required to update their computer systems, nor are they required to actively monitor for suspicious trades. One Member State, (**UK)**, finds the STR regime to be extremely valuable in identifying possible cases of market abuse, however it noted some areas for improvement – (a) "defensive reporting" where firms make reports when there are no reasonable grounds for suspecting that a transaction constitutes market abuse; (b) firms focussing on the quantity of reports rather than the quality; (c) some firms have too high a threshold for considering a STR; (d) lack of reporting concerning transactions which, while they may not have provided reasonable grounds at the time may retrospectively be seen as suspicious.

52. Three Member States, (**FI**, **FR** and **EL)**, intend to make changes to the STR regime currently in place. Two Member States (**FR EL)** are considering requiring/receiving STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market. One Member State, (**FI)**, stated that it intends to give more guidance on examples for reporting

53. Four Member States, (**EL**, **NL**, **RO** and **SE)**, have taken enforcement action or court cases against persons failing to comply with Article 6 paragraph 9 of MAD. One Member State, (**EL)**, has imposed administrative sanctions on persons professionally arranging transactions who might reasonably have suspected that the transactions constituted market abuse. One Member State, (**NL)**, imposed a fine of €21,781 for failure to report a suspicious transaction. One Member State, (**RO)**, imposed sanctions upon the compliance officers within investments firms that failed to send a STR.

Recommendations

54. It is recommended that all Member States encourage the reporting of STRs on OTC derivatives, where the underlying asset is an instrument admitted to trading on a regulated market, until such time as it becomes mandatory. The CESR OTC Task Force recommended that the European Commission be requested to amend Directive 2006/6/EC to make the reporting of STRs on OTC derivatives mandatory. This proposal was included in CESR's response to the Commission's Call for Evidence on the review of Directive 2006/6/EC.

55. It is recommended that the European Commission be requested to amend Article 6(9) of Directive 2006/6/EC to extend the reporting requirements to include reports of suspicious unexecuted orders to trade, in a way that makes clear that individual firms have the obligation to decide whether to execute a transaction or not.

F. Supervisory and investigatory powers – Article 12 of MAD, directive 2003/6/EC

56. Article 12 paragraph 1 states that such power is exercised (a) directly or, (b) in collaboration with other authorities or with the markets undertakings or, (c) under its responsibility by delegation to such authorities or the market undertakings or, (d) by application to the judicial competent authorities. The Members were first asked to provide the problems encountered in the case where they do not exercise their power directly.

57. The responses show that among the seventeen Member States concerned as sharing their power (**AT, BE, ES, FI, HU, IS, LT, LU, LV, MT, NL, NO, PT, RO, SE, SI, SK**), the problems are quite rare (5 Member States: (**EE, ES, FI, NL, NO**), partly because we are still in early days of the MiFID and because across the Membership, few cases have been raised. Although rare, these problems are significant and must draw the attention of the Review Panel, such as timeliness and/or procedural burdens when another Authority is involved, as well as conflicts of European legislation as regards the issue of personal data, for instance. In addition, it must be underlined that to the question whether they were satisfied with the practical application of the option to sharing these powers or exercising these powers directly, a negative response was given in 11 cases (**DK, EE, ES, FI, LT, LV, MT, NL, NO, RO, SI**).

58. Article 12 paragraph. 2 provides a list of powers that includes at least the rights (a) to have access to any document in any format whatsoever and receive a copy of it, (b) to demand information from any person and if necessary to summon and hear any such person, (c) to carry out onsite inspections, (d) to require existing telephone and data traffic records, (e) to require the cessation of any practice that is contrary to the provisions adopted in the implementation of MAD, (f) to suspend trading of the financial instruments concerned, (g) to request freezing and/or sequestration of assets, (h) to request temporary prohibition of professional activity.

59. In relation to these powers, the Member States were first asked to express the problems encountered, to describe them and to indicate if they have plans to change. Whereas for a majority of twenty of them (**AT, BE, BG, DE, DK, FR, HU, IE, IS, IT, LT, LU, MT, NL, PL, PT, RO, SI, SK, UK**), no problem has been encountered, six Member States (**EE, EL, ES, FI, NO, SE**) presented procedural or legal matters as limitations to the efficient performance of their power, with three of them intending to carry out changes either at national level (by promoting amendment to the law) and/or by applying their case to the European authorities. Even though it is not a general view, such situation highlights the expectations nurtured in terms of improvement of some specific aspects of the directives concerned.

60. Besides, it should be noted that 11 Member States (**BG, CY, DE, EE, EL, FR, IE, IT, PL, PT, UK**) exert additional powers, most generally directly on their own. These powers pertain to two main ones: obligating persons to comply with market abuse provisions on the one hand, gathering evidence in the course of an investigation thanks to specific provisions on the other (e.g., seizing of documents, freezing of assets and searching of premises).

61. As regards the list of the powers granted to the Authorities, the whole Membership exerts them, with very few exceptions. However, the effective ways of carrying them out show important dissimilarity depending on the type of powers concerned. The limits and alleviations imposed to the performance of these powers may either stem from material questions or from legal aspects such as the protection of individual liberty which interferes with the objectives of the directive.

Recommendations

62. The absence of harmonisation in the performance of the powers is not surprising since it confirms the conclusions of the previous work of the Review Panel, especially the MiFID mapping of 2008. The same recommendations can be adopted, and almost the same wording: the capacity to act on an equal footing when performing their powers is considered by CESR as a precondition for the Member States to benefit from a credible EU supervisory system and to deliver convergence between them.

G. Professional secrecy – Article 13 of Directive 2003/6/EC

63. All the Members have incorporated in their legislation the possibility to waive professional secrecy but, although widespread, such possibility depends on requirements specified by national laws that can be very diversely applied.

64. The most current exemption to the obligation of professional secrecy relates to the exchange of information with local Authorities (including, among others, the Central Banks, the anti money laundering institutions and in five Member States – (**HU, PL, NO, SI, SK)** - the tax authorities) or with foreign Authorities, as it is used by 24 Members (**BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE, LT, LU, LV, MT, NL, NO, PL, PT, RO, SI, SK, UK**).

65. The relations with the Courts is the second main reason for which confidentiality may be waived as it concerns sixteen Members (**BG, CY, CZ, DE, EE, EL, FI, FR, HU, IE, IS, IT, LU, PL, SI, SK, UK**).

66. It seems that the system raises no difficulties and that it works quite in good conditions thanks to the precise requirements stated by law. However, the extent to which professional secrecy sometimes may be waived is so wide that it could deprive this right from its actual meaning.

Recommendations

67. To be significant, the notion of professional secrecy must be protected by a strict and limited number of exemptions. However, the variety of possibilities to breach it legally is so wide across the Membership that it could be of interest to have a reflection on its actual uses. Therefore the Review panel proposes to recommend the European Commission to examine the question of professional secrecy with respect to the financial directives in order to harmonise the respective situations while preserving adequate possibilities for international co-ordination as well as internal law enforcement purposes.

H. Disclosure of measures or sanctions – Article 14(4) Directive 2003/6/EC

68. Member States reported different policies regarding the publication of sanctions or measures imposed in case of infringement of the market abuse regulation.

69. Nineteen Member States **(BE, BG, CY, CZ, EL, FR, HU, IE[2] IS, IT, LT, LU, LV, MT, NO, PL, RO, SK, UK)** stated that they disclose directly to the public every measure or sanction 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.

70. The publication of every measure or sanction may either be required by a provision incorporated in the law or derive from the general policy adopted by the Authority. There are also differences concerning the form and the content of a published sanction or measure. This 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.

71. The main reason for publication of measures and sanctions reported by Member States is a better transparency and the provision of information to the market reported by twelve Members **(BE, BG, CY, CZ, DK, EL, HU, IT, LT, PL, RO, UK)**. Other reasons were also mentioned, including the publication being considered as an additional sanction against the violator or a possible deterrent against similar breaches, the enhancement of public confidence and a better functioning of the market.

72. Ten Member States **(DE, DK, EE, ES, FI, NL, PT, SE, and SI)** declare that not every measure or sanction imposed for infringement of the provisions adopted in the implementation of MAD is published. Publication may depend on different factors, including the seriousness of sanction and whether the publication is of a public interest or it is necessary for the protection of investors. Concerns on confidentiality and possible liability of the Authority have also been mentioned.

73. All Member States but four (**AT, DE, EE, and NL**) declared that the Authority is satisfied with the practical application of the provisions in place regarding disclosure of measures or sanctions and consider them effective in their application.

Recommendations

74. The finding of the survey shows that there is a clear divergence among Member States regarding the publication of measures and sanctions imposed for market abuse violations. The Review Panel acknowledges that the publication of sanctions and measures imposed by the Authorities is of high importance to enhance transparency and to maintain confidence in financial markets.

[2] In IE the only sanction that is not disclosed is a private reprimand or caution.

I. Assistance requested by the competent authority of another Member State – Article 16.4 of Directive 2003/6/EC

75. Regarding reasons to deny assistance or to deny undertaking joint investigations with the competent authority of another Member State, as provided for in Article 16.4 of Directive 2003/6/EC, **none** of the competent authorities has reported that its domestic legislation foresees additional reasons to those established in the MAD.

J. Additional items in lists of insiders – Article 5 paragraph 2 and 4 of implementing directive 2004/72/EC

76. According to the findings of this survey there is no tendency of convergence on the option of requiring additional items in lists of insiders or not. Eight Member States **(BE, DE, EL, NO, PL, LT, LV** and **SK)** require other items in additions to the minimum requirement of the implementing directive 2004/72/EC, whereas twenty Member States do not require additional items. All Member States are satisfied with their practical application except two Member States who have not expanded the list of items in lists of insiders. However they use alternative powers to require additional items.

77. Only two Member States **(DE, LV)** have a legislation that requires the lists of insider to be kept for a specific number of years greater that the minimum five years as laid down under the implementing directive 2004/72/EC. This is because of harmonization with other national law. The other twenty seven Member States requires five years or, as the directive states, at least five years. This might seem as a clear tendency of convergence on the option to require lists of insiders to be kept for five years. However, the survey undertaken does not reveal how many of the Member States have chosen exactly five years and how may have chosen the exact wording of the directive. Therefore it is not possible to say that there is a possibility of convergence for lists of insiders are to be kept for five years

Items in lists of insiders

78. Implementing directive 2004/72/EC states in Article 5.2 that lists of insiders shall state at least: (a) the identity of any person having access to inside information; (b) the reason why any such person is on the list; (c) the date at which the list of insiders was created and updated. In most Member States these are the only items required to be included in lists of insiders. However eight Member States **(BE, DE, EL, NO, PL, LT, LV,** and **SK)** require additional items. In one Member State **(LU)** there is strictly speaking no additional information to be included in the insiders' lists. The competent authority has issued implementation rules of the law on market abuse where it clarifies the details of the information that has to be included in lists of insiders.

79. Most of the additional items have been included as they are deemed relevant and necessary information to facilitate future market abuse investigations. Also, in one instance the additions are made to make the persons on the lists of insiders aware of their obligations and prevent from possible misconduct.

80. All Member States but two **(PT** and **UK)** are satisfied with the practical application of items in the lists and consider them effective in its application. Neither of the legislations of the two Member States which are not satisfied require additional items in the list. Both Member States have reported that when requesting lists they have a need of more detailed information than those items required in the lists. Therefore thy use the alternative powers to require information for the purposes of an investigation.

81. None of the twenty nine Member States have any plans to make any changes in the requirements of items in lists of insiders.

Time requirement for keeping lists of insiders

82. Article 5.4 of the Implementing directive 2004/72/EC states that lists of insiders shall be kept for at least five years after being drawn up or updated. Twenty seven Member States **(AT, BE, BG, CY, CZ, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LT, LU, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK)** require the lists of insiders to be kept for five years or at least five years. Two Member States **(DE** and **LV)** have opted to implement a specified time of more than five years. In both cases the reason is the harmonization with other national law.

83. All twenty nine Member States are satisfied with their practical application of the time requirement of keeping lists of insiders and find the rule effective in its application. Only one Member State **(IS)** reported problems with the time requirement of the keeping of lists of insiders. The competent authority has had to fine many issuers for not sending the lists on a six months basis. This problem is also affecting the 5 year rule. This Member State **(IS)** does not have any plans to change the time period for which that lists of insiders have to be kept, but the competent authority has recently started to observe more closely that issuers make the lists and sends them on a regular basis.

K. Threshold – Article 6 paragraph 1 a) of Directive 2003/125/EC

84. Twenty four Member States (**AT, BE, CY, CZ, DE, DK, EE, EL, ES, Fl, FR, HU, IE, IS, LT, LU, LV, MT, NO, RO, SE, SI, SK, UK)**, apply the threshold provided in the Directive (above 5%)**.** Five Member States provide a lower threshold: equal to 5%, **BG**, **NL**, and **PL,** and 2%, **IT** and **PT.**

85. In addition to the reference to quantitative thresholds, the authorities of two Member States, (**NL**, **PT),** underlined the obligation to disclose an even lower holding (below 5% and 2%, respectively) if, in the case, it constitutes a material or significant financial interest.

86. In all but one Member States, (**NL**) the relevant threshold is identical both for disclosure of shareholdings in the share capital in the issuer held by the relevant person (or any related legal person), and for shareholdings in the share capital of the relevant person (or any related legal person) held by the issuer. In such other State (**NL),** there is no obligation for a recommendation to state holdings of an issuer in the relevant person.

87. As far as **reasons** are concerned, four of the Members States whose legislation has lowered the threshold justify such option with the harmonization with the provisions on information about major holdings under the Transparency Directive **(IT, NL, PL,** and **PT)**. On the other hand, the reasons given for the option to keep the threshold provided in the Directive are its materiality, effectiveness, suitability and proportionality, namely with the size and liquidity of the market in question (**DE, EE, MT, ES,** and **RO)** respectively**.**

88. All Member States are **satisfied** with the practical application of the threshold chosen and consider its **application effective**. However, one Member State (**PT),** pointed out that the transparency obligations in recommendations would be more effective if they cover disclosure of transactions made by the legal person responsible for the recommendation when the market is driven by its dissemination' impact, enabling investors to properly assess both the objectivity of the recommendation and the eventual interest of its responsible.

89. Exception made to one Member State **(FI)**, none of the Member States reported any **problems** with the option chosen. The problem felt by that Member State, and also mentioned by other Member State, (**EL),** with regard to effectiveness in the application of the option chosen, relates to the uncertainty on how the threshold should be calculated: whether at an individual level (by company), or at a "global" level, adding up the shareholdings of affiliate companies and related persons.

90. Only one Member State (**NL)**, has **plans for change** of the option chosen. This change will be towards lowering the current threshold (for a relevant person to disclose shareholding in the issuer) from 5% to 3% and stems from a change in the threshold for notification of major holding under the Transparency Directive.

91. None of the Member States has taken **enforcement action or court cases** against persons failing to comply with Article 6 § 1 a) of Directive 2003/125/EC.

Observations

92. The findings of this survey show that there is a clear split between the States (a majority) whose legislation has not lowered the threshold, set at community level, for the disclosure, in recommendations, of cross-shareholdings that exist between the relevant person (or any related legal person) and the issuer (and *vice versa*), and the five States whose legislation chosen to lower such threshold in order to harmonize it with the major holding provisions under the Transparency Directive.

93. Considering the difficulties reported by two Member States, a clarification on how the threshold should be calculated might be useful.

L. Obligations in relation to fair presentation of recommendations – Article 4 paragraph 1 of the Implementing Directive 2003/125/EC

94. Only two Member States (**DE, IS)** impose other obligations in relation to fair presentation in addition to those laid down in Article 3 and Article 4(1) of the Directive 2003/125/EC.

95. **DE** imposes that persons who prepare recommendations are obliged to do so with the requisite degree of expertise, care and conscientiousness. In **IS** the person needs to ensure that when an update of a recommendation takes place, the information of possible conflict of interests should also be updated.

96. Two Member States (**DE, PT**) have encountered problems with the option they have chosen.

97. **DE** has encountered some difficulties in defining how to prepare analysis of financial instruments with the requisite degree of expertise, care and conscientiousness. **PT** has issued a set of non-compulsory obligations in relation to fair presentation of recommendations

98. **All** Member States except on (PT) are satisfied with the option they have chosen.

99. None of the Member States have plans to change present requirements. .

M. Disclosure of other items – Article 5 Paragraph 2 of the Implementing Directive 2003/125/EC

100. Only one Member State (**NL)** requires that the information to be disclosed should include other items in addition to those laid down under Article 5(2) of Directive 2003/125/EC.

101. **All** Member States except one (PT) are satisfied with the option.

102. Two Member States (**FI, PT)** have encountered problems with the application of the option they have chosen. In **FI** the problem relates to uncertainty regarding what such conflict of interest might be in practice. **PT** has issued a set of non-compulsory obligations to ensure a fair disclosure of conflict of interest to the public is achieved.

III. MAIN REPORT SECTIONS A-M

Section A. Options and discretions in relation to the scope of MAD on MTFs.

103. According to article 9 of directive 2003/6/EC (MAD[3]), this directive shall apply to any financial instrument admitted to trading on a regulated market in at least one Member State. However, since this is only a minimum requirement, Member States are free to apply the MAD regime (in part or in full) also to (all or some) MTFs.

104. This section A shows how far Member States have extended the scope of MAD to MTFs, gives reasons for this extensions and also presents some problems encountered. This set of questions was new compared to the old questionnaire used for the mapping exercise for MAD in 2006.

A1. Is the MAD regime (in at least some part) applicable to MTFs (at least some) in your jurisdiction? (Yes / No)

105. Yes: 21 Member States (**AT, BT, DE, DK, EL, ES, FI, FR, HU, IS, IT, LT, LU, MT*, NL, NO, PL, PT, SE, SK, UK**)

106. No: 8 Member States (**BG, CY, CZ, EE, IE, LV, RO, SI**)

*see Question 3

A2. Please develop your answer by marking one box of this table

	All MTFs	Some MTFs	MTFs not covered
MAD regime in full	A	C	E
MAD in some part(s)	B	D	

107. Legislators in the Member States obviously made use of their many options in respect of the scope of the MAD regime on MTFs. Therefore a remarkably heterogeneous picture emerges. All five possible options (A-E) were chosen by the legislators. Especially within the options B and D there are again several possible sub-options (compare question A 4) which also have been very differently chosen by legislators. This raises the question, of whether more homogenous rules regarding the scope of the MAD regime on MTFs could not reduce the burden on cross-national acting issuers and investors of complying with so many different regimes.

108. The answers divided as follows between the five options:
- Option A - four Member States (**ES, HU, IS, NL**)
- Option B - nine Member States (**AT, DK, LT, LU, NO, PL, PT, SE, SK**)
- Option C - two Member States (**EL*, MT****)
- Option D – six Member States (**BE, DE, FI, FR, IT, UK**)
- Option E- eight Member States (**BG, CY, CZ, EE, IE, LV, RO, SI**)

* MAD regime is applicable for all MTFs authorized by HCMC or the Bank of Greece
** see Question 3

[3] Market Abuse Directive

A3. If (C) (all of MAD to part of MTFs) or (D) (part of MAD to part of MTFs), please specify the MTFs in your jurisdiction where (all or at least certain) prohibitions and/or requirements provided for in the MAD apply, if actions (or omissions) carried out concern financial instruments admitted to trading (only) on such MTFs (or at least a request for being admitted to trading on such a MTF has been made).

109. **BE**: The 5 Belgian MTFs are listed on our website: http://www.cbfa.be/nl/fm/gm/li/html/mtf_exp_li.asp (Alternext, Marché Libre, Ventes Publiques, trading facility and Easynext). The scope of the MAD provisions (more precisely, of the Belgian law transposing the MAD) has been partially or fully extended to some of those MTFs. More specifically, the administrative market abuse interdictions are applicable to Alternext, Trading Facility and Easynext, whereas the preventative measures are only applicable to Alternext. However, on the Marché Libre, intended for micro-caps, the penal market abuse interdictions apply. Basically, this means that the administrative interdictions are not applicable on the Marché Libre and the Ventes Publiques. As for the Marché Libre, it is an MTF for micro-caps, with one fixing daily in the afternoon. There are basically no real listing requirements, such as a minimum free float, minimum capitalization or minimal IPO-size. The regulatory burden is very low. Apart from compliance with the general company law, hardly any financial law rules apply: only on entry to the marché libre and for subsequent public offerings (and mandatory bids on them) a CBFA-approved prospectus has to be published, but the companies are not obliged to publish inside information or periodic information according to financial law rules. There are currently about 25 - 30 companies listed on the Marché Libre. Mostly they list shares, but some have listed bonds. Their total company value at IPO was in the majority of cases less than € 10 M, but some were valued at 25 or even € 30 M. The funds raised during IPO have always been less than € 2,5 M, mostly around € 1 - 1,5 M, sometimes even only €0,5 M. There is no aggregated market data readily available, but most of these stocks are very illiquid. Les Ventes publiques is a platform without any listings or admitted issuers: there's no continuous trading, but anyone can put on sale eg 'bons de caisse', bonds, stocks of bankrupt companies (where a banckuptancy dividend still has to be paid out), shares of non-listed companies. This market is very illiquid as well.

110. **DE**: Some parts of the MAD regime apply to financial instruments admitted to trading on MTFs operated by operators of regulated markets (so called Freiverkehr).

111. **EL**: The provisions of Law 3340/2005 implementing MAD apply to the MTFs that are operated by an investment firm (AEPEY) or a credit institution that is licensed by the HCMC or the Bank of Greece respectively (Art. 6a par. 6-7 Law 3759/2009). As a result, the MAD regime does not apply to MTFs that are not registered with the HCMC or the Bank of Greece.

112. **FI**: There are two separate types of MTFs in the Finnish jurisdiction. One has more stringent regulatory regime than another. In both cases the MAD rules concerning insider trading and market manipulation apply. However, it should be noted that there are no MTFs licensed at the moment.

113. **FR**: The concerned MTF is Alternext Paris.

114. **IT**: Art. 116, 2-bis. Tuf extends the application of MAD Art. 6 (with the exception of the last sentence of Para 3 and Para 4) to the issuers of financial instruments who have requested or authorised the admission to trading of such instruments on multilateral trading facilities falling within the categories indicated by Consob with its regulations. The insider trading and manipulation prohibitions provided for in the directive were extended by Art. 180 Tuf to the financial instruments admitted to trading on Italian MTFs, whose admission to trading has been requested or authorized by the issuer.

115. **MT**: (Regarding Question 1) Yes, In terms of article 4 of the Prevention of Financial Markets Abuse Act ('PFMA'), the provisions of this Act shall apply to financial instruments admitted to trading on a regulated market in Malta or in any other Member State of the EEA State or for which a request for admission to trading on such a market has been made. The fact that the transaction itself does not take place on such regulated market or constitutes an off-market deal in terms of the Financial Markets Act (Off-Market) Deals Regulations shall not exclude the applicability of this Act to such transaction.

116. Malta has only one trading platform which is a regulated market and which is operated by the Malta Stock Exchange. The Malta Stock Exchange is a small market with only nineteen different listed companies which have their shares which are being traded. There are no MTFs established and regulated in Malta. This notwithstanding, as explained above, the PFMA is also applicable to transactions carried out on an MTF (established in the EEA) in so far as the said transactions are in financial instruments which are traded on a regulated market.

117. (Regarding Question 2) As explained above, the MAD regime is applicable to MTFs with respect to those financial instruments which are also traded on a regulated market. If some or all of the financial instruments traded on an MTF are not also traded on a regulated market then the MAD will partially/not apply to the said MTF.

118. **UK**: The UK regime covers securities that are admitted to trading on the "prescribed markets" of Aim and Plus Markets, which are MTFs.

119. Twenty answers stated that the option was non-applicable to their Member States (**AT, BG, CY, CZ, DK, EE, ES, HU, IE, IS, LT, LU, LV, NL, NO, PL, PT, RO, SE, SK**)

120. **SI**: MAD regime is not applicable to MTF directly. Nevertheless the MAD regime would apply for each transaction with financial instruments admitted to trading on a regulated securities market but executed on the MTF. On the other hand for securities traded only on MTF the MAD does not apply. In fact only one MTF was given Agency's licence to operate while it is not active. Article 379(1) of the Market in Financial Instruments Act (ZTFI) applies as: Chapter 10 of the ZTFI (Prohibition of market manipulation and insider trading) applies for each financial instrument admitted to trading on regulated securities market in at least one Member State and financial instrument for which a requirement to be admitted to trading on those markets is pending regardless of the fact that transaction has been executed on or off regulated market.

A4. If some parts of the MAD regime apply to MTFs in general, (B), or to some MTFs (D), please specify which parts of the MAD regime apply to these MTFs (multiple answers possible):

a) Publication of inside information

121. The answers divided as follows:
- Yes: six Member States (**DE***, **FI, FR, IT, MT*, SE**)
- No: ten Member States (**AT, DK, LT, LU, NO, PL, PT, SK, UK**)
- n/a: 13 Member States (**BG, CY, CZ, EE, EL, ES, HU, IE, IS, LV, NL, RO, SI**)
- **BE**: see answer for question 3. As long as the financial instruments which is traded on the MTF is also traded on a regulated market.

* As long as the financial instrument which is traded on the MTF is also traded on a regulated market.

b) Publication of managers' transactions

122. The answers divided as follows:
- Yes: five Member States (**DE***, **FR, MT**, PL, LT**)
- No: 11 Member States (**AT, DE, DK, FI, IT, LU, NO, PT, SE, SK, UK**)

- n/a: 13 Member States (**BG, CY, CZ, EE, EL, ES, HU, IE, IS, LV, NL, RO, SI**)
- **BE**: see answer for question 3. Please refer to our reply to 4 (a) above.

*As long as the financial instrument which is traded on the MTF is also traded on a regulated market.

c) Insider lists

123. The answers divided as follows
-Yes: five Member States (**DE*, DK, LT, MT*, PL**);
- No: ten Member States (**AT, FI, FR, IT, LU, NO, PT, SE, SK, UK**)
- n/a: thirteen Member States (**BG, CY, CZ, EE, EL, ES, IE, HU, IS, LV, NL, RO, SI**)
- **BE**: see answer for question 3. Please refer to our reply to 4 (a) above.

d) Suspicious transactions reports

*As long as the financial instrument which is traded on the MTF is also traded on a regulated market.

124. The answers are divided as follows.

- Yes: eleven Member States (**AT, DE*, DK, FI, IT, LT, MT*, PT, SE, SK, UK****)
- No: four Member States (**FR, LU, NO, PL**)
- n/a: thirteen Member States (**BG, CY, CZ, EE, EL, ES, HU, IE, IS, LV, NL, RO, SI**)
- **BE**: see answer for question 3. Please refer to our reply to 4 (a) above.

*As long as the financial instrument which is traded on the MTF is also traded on a regulated market.

** [Sup 15 refers to qualifying investments on prescribed markets]

A5. Further to question 4, please indicate possible other areas which are *not* applicable

125. **AT**: There are no other areas which are not applicable.

126. **BE**: see Q A3

127. **DE**: There are no other areas which are not applicable.

128. **DK**: The rules concerning insider trading and market manipulation are also applicable to the MTFs.

129. **FI**: Investment research.

130. **IS: T**he MAD regime does not apply to MTFs which provide their services on a cross-border basis in Iceland.

131. **IT**: There are no other areas of MAD regime that do not apply to MTFs.

132. **LU**: Notification of managers' transactions, obligations applicable to persons who produce investment recommendations, share buy-backs and stabilisation

133. **MT**: The text of the MAD indicates that the directive applies to financial instruments admitted to trading on a regulated market or for which a request for admission to trading on such a regulated market has been made. In order to avoid any possible loopholes Malta decided to apply the requirements of the directive whether the transaction takes place through the systems of the regulated market or outside the regulated market. 'Therefore, as long as the financial instrument which is traded on an MTF is also traded on a regulated market, the transactions on an MTF fall within the scope of the PFMA. All other transactions fall outside the scope of the Maltese law which transposes the MAD.'

134. **NO**: None.

135. **PL**: There are no other areas where MAD is not applicable to MTFs. We would like to point out that the obligation concerning publication of inside information by companies listed at MTFs is not covered by the provisions of law but is included into the MTF Regulations issued by the Warsaw Stock Exchange running the MTF.

136. **PT**: Except for the criminal prohibition from using and disclosing inside information and the prohibition from engaging in market manipulation (as well as the related obligation for financial intermediaries to report suspicious transactions that may be qualified as such crimes), the MAD provisions are not applicable to financial instruments traded solely on MTFs.

137. **SE**: We have no further areas which are not applicable to the extension of the scope beyond regulated markets.

138. **SK**: In the context of obligations stipulated in the MAD we are not aware of other possible areas which are not applicable.

139. **UK**: none

140. Twelve answers stated non applicable for their 13 Member States (**BG, CY, CZ, EE, EL, ES, HU, IE, LV, NL, RO, SI**)

A6. In case you answered A, B, C and/or D, please explain the reasons why your legislation provides for, or, in case you answered E, does not provides for, the above described extension of the scope of MAD beyond regulated markets.

141. As a consequence of the various options and sub-options chosen, there are also reasons for many different possible scenarios. Therefore the possibility to summarize and categorize the reasons is naturally limited. Sometimes the same reasons are given to argue for quite different options.

Reasons for MAD regime in full on all MTFs (option A)

142. For the reasons set out in the recitals in the preamble to the Directive 2003/6/EC the MAD regime in full would apply to all MTFs (**ES**). The seriousness of market manipulation would require the application of MAD regime to all MTFs (**IS**). Besides, the interpretation that the MAD regime required application to MTFs led to such a domestic transposition of the MAD regime (**IS**). In one Member State (**NL**) the explanatory memorandum of the law implementing MiFID would consider that Article 43 extends the prohibition of market abuse to all MTFs. In another Member State (**HU**) the reason for applying the MAD regime in full to all MTFs was that the scope of the application of market abuse provisions has not been limited to specific kind of MTFs.

143. **ES**: The CNMV considered that the reasons that led the EC to develop a market abuse regime for regulated markets, as set out in the preamble to Directive 2003/6/EC, were also valid and appropriate for MTFs.

144. **HU**: No concern emerged around the application of the MAD regime to such markets. However, the domestic implementation of MAD makes no barriers to the application of market abuse provisions to MTFs.

145. **IS**: In the light of the seriousness of market manipulation it was considered right to extend the regime of MAD to MTFs. It was also understood that terminology of the MAD included MTFs.

Reasons for MAD in some parts on all MTFs (option B)

146. In order to enhance investors' confidence and trust in financial markets (e.g. by means of transparency), the scope of MAD was extended in some Member States (**LT, LU, NO, PL, PT**). The scope was extended to preserve the market integrity of the MTFs (**DK**, **LU, and PT**) and to ensure the proper functioning of the MTFs (**PL**). The preventive effect of the market abuse prohibitions was also stated as reason to extend the scope of MAD (**NO**). The extension was chosen to supply the regulator with sufficient information and enable it to supervise and enforce possible market manipulations effectively (**LT, NO**). Also in order to have continuity with the legislation before MAD, a wider scope was maintained (**SE**).

147. However, the extension of all obligations of the MAD regime was considered too burdensome and that costs would outweigh benefits (**DK**, **LU**).

148. **AT**: No specific reasons.

149. **DK**: Pursuant to the Danish legislation, the prohibitions of insider trading and market manipulation apply to both regulated markets and to MTFs. STR also apply. When implementing MAD and MiFID directives, Denmark mainly chose the minimum standards towards MTFs. Denmark, however, wanted the prohibitions of insider trading and market manipulation to apply to MTFs as well as regulated markets because of the preventive effect of the prohibitions in the market and with regards to effective enforcement of the marked abuse regime.

150. **LT**: The reason is the same as stated in MAD – to enhance investor confidence in financial markets. The extension has been made in order to get sufficient information to supervise for possible market manipulation. At this particular moment the extension of inside information has not been implemented, since we believe that fewer requirements for information disclosure should be applicable for companies listed in MTF than for the issuers in regulated market. Therefore, particular requirements for companies listed in MTFs are indicated in the rules of individual MTF.

151. **LU**: The creation in Luxembourg of an MTF in July 2005 according to the directive 2004/39/EC on markets in financial instruments has initiated the debate to extend the scope of the draft law implementing MAD to MTFs. Such an extension has been considered by the regulator as well as by the professionals of the financial sector and the Luxembourg Stock Exchange as being important in order to preserve the market integrity of the MTFs and the confidence of investors in those markets. It has been decided that the prohibitions of insider dealing and market manipulation as well as the sanctions thereof will be applicable to any transaction in financial instruments admitted to trading on at least one MTF, or for which a request for admission to trading on such an MTF has been made, irrespective of whether or not the transaction itself actually takes place on that MTF. The draft law has been amended accordingly and has been adopted by the Luxembourg Parliament without any objection to the said extension. At the time of extending the MAD regime to MTFs it has been considered that the extension of all the obligations set up in MAD to MTFs would be too burdensome and that the costs outweigh the benefits.

152. **NO**: Pursuant to the Norwegian legislation, the prohibitions of insider trading and market manipulation apply to both regulated markets and to MTFs. Other parts of the MAD regime do not apply to MTFs (see question A4). When implementing MAD and MiFID directives, Norway mainly chose the minimum standards towards MTFs. Norway, however, wanted the prohibitions of insider trading and market manipulation to apply to MTFs as well as regulated markets because of the preventive effect of the prohibitions in the market and with regards to effective enforcement of the market abuse regime.

153. **PL**: In the Regulator's opinion provisions of MAD are necessary in order to ensure the proper functioning of the MTF. MTF (NewConnect in PL) is a fairly new market in Poland (March 2007) and the intention of the Regulator was to ensure the same level of public trust (compared to the regulated market) resulting from supervision and transparency. It does not include STR, because Regulator's goal was to minimise the cost of the market operation.

154. **PT**: Except for the criminal prohibition from using and disclosing inside information and the prohibition from engaging in market manipulation (as well as the related obligation for financial intermediaries to report suspicious transactions that may be qualified as such crimes), the MAD provisions are not applicable to financial instruments traded solely on MTF's. At the time of MAD transposition (which occurred before MIFID), these prohibitions were the single measure adopted to preserve the market integrity and public confidence of such non-regulated markets.

155. **SE**: The national law on market abuse prior to MAD had a wider scope, which was kept when implementing MAD in Sweden (trading on securities markets instead of trading on regulated markets).

156. **SK**: It is a result of transposition of MAD in our legislation, chosen by Slovak legislator (Ministry of Finance of the Slovak Republic). We are not aware of any such reason.

Reasons for MAD regime in full on some MTFs (option C)

157. In order to expand supervision over all trading platforms and also to ensure and promote market integrity and protect investors' interests the MAD regime in full would apply to some MTFs explained one Member State (**EL**). Another Member State (**MT**) argued that the MAD applies to all transactions in financial instruments which are traded on a regulated market, irrespective of whether the said transactions is executed through the market or off-exchange (including through the systems of an MTF). Therefore, as long as, the financial instruments which are traded on an MTF are also traded on a regulated market, the transactions on the MTF fall within the scope of the PFMA. All other transactions fall outside the scope of the Maltese law which transposes the MAD..

158. **EL**: By extending the scope of MAD to MTFs, the HCMC seeks to expand its oversight over all trading platforms in order to ensure and promote market integrity and protect investors' interests.

159. **MT**: In terms of Malta's PFMA, a suspicious transaction report must be submitted if the transaction executed through the system of an MTF is in a financial instrument which is traded on regulated market. Therefore, if a suspicious transaction in financial instrument X (which is traded on a regulated market) is executed through an MTF, the investment firms which executed the said transaction is required to make a suspicious transaction report. If on the other hand, a suspicious transaction is carried out on an MTF in a financial instrument which is not traded on a regulated market, then MT PFMA does not require the submission of a suspicious transaction report.'

Reasons for MAD in some parts on some MTFs (option D)

160. For reasons of market and investor protection (**DE, FIN, FR, UK**) application of MAD on at least some MTFs was regarded as necessary. Since within one exchange there can be regulated markets and MTFs, the same standard of protection against market abuse should apply. Different levels of protection could adversely affect investors' confidence in the integrity of the whole exchange including the regulated markets (**DE**). Also for credibility reasons the MAD regime would apply to some MTFs (**FI**) and in order to guarantee proper information of the market (**FR**).

161. However, "In order to contain costs of a regime which is not harmonised at EU level, the MAD regime applies only in some parts on some MTFs (**IT**).

162. **BE**: see Q A3

163. **DE**: The prohibitions of insider dealing and market manipulation as well as the regime concerning research were extended to MTFs operated by operators of regulated markets because within one exchange consisting of regulated markets and MTFs the same standards of protection against market abuse should apply. Different levels of protection could adversely affect investors' confidence in the integrity of the whole exchange including the regulated markets. The regimes concerning publication of inside information or managers' transactions were not extended, since on MTFs financial instruments can be admitted and traded without consent of the issuers. Therefore it would be inappropriate to burden these issuers and their managers with additional publication obligations.

164. **FR**: Most of the Market Abuse Directive provisions have been extended to Alternext Paris, the leading French MTF of trading unlisted equities, for investor protection reasons and proper information of the public.

165. **IT**: The need to contain costs of regime which is not harmonised at EU level.

166. **UK**: At the time of the implementation of MAD AIM and Plus markets were the only MTFs in the UK. AIM and Plus markets offer both primary listings to shares not admitted to trading on a regulated market and secondary listings for shares that are admitted to trading on a regulated market. It was considered that investors in such shares should be subject to the protections of an anti-market abuse regime: the markets themselves also supported this. Trading which occurs on these markets in shares admitted to trading on regulated markets does, of course, fall under MAD. Subsequent to the implementation of MAD there has been an increase in the number of MTFs. These newer MTFs only undertake secondary trading in shares admitted to trading on a regulated market. The full scope of MAD is not extended to these MTFs, however they have more general governance on Market Abuse under rules Stated in the FSA Handbook in chapter MAR 5.6.1;

A firm operating an MTF must:
(1) report to the FSA:
(a) significant breaches of the firm's rules;
(b) disorderly trading conditions; and
(c) conduct that may involve market abuse;
(2) supply the information required under this rule without delay to the FSA and any other authority competent for the investigation and prosecution of market abuse; and
(3) provide full assistance to the FSA, and any other authority competent for the investigation and prosecution of market abuse, in its investigation and prosecution of market abuse occurring on or through the firm's systems.

Reasons for MTFs not covered (option E)

167. The application of the MAD regime to MTFs would produce costs that outweigh the benefits (especially in the case of insider trading) (**CZ**) and in order to offer issuers an additional cheaper option with minimum regulation the MAD regime would not cover MTFs (**EE**). The application of the MAD regime to MTFs would also hamper potential future development and overall liquidity of capital markets (**SI**). Since the MAD regime applies also to MTFs, as long as the concerned financial instrument is also listed on a regulated market, there would be no need to expand the scope of MAD to MTFs (**BG**). Other reasons stated are that there were (so far) no MTFs in the Member States concerned (**BG, LV**) and that the Member States (**RO**) had chosen to implement the MAD (and MiFID) regulation on a minimum basis. Another reason

mentioned was that it would be not reasonable to apply the same criteria for regulated markets and MTFs (**LV**).

168. **BG**: The MAD regime is applied to financial instruments admitted to trading on a regulated market. As far as the MAD case refers to such instruments, it does not take into account on what market a transaction was concluded (it might also be on an MTF or OTC). We do not have any extension or special regime for MTFs. For the time being we do not have any experience in issuing permissions for the organizing of MTFs. For that reason we do not have any problem with the chosen option.

169. **CY**: In Cyprus the MAD regime is not applicable to MTFs for two reasons:

(a) Article 9 of MAD clearly States that the directive "shall apply to any financial instrument admitted to trading on a regulated market.....", and
(b) at the time MAD was transposed into National Law there was only the regulated market (Cyprus Stock Exchange - CSE). In actual fact it is only recently that we have granted an operating license for a MTF to be operated by the CSE.

The CySEC Council has already taken a decision to look into this issue further with a view to possibly extending the scope of the Market Abuse Law to also apply to MTFs.

170. **CZ**: We think the supervision of MTF from the view of MAD (in the Czech market conditions) would be combined with larger costs than earnings. That is especially case of insider trading.

171. **EE**: It was decided not to be extended the MAD regime beyond regulated markets to enable MTFs to operate as markets with minimum regulation and thus offer a cheaper option for issuers.

172. **IE**: MTFs do not fall within the definition of Regulated Market as set out in the MAD however following the current review of MAD by the EU Commission this matter will be reviewed again.

173. **LV**: Currently, there is no MTF functioning in Latvia. The extension of MAD requirements to the MTFs could be considered, but the right balance should be found on regulating MTFs. It is not reasonable to apply the same criteria both to RMs and MTFs. The difference should be kept.

174. **RO**: C.N.V.M. ensured the transposition of Article 9 of MAD. The legal framework shall be amended accordingly once MAD is revised with respect to the application of such provisions to MTFs as well.

175. **SI**: In Slovenia the MAD directive is currently transposed through the relevant provisions of the Market in Financial Instruments Act (ZTFI), Chapter 10. Even though the MAD is a directive of minimum harmonisation, Slovenia followed Article 9 and 10 of MAD when the ZTFI was drafted and the decision on the scope of the application of the MAD regime was made. Slovenia decided not to introduce requirements that would be more stringent than those set forth in the MAD. The rationale behind this decision was not to hamper potential future development of capital market in Slovenia rather to boost overall liquidity of capital markets, by at least theoretically allowing the emergence of markets with less stringent regulation.

Reasons for not applying publication (and notification) of inside information on MTFs (sub-option)

176. Since on MTFs financial instruments can be admitted and traded without consent of the issuers, it would be inappropriate to burden these issuers and their managers with additional publication obligations (**DE**). Another CESR Member argued that generally for companies

listed on MTFs there should be fewer requirements for information disclosure than for issuers in regulated markets (**LT**).

Reasons for not applying publication (and notification) of managers' transactions on MTFs (sub-option)

177. Since on MTFs financial instruments can be admitted and traded without consent of the issuers, it would be inappropriate to burden these issuers and their managers with additional publication obligations (**DE**).

Reasons for not applying STRs on MTFs (sub option)

178. In order to minimise costs, the requirement of STRs would not apply for MTFs (**PL**).

A7a. Are you satisfied with the practical application of the extension of the scope of MAD?

179. The answers divided as follows:
- Yes: 18 Member States (**AT, BE, DE, DK, FI, FR, HU, IS, IT, LT, LU, MT*, NL, NO, PL, SE, SK, UK**)
- No: two Member States (**ES, PT**)
- n/a: eight Member States (**BG, CY, CZ, EE, IE, LV, RO, SI**)

*In the Maltese market, very few trades take place outside the trading platform operated by the Malta Stock Exchange. Accordingly, to date we have not experienced any major difficulties with our market abuse regime in its current form/scope.

180. **EL**: Due to the fact that we have very recently extended the scope of MAD to MTFs, we have not yet adequate experience to fully evaluate the practical application of the extension.
- Please refer to our reply to question 6 above.

A7b. Are you satisfied with the practical application of the non-extension of the scope of MAD? (Yes – No)

181. The answers divided as follows:
- Yes: six Member States (**BG, CZ, EE, LV*, RO, SI**)
- No: two Member States (**CY, IE**)
- n/a: 21 Member States (**AT, BE, DE, DK, EL, ES, FI, FR, HU, IS, IT, LT, LU, MT, NL, NO, PL, PT, SE, SK, UK**)

*No MTF in Latvia to which MAD regime apply.

A8a. Do you consider this extension effective in its application? (Yes – No)

182. The answers divided as follows:
- Yes: 17 Member States (**AT, BE, DE, DK, FI, FR, HU, IS, LT, LU, MT, NL, NO, PL, SE, SK, UK**)
- No: two Member States (**ES, PT**)

EL: Due to the fact that we have very recently extended the scope of MAD to MTFs, we have not yet adequate experience to fully evaluate the practical application of the extension.
IT: The new provisions extending MAD regime to MTFs were introduced in mid July this year. Therefore we do not have sufficient data to assess the effectiveness of the extension, yet.
- n/a: eight Member States (**BG, CY, CZ, EE, IE, LV, RO, SI**)

A8b. Do you consider this non-extension effective in its application?

183. The answers divided as follows:
- Yes: four Member States (**BG, CZ, RO, SI**)

- No: three Member States (**CY, EE, IE**)
- n/a: 21 Member States (**AT, BE, DE, DK, EL, ES, FI, FR, HU, IS, IT, LT, LU, MT, NL, NO, PL, PT, SE, SK, UK**)
- **LV**: No practical experience that it is ineffective, because there are no MTFs in operation in Latvia.

A9. Encountered problems

184. Like the reasons, also the problems depend on the options (and sub-options) chosen.

Problems with MAD regime in full on all MTFs (option A)

185. One Member State considers the application of the full MAD regime on all MTFs would not be very effective due to the special characteristics of these markets and of the financial instruments admitted to trading in these markets. Therefore, a simplified regime with only Article 2 – 5 (but not Art. 6) of MAD applicable would be more suitable for MTFs.

Problems with MAD in some parts on all MTFs (option B)

186. One Member State (**LU**) which had chosen the (sub-)options not to apply the requirements of publication of insider information and the requirement of STRs to MTFs, encountered the following problems: The publication of insider information and STRs would be both indeed important means for detecting, preventing and investigating market abuses conducted on MTFs. Since financial institutions often also have difficulties to identify whether financial instruments are admitted to trading on regulated markets or on MTF, an extension of the scope of MAD on MTFs regarding STRs should be therefore not too burdensome.

187. Another Member State (**PT**) reported the problem that on MTFs where both financial instruments listed on regulated markets (MAD applicable) and instruments not listed on regulated markets (MAD not applicable) are traded, different rules apply in the same negotiation platform. This would be not beneficial in respect of a level playing field between markets and clarity of rules applicable. Furthermore, Article 26 of MiFID would already require MTF's operators to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. The MAD regime would include not only the prohibitions of insider dealing and market manipulation but also rules (namely, transparency rules) which constitute preventative measures against market abuse. Therefore it would seem incoherent that, on one hand, MTFs should control breaches against market abuse but, on the other hand, the preventative measures against market abuse would not apply. The existence of different rules applicable in the same MTF platform could also cause cross border arbitration, particularly when an unlisted financial instrument is traded in MTFs located in States with different laws and, consequently, when the same practice would constitute market abuse in one State and not in the other.

Problems with MAD regime in full on some MTFs (option C)

188. No problems were reported in relation to option C. However, it should be taken into consideration that only relatively few - only two countries (**EL, MT**) - have chosen this option.

Problems with MAD in some parts on some MTFs (option D)

189. One Member State (**UK**) reported problems with a MTF where companies would provide sometimes insider lists of relatively poor quality because they were not obliged to keep a contemporary record of events. As the lists were compiled retrospectively they may contain errors and omissions.

Problems with MTFs not covered (option E)

190. One Member State (**IE**) pointed at the problem that they would be unable to pursue under their legislation possible cases of market abuse brought to their attention.

A9a. Have you encountered any problems with the extension?

191. The answers divided as follows:
- Yes: four Member States (**ES, LU, PT, UK**)
- No: 16 Member States (**AT, BE, DE, EL, FI, FR, HU, IS, IT, LT, MT*, NL, NO, PL, SE, SK**)
- n/a: 9 Member States (**BG, CY, CZ, DK, EE, IE, LV, RO, SI**)

* No particular problems have been encountered with our extension of the scope of the PFMA to off-market deals in financial instruments traded on a regulated market.

A9b. Have you encountered any problems with the non-extension?

192. The answers divided as follows:
- Yes: 1 Member State (**IE**)
- No: 8 Member States (**BG, CY, CZ, DK, EE, LV*, RO, SI**)
- n/a: 20 Member States (**AT, BE, DE, EL, ES, FI, FR, HU, IS, IT, LT, LU, MT, NL, NO, PL, PT, SE, SK, UK**)

* No evidence of problems, because there are no MTF operation in Latvia.

A10. If yes, please provide a description of the problems encountered.

193. One member considers that the application of the MAD regime to MTFs in full will not be very effective due to the special characteristics of these markets and of the financial instruments admitted to trading in these markets. For this reason, the CNMV will be in favour of a simplified market abuse regime for these markets where, for instance, articles 2 to 5 of the MAD shall be applicable but not the obligations established in article 6 of the MAD.

194. **IE**: Possible cases of market abuse brought to our attention which we would be unable to pursue under the legislation.

195. **LU**: The application of the law on market abuse has shown that the obligation to inform the public as soon as possible of inside information which directly concerns an issuer as well as the right of delaying the publication of inside information according to article 6 (2) of MAD and the obligation of professionals arranging transactions in financial instruments admitted to trading on an MTF who reasonably suspect that a transaction might constitute insider dealing or market manipulation to notify the competent authority thereof, are important means for detecting, preventing and investigating market abuses conducted in financial instruments admitted to trading on at least one MTF or for which such a request has been made. Considering that financial institutions often have difficulties to identify whether the financial instrument in question is admitted to trading on a regulated market or an MTF, and are notifying suspicious transactions for instruments admitted to a market (whether the market is a regulated market or an MTF), such an extension should not be burdensome for financial institutions.

196. **PT**: The MAD Regime already applies to instruments listed on regulated markets, even when being traded on MTFs. This means that, as far as MTFs are concerned, when they trade instruments listed and not listed in regulated markets different rules apply in the same negotiation platform. This is not beneficial, either for the level playing field between markets, or for the clarity of the rules applicable within MTFs. Furthermore, article 26 of the MiFID already requires MTF's operators to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. The MAD regime includes not only the prohibitions of insider dealing and market manipulation

but also rules (namely, transparency rules) which constitute preventative measures against market abuse. It seems, therefore, incoherent that, on one hand, MTFs should control breaches against market abuse but, on the other hand, the preventative measures against market abuse do not apply. The existence of different rules applicable in the same MTF platform could also cause cross border arbitration, particularly when an unlisted financial instrument is traded in MTFs located in States with different laws and, consequently, when the same practice would constitute market abuse in one State and not in the other.

197. **UK**: While we have the ability to gather insider lists from Aim companies we have experienced that the quality can be low as the companies are not obliged to keep a contemporary record of events. As lists are compiled retrospectively they may contain errors or omissions.

A11. If you have encountered any problems, are there any plans (thoughts) to make changes in your jurisdiction?

198. Three Member States (**IE, LU, and PT**) explained that they want to wait for the outcome of the MAD Review of the European Commission.

199. One Member State (**UK**) believes that the scope of MAD should be extended to cover all instruments admitted to trading on securities MTFs and instruments whose value depends on an instrument admitted to trading on an MTF (i.e. instruments which are not separately traded on a regulated market). Such a change would recognise the ability of a number of MTFs to admit securities to trading as a primary market.

200. **IE**: An extension of the MAD regime to MTFs has been considered, however it has been put on hold until after the EU Commission review.

201. **LU**: We do not think that multiple changes in the legislation would benefit the market and therefore prefer waiting for the forthcoming amendments to the MAD to be adopted by the EC institutions.

202. **PT**: There are no immediate plans, as the MAD review is expected to occur in the near future.

203. **UK**: As we have stated in our response to the recent call for evidence on the Market Abuse Directive. In principle, we believe that the scope of MAD should be extended to cover all instruments admitted to trading on securities MTFs and instruments whose value depends on an instrument admitted to trading on an MTF (i.e. instruments which are not separately traded on a regulated market). Such a change would recognise the ability of a number of MTFs to admit securities to trading as a primary market.

Appendix

Article 9 of Directive 2003/6/EC ("MAD")

"This Directive shall apply to any financial instrument admitted to trading on a regulated market in at least one Member State, or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market.

Articles 2, 3 and 4 shall also apply to any financial instrument not admitted to trading on a regulated market in a Member State, but whose value depends on a financial instrument as referred to in paragraph 1.

Article 6(1) to (3) shall not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State."

Section B. Information of decision to delay public disclosure of inside information – Art. 6.2 of Directive 2003/6/EC

204. This Section is related to the MAD option according to which Member States may require (or not) that an issuer shall without delay inform the competent authority of the decision to delay the public disclosure of inside information.

205. Sixteen Member States **(AT, BE, BG, CY, CZ, ES, Fl, HU, IT, LV, LT, MT PL, RO, SI, SK)** replied that their legislation provides for the requirement that issuers inform the competent authorities without delay should they decide to delay the public disclosure of inside information. Most Member States selected this option in order to prevent the delay of public disclosure of inside information and in order to enhance the effectiveness of their supervisory powers. Out of them, thirteen Member States **(AT, BE, CY, CZ, Fl, HU, IT, LT, LV, PL, RO, SI, SK)** are satisfied with the practical application of their option whereas, two Member States **(BG** and **ES)** are not satisfied, and one Member State **(MT)** reported that this option has not been availed of in practice.

206. Thirteen Member States **(AT, BE, CY, CZ, Fl, HU, IT, LT, LV, PL, RO, SI, SK)** consider this option effective in its application, whereas two Member States **(BG** and **ES)** do not consider this option effective in its application. One Member State **(MT)** reported that this option has not been availed of in practice. Out of them, three Member States **(AT, BE, ES,)** encountered problems but they have not any concrete plans to change their option, whereas one Member State **(BG)**, has replied that has encountered problems and has some plans for changes.

207. Eleven Member States **(DE, DK, EE, EL, FR, IE, IS, LU, NL, PT, UK)** replied that their legislation does not provide for the requirement that issuers inform the Authorities without delay should they decide to delay the public disclosure of inside information. Most Member States mentioned that they adopted the relevant option because they believe that the issuers should be responsible for the correct and timely public disclosure of inside information. Out of them, seven Member States **(DE, DK, EL, FR, IE, LU, UK)** are satisfied with the practical application of their option whereas four Member States, **(EE, IS, NL, PT)** are not satisfied with the practical application of their option. Eight Member States **(DE, DK, EL, FR, HU, IE, LU, UK)** consider this option effective in its application, whereas four Member States **(EE, IS, NL,** and **PT)** do not consider this option effective. Out of them, **EE** has encountered problems but replied that they do not have any plans to change their option, which is the case also for **NL** which is thinking of changing its option even if there are not yet any concrete plans. Two Member States **(IS** and **PT)** have encountered problems and they have some plans for changes.

208. Two Member States **(NO** and **SE)** replied that their legislation provide for the requirement that issuers inform their regulated market without delay. **NO** and **SE** are satisfied with their option and consider it effective in its application. In addition, they have reported that they have not encountered any problems.

B1. Please describe the reasons why your legislation provides for the requirement (or does not provide for the requirement) that issuers inform your Authority without delay should they decide to delay the public disclosure of inside information.

209. Sixteen Member States **(AT, BE, BG, CY, CZ, ES, Fl, HU, IT, LT, LV, MT, PL, RO, SI, SK)** replied that their legislation provides for the requirement that issuers inform the Authorities without delay should they decide to delay the public disclosure of inside information. In relevant cases for the following reasons:

210. **AT**: To prevent abuse of the possibility to delay the public disclosure of inside information.

211. **BE**: To enable the regulator to put the securities of the issuer under enhanced scrutiny.

212. **BG**: The provision of this option allows the regulator to carry out effectively its supervisory powers.

213. **CY**: To decide whether the information is of nature that can be delayed..

214. **HU**: This provision aims to keep an eye on the market. With this information the HFSA is able to identify suspicious trades in the given instrument.

215. **IT**: To get to know and evaluate immediately possible damages to the market transparency as well as potential violations of duty to disclose. The regulator assessment aims at ensuring that the delay of disclosure is not prejudicial to market integrity and does not create unjustified information asymmetries.

216. **LV**: Provides that the competent authority does not take a decision to allow or to prohibit the delay of inside information. But if the competent authority finds that there are no reasonable grounds for a delay, it requires the issuer to disclose the relevant information immediately.

217. **PL**: To monitor transactions executed on the shares of the objective company more carefully.

218. **RO**: This obligation has been set in order to ensure the transparency and integrity of the market. Moreover, the regulator has also the power to force the issuer to disclose such information.

219. **SI**: The regulator's opinion is that this requirement is set for in the law for the following reasons: - the regulator is this way able to get better and more detailed insight into the area of public companies (issuers) "handling" of inside information. This is particularly important in cases where issuer decides to delay public disclosure that proves not to be in compliance with the law. The regulator may take certain actions such as to issue an order to issuer with the request to publicly disclose information, - delay in public disclosure of inside information means additional reason for more detailed supervision of trading on regulated market and to monitor price movements of securities for which the provisions of MAD apply, - the old law (ZTVP) in force before the ZTFI (August 2007 on) required that issuers got the regulator's approval for a delay. Past practice proved that this was not efficient regulation as regards the delay since it generally regards ad-hoc information and each delay in procedure is important. Individual requests for a delay had to be dealt with in accordance with the legally defined procedures while final decisions had to be made by the regulator' Council in the Senat - decided on its regular sessions.

220. **SK: I**t is a result of transposition of MAD into their legislation, chosen by Slovak legislator (Ministry of Finance of the Slovak Republic). They are not aware of any other reason.

221. Eleven Member States **(DE, DK, EE, EL, FR, IE, IS, LU, NL, PT, UK)** replied that their legislation does not provide for the requirement that issuers inform the Authorities without delay should they decide to delay the public disclosure of inside information. Most Member States mentioned that they adopted the relevant option because they believe that the issuer should be responsible for the correct and timely public disclosure of inside information for the following reasons:

222. **DE**: According to German law the issuer is obliged to notify the regulator- together with the preliminary notice of a disclosure - of the reasons for a delay, stating also the time of the decision concerning the delay. This means the notification has not to be made at the moment of the decision to delay, but (without delay) at the moment of the preliminary notice (a

preliminary notice should be submitted prior to a public disclosure of inside information to the regulator). The issuer is exempted from the disclosure requirement as long as necessary to protect its legitimate interests, provided there is no reason to expect a misleading of the public and the issuer is able to ensure that the inside information will remain confidential. Late public disclosure must be affected immediately.

223. **DK**: To minimize the administrative burden on the issuer the Danish legislation does not require an issuer to inform the competent authority.

224. **EL**: The regulator has chosen the option to leave the whole responsibility for the decision to delay the public disclosure of inside information to the issuer. They consider that the issuers are best positioned to ascertain whether substantial grounds exist to delay the disclosure of inside information. Furthermore, it is difficult to detect in advance whether the issuers are indeed delaying the public disclosure of inside information for legitimate reasons.

225. **NL**: Dutch law does not require issuers to inform the AFM of their decision to delay disclosure of inside information. The explanatory memorandum of the law implementing MAD considers that notifying the authority conflicts with the issuer's responsibility when delaying disclosure.

226. **PT**: Taking into account their experience in this field, the regulator understands their option should be revisited. As the MAD directive is under review, they consider that a uniform regime should be adopted, the rule being the notification to the supervisors.

227. **SE: T**he supervision of delays is the responsibility of the regulated market/MTF according to national law. This was considered to be the most cost-efficient solution. Further **SE** has chosen not to implement the discretionary power in the sense that issuers do not have to inform the Regulator in the event of delayed public disclosure. Issuers are however, obliged to inform the market place should they delay disclosure of inside information. Such delay is permitted in accordance with law as long as this is necessary to protect its legitimate interests, provided the public is not misled and the issuer is able to ensure that the information will remain confidential

228. **UK**: The approach that was taken as it was felt that the requirement to notify the regulator may prove to be unduly burdensome for issuers. Despite this, should an issuer wish to do so, they are not prevented from notifying the regulator, and, in practice, issuers do on occasion discuss potential delays in disclosure with the regulator.

229. **NO**: Provides that the issuers must inform the regulated market without delay, should they decide to delay the public disclosure of inside information. The main reason for implementing the notification requirement in the Norwegian legislation is that after such notification to the stock exchange has been made, the market surveillance department can intensify its surveillance of these specific issuers' shares.

B2. Are you satisfied with the practical application of the option to require (or not to require) that issuers inform your Authority without delay should they decide to delay the public disclosure of inside information?

230. Twelve Member States **(AT, BE, CY, CZ, FI, HU, IT, LT, LV, PL, RO, SI, SK,)** of sixteen **(AT, BE, BG, CY, CZ, ES, Fl, HU, IT, LT, LV, MT, PL, RO, SI, SK)** are satisfied with the practical application of the option to require that issuers inform their Authority without delay should they decide to delay the public disclosure of inside information.

231. Eight Member States **(DE, DK, EL, FR, IE, LU, SE, UK) of twelve (DE, DK, EL, FR, IE, IT, LT, LV, LU, NO, SE, UK) are satisfied with the practical application not to use this option.**

232. **Six** Member States **(BG, EE, ES, IS, NL, PT)** are not satisfied with the practical application of their option. **MT** reported that this option has not been availed of in practice.

B3. Do you consider this option effective in its application?

233. Twenty two Member States **(AT, BE, CY, CZ, DE, DK, EL, FI, FR, HU, IE, IT, LT, LV LU, NO, PL, RO, SE, SI, SK, UK)** consider this option effective in its application, whereas, six Member States **(BG, EE, ES, IS, NL** and **PT)** consider this option not effective in its application. **MT** reported that this option has not been availed of in practice and the regulator is currently considering the issue of a circular to the listed companies and sponsoring stockbrokers wherein their attention is drawn to this requirement and the importance of informing promptly the Authority about the delay in publication of price sensitive information.

B4. Have you encountered any problems with the option you have chosen? If yes please provide a description of the problems encountered.

234. Nine Member States **(AT, BE, BG, DE, EE, ES, IS, NL,** and **PT)** have encountered problems with the option they have chosen, whereas, twenty Member States **(CY, CZ, DK, EL, FI, FR, HU, IE, IT, LT, LU, LV, MT, NO, PL, RO, SE, SI, SK, UK)** have not encountered any problems with their option.

B5. If you have encountered problems please provide a description of the problems encountered.

235. Nine Member States **(AT, BE, BG, DE, EE, ES, IS, NL, PT)** have encountered problems, which are the following.

236. **AT**: An issuer claimed in a penal proceeding for violation of the obligation to inform the public of inside information that it delayed the public disclosure of the relevant inside information although it did not inform without delay the regulator of this decision.

237. **BE**: Issuers are only obliged to notify the delay of disclosure, but not the content of the information withheld. In some cases however, issuers do disclose to the regulator the content, which in some cases seems to be to shift responsibility onto the regulator.

238. **BG**: The time frame for informing the regulator about the delay of public disclosure of inside information is not specified in their legislation.

239. **DE**: In some individual cases it is a problem to define the issuer's legitimate interests. Sometimes the interests in question are interests from a third party. Another isolated problem is the necessity that such omission would not be "likely to mislead the public" because every important and price sensitive "hidden" information for the market is "misleading" to the market.

240. **EE**: In some cases, after the publication of inside information the reasons for the delayed publication have been questionable. In these cases, the regulator has the possibility to ask the issuer to explain the reasons for delaying the disclosure.

241. One member describes a case of misuse of the relevant provision of their legislation, by mentioning that delaying the publication of inside information till the moment that it reaches a high probability of occurrence (almost certainty) is the norm and not the exception and issuers tend to inform the regulator at the same time that they disclose the inside information to the market.

242. **IS**: It has had several cases in the last 18 months where issuers seem to have neglected their duty to publish inside information and state under investigation that they have decided to

delay publication, but can not confirm that with written documents like minutes from the meeting where such a decision would have been made.

243. **NL**: Delayed disclosure of inside information increases the risk of information leaks. Knowing that disclosure has been delayed enables targeted monitoring of relevant issuers. In order to interpret an anomalous price movement, the regulator needs to contact the issuer to find out whether they have delayed publication. The regulator cannot then verify the issuer's statement in real time.

244. **PT**: Despite the legal framework, the regulator has publicly recommended issuers to notify delays in disclosure to it and this recommendation/notification has in fact contributed to solve any problems, as it makes easier to deal with involuntary leaks or breaches of confidentiality.

B6. If you have encountered any problems are there any plans (thoughts) to change your option?

245. Four Member States **(AT, BE, EE** and **ES)** replied that they have not any plans or thoughts to change their option, whereas:

246. **BG**: It has thoughts to introduce in their legislation concrete technical requirements about the time frame for informing the regulator about the delay of public disclosure of inside information.

247. **NL** is thinking of changing this option but there are no concrete proposals so far.

248. **IS**: Some thoughts for changes are still within the supervisory authority and therefore plans are in very early stages.

249. **PT**: Despite their legal framework, the regulator has publicly recommended issuers to notify delays in disclosure to it and this recommendation/notification has in fact contributed to solve any problems, as it makes easier to deal with involuntary leaks or breaches of confidentiality.

B7. Does your legislation provide that prior approval is necessary for issuers to carry out their decision to withhold inside information?

250. Twenty-seven Member States **(AT, BE, BG, CZ, DE, DK, EE, EL, ES, Fl, FR, HU, IE, IS, IT, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK)** replied that their legislation provide that prior approval is not necessary for issuers to carry out their decision to withhold inside information. One Member State **(CY)** replied that its legislation provide that prior approval is necessary for issuers to carry out their decision to withhold inside information.

B8. Has your Authority issued any guidance rules on the maximum time for delaying the publication of inside information?

251. Twenty six Member States **(AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, Fl, HU, IE, IS, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK, UK)** replied that their Authorities have not issued any guidance rules on the maximum time for delaying the publication of inside information, whereas, three Member States **(FR**, **NO** and **SI)** have issued guidance/rules on this topic.

B9. If your Authority issued guidance rules on the maximum time for delaying the publication of inside information please provide us with further details of the rules.

252. The details of the guidance/rules on the maximum time for delaying the publication of inside information are as follows:

253. **FR**: In the Recommendation of 28 July 2009, the regulator addresses the cases of ailing companies under administrative receivership. In such situation, the time period for delaying the information is of "a few days, or even a few weeks" if the interests of current or future shareholders are jeopardized or if negotiations aimed at saving the company are still running.

254. **NO**: The regulated market is the relevant authority with respect to the rules on delayed publication. According to Norwegian legislation and the guidance rules issued by Oslo Stock Exchange, publication of inside information can be delayed for as long as the following cumulative conditions are satisfied; (i) immediate disclosure will prejudice the issuer's legitimate interests; (ii) the delay does not mislead the public; and (iii) the issuer must be able to ensure the confidentiality of the information in question. Notification of a decision to delay publication must be given to the Listing Department of the Oslo Stock Exchange, and can be given verbally. Oslo Stock Exchange has issued guidance related to delaying of the publication of insider information in their "Continuing obligations of stock exchange listed companies". The guidance can be found on their website: http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/The-Issuer-Rules. More detailed information can be found in Appendix to Oslo Stock Exchange Circular No. 3/2005 Section 3.6: http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Circulars/3-2005-New-legislation-on-disclosure-rules-for-issuers-of-financial-instruments-implementing-the-EU-directive-on-marked-abuse.

255. **SI**: No special guidance as regards the maximum time for delaying the publication. It is required by the law to publish it as soon as possible when the reasons for a delay cease to exist. However the regulator draws attention to this in its regular (annual) circular letters addressed to public companies to indicate expected time of a delay when notifying the regulator. The regulator also supervises this in the course of its regular supervision of public companies' reporting requirements (the regulator controls actual publication of inside information in relation to companies' announcements of the delay).

B10. Has your Authority issued any specific guidance on the measures / method by which issuers should ensure the confidentiality of delayed information?

256. Fourteen Member States **(AT, CY, CZ, DE, ES, FI, MT, NO, PL, PT, RO, SE, SI, UK)** have issued specific guidance on the measures / method by which an issuer should ensure the confidentiality of delayed information, whereas, fifteen Member States **(BE, BG, DK, EE, EL, FR, HU, IE, IS, IT, LT, LU, LV, NL SK)** have not issued any specific guidance.

B11. If your Authority issued specific guidance on the measures / method by which issuers should ensure the confidentiality of delayed information please provide us with further details.

257. The details of guidance on the measures / method by which an issuer should ensure the confidentiality of delayed information are the following:

258. **AT**: The regulation on principles for the distribution of information in enterprises and on measures to avoid abuse of inside information provides for measures an issuer has to take in order to ensure the confidentiality of inside information.

259. **CY**: According to the law for the safeguarding of their confidentiality the issuer must: (a) Establish effective arrangements denying access to such information to persons other than those who require it for the exercise of their functions within the issuer; (b) take necessary measures to ensure that any person with access to such information is aware of his duties accruing from the present Law and is aware of the sanctions in case of their violation; (c) have in place measures which allow immediate public disclosure in case the issuer was not able to ensure the confidentiality of the relevant inside information, without prejudice to paragraph (d) of Section 11 and subsection 1 of Section 16.

260. **CZ**: The issuer shall restrict access to the inside information, built "chinese walls" and monitor if the delay in publishing of inside information would not be likely to mislead the public. The issuer shall instruct its insiders about prohibitions and rules of insider trading too.

261. **DE**: The issuer is obliged to take appropriate organizational measures to guarantee that, during the exemption period, inside information is accessible exclusively to those persons or entities that need it to fulfil their duties. If, during the period of time in which the issuer has decided to postpone disclosure, parts of the circumstances constituting inside information are being spread as rumours, or if certain details (or the information in its entirety) are made public, confidentiality is no longer assured, provided that the issuer knows (or has reason to believe) that such rumours or making public of details are the result of a breach of confidentiality within the issuer's sphere of control. If the spreading of such rumours can be attributed to a breach of confidentiality within the issuer's sphere of control, the issuer will no longer have the option to continue postponing the ad hoc disclosure. The same applies if details concerning the circumstances constituting inside information are made public, and the issuer cannot exclude that such publication originates from within its sphere of control.

262. **ES**: Articles 83 and 83 bis. of the Securities Market Law (SML) provide for measures that firms or groups of firms that provide investment services, and other firms that operate or provide investment advice services on the securities markets, and issuers are obliged to establish to prevent the flow and/or the misuse of the inside information. Additionally, the regulator has issued a guide for action on the transmission of inside information to third parties.

263. **FI**: According to their standards an issuer has to have arrangements to ensure the use and dissemination of inside information and issuer has to keep company-specific insider register.

264. **MT**: Regulation 6 (2) of L.N.108 of 2005 PFMA (Disclosure and Notification) Regulations, 2005 - lists three measures by which an issuer should ensure the confidentiality of delayed information. The Regulation states that: 'So as to be able to ensure the confidentiality of inside information, an issuer shall control access to information the disclosure of which is delayed, and, in particular shall ensure that the issuer has:- (a) established effective arrangements to deny access to such information to persons other than those who require it for the exercise of their functions within the issuer; (b) taken the necessary measures to ensure that any person with access to such information acknowledges the legal and regulatory duties entailed and is aware of the sanctions attaching to the misuse or improper circulation of such information; and (c) in place measures which allow immediate public disclosure in case the issuer was not able to ensure the confidentiality of the relevant inside information, without prejudice to the proviso of sub-article (3) of Article 9 of the Act.

265. **NO**: A condition for a delay in making information public is that such information can be kept confidential, i.e. there is no danger of the information being leaked. The condition must be seen in conjunction with Section 3-4 in the Norwegian Securities Act, according to which (i) persons who are in possession of inside information must not disclose such information to unauthorised persons; (ii) persons possessing inside information shall handle such information with due care so that inside information does not come into the possession of unauthorised persons or is misused; and (iii) issuers of financial instruments and other legal entities who are regularly in possession of inside information shall have routines for secure handling of inside information. Companies do, to some extent, have direct control over the risk that inside information falls into the hands of unauthorised persons. This implies that companies that choose to delay the publication of inside information must have in place procedures and a carefully considered strategy on how to manage the information in question prior to its eventual publication. Companies are responsible for ensuring that inside information is only made available to persons with an absolute need for the information or who have

a justifiable need for access, and that confidentiality is maintained at all times. Companies that have delayed making information public should have in place measures which allow immediate public disclosure in case the issuer have reason to believe that the information is known to, or about to become known to unauthorised persons. Further guidance can be found in appendix to Oslo Stock Exchange Circular No. 3/2005 Section 3.6.5: http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Circulars/3-2005-New-legislation-on-disclosure-rules-for-issuers-of-financial-instruments-implementing-the-EU-directive-on-marked-abuse.

266. **PL**: The issuer shall ensure the confidentiality of the delayed information by: -Restricting access to such information; -Protecting documents containing such information; -Protecting computer system containing such information; -Supervising the circulation of the document and carriers containing the information. The abovementioned documents and carriers shall be affixed with a clause stating that the document contains inside information -Persons gaining access to such information shall be informed (prior to the receipt of such information) on the type of the information and the penal and administrative sanctions related to the illegitimate disclosure and usage of such information. -A list of persons having access to such information shall be carried out by the company. The list should include: names of the persons granting and granted access to the information, date, exact time and way the information was disclosed to that person.

267. **PT**: Guidance is mainly focused on recommending a record of the reasons for the delay to the regulator, notification of the delay to the regulator and continuous assessment of the compliance with the delay's legal requirements.

268. **RO**: Issuers control access to delayed inside information as follows: a) establishing effective arrangements to deny access to such information to persons other than those who require it for the exercise of their functions within the issuer; b) taking the necessary measures to ensure that the persons with access to such information acknowledge the legal and regulatory duties entailed and are aware of the sanctions attaching to the misuse or improper circulation of such information; c) setting measures which allow immediate public disclosure in case the issuer was not able to ensure the confidentiality of the relevant inside information. The regulation on issuers and securities operations sets the requirement that during the period in which the issuer decides to delay public disclosure of inside information, the persons who have access to inside information may not: a) trade, purchase or alienate, directly or indirectly, securities issued by the issuer; b) use the inside information for their own or other persons benefit; c) persuade other holders of inside information to use them; d) disclose inside information; e) determine other persons to act based on inside information.

269. **SE:** If an issuer defers the disclosure the issuer shall immediately notify the securities exchange. To ensure that information is not leaked, the issuer shall: - deny persons access to information they do not need, ensure that all persons who have access to such information understand the related legal obligations and are aware of sanctions associated with abuse and improper dissemination of the information, immediately disclose such information in the event the issuer has not been able to guarantee that the involved information is kept confidential.

270. **SI**: The regulator issued law on special requirements for inside information and investment recommendation publication. Article 5 defines in detail the conditions for a delay of insider information publication. As regards ensuring the confidentiality of delayed information the following applies (paragraph 4 of Article 5): "Issuer is obliged to keep confidentiality of inside information whose publication it has delayed in a way to: ensure proper supervision of the access to this information and on its use, especially in a way to enable access and use of this information only to persons who use it urgently for performance of their duties and who are listed on the list from Article 7 of this Decision (note: this list states persons who have access to inside information) set efficient system for refusal of access to this information to all persons who are not on the said list accept the steps necessary to ensure that each person from the

first line of this paragraph is properly aware of rights and duties arising form the right to access to inside information and that is aware of sanctions for misuse or non authorised dissemination of inside information. In case an individual or a legal person receives this information on the basis of a contract it should contain explicit written clause about the obligation not to disclose inside information and the obligation to compile a list of persons who have access to inside information which will be at an issuer's disposal any time set measures that enable immediate disclosure to the public in accordance with this Decision if issuer does not manage to assure confidentiality of inside information in spite of measures and steps taken in accordance with previous points of this paragraph. Probability that this disclosure occurs is demonstrated primarily in a significant change of market price of issuer's securities or significant rise of trading volume in issuer's securities that do not have logical grounds in previously published regulated information of this particular issuer.

271. **UK:** It has included some guidance in the Disclosure and Transparency Rules (DTRs) in respect of selective disclosure when the issuer is permitted to delay disclosure of inside information. This sets out some factors an issuer should consider in order to maintain the confidentiality of any information which it is considering selectively disclosing to persons owing it a duty of confidentiality. It has also published, in its Market Watch newsletter, some information on controls over inside information in respect of public takeovers.

B12. In any case, could you please provide your practical experiences in relation to measures taken / which method applied by an issuer in order to ensure the confidentiality of delayed information?

272. Regarding the practical experiences in relation to measures taken / or method applied by an issuer in order to ensure the confidentiality of delayed information Member states replied the following:

273. **BE**: Downsizing the number of insiders is the most important measure. Traditionally code names are used in sensitive files.

274. **CZ**: In practice the issuer follows guidance which is described in previous question.

275. **DE**: Issuers are highly aware of the obligation to keep inside information absolutely confidential. So issuers try to keep a lid on the information by informing as few people as possible. The carrier of inside information are informed about their obligation to keep the inside information confidential, about the prohibition of insider trading and about the forbiddance of passing on inside information. Domestic issuers are furthermore obliged to maintain insider lists, i. e. lists of persons active on behalf of the issuer and who are authorised to access inside information.

276. **EE**: The main measure seems to be informing the insiders of their respective obligations and limiting access to inside information (use of passwords, insiders list).

277. **EL** has reported as measures (a) "Chinese walls" among company's departments and (b) the issuers usually sign confidentiality agreements.

278. **FI**: Company-specific insider registers work well.

279. **HU**: It is up to the issuer in which manner it ensures the confidentiality of the given information. No specific examples can be mentioned as to this.

280. **IS**: Issuers have not taken measures that are secure enough as there have been cases where the information has leaked to the press.

281. **LU** noticed in some cases that despite the measures taken by the issuers (such as Chinese Walls, strict confidentiality rules upon those persons who are aware of the inside information) there is nevertheless a leak of inside information. This is due to the fact that the Chinese Walls were not effective enough, that some concerned persons are subject to specific conflicts of interest (i.e. managers or major shareholders in takeovers), that the confidentiality rules are not sufficiently strict, that the issuer does not supervise as much as necessary that a rigorous confidentiality is preserved by all the persons who are aware of the inside information. It may also happen that there is a deliberate leaking to the press.

282. **LV**: It is up to the issuer to choose the methods for ensuring the confidentiality. The regulator monitors and analyses the transactions in financial instruments of the relevant issuer and the information in mass media in order to establish, whether specific conditions exist indicating that third persons have become aware of inside information.

283. **NL**: Issuers keep insiders lists and require confidentiality agreements be signed.

284. **PL:** The issuer is obliged to follow all the abovementioned rules, as these are included in the act of law.

285. **RO** has reported that they have no infringement.

286. **SE**: As the regulated market/MTF has the responsibility, they are the ones with practical experience.

287. **SI**: The regulator issued law to define more in detail the provisions of information delay and keeping of confidentiality. In fact there is no special practical experience with this measure since in the first half of 2009 there was only one case where issuer announced delay of inside information publication (in 2005 - 5 cases, in 2006 -1 case and in 2007 - 2 cases, no cases in 2008). Not much additional information has been given in this case beside the ones that the law and by laws require. The regulator issued also a form called ODNI – Notification of a delay to publish inside information: a firm, registered seat and company number of an issuer, a class of securities issued and organized market segment where securities are traded, detailed description of business event to which this notification refers, justification proving that a condition from Article 386 paragraph 2 of ZTFI is fulfilled, justification that a delay of publication is not misleading for investors estimated time for information publication delay, a date of notification.

288. **UK**: It does not have any practical examples of how issuers seek to ensure the confidentiality of delayed information. It would expect issuers to seek to achieve this aim by minimizing the number of people privy to the information, by ensuring all persons who have the information are aware of their obligation to maintain its confidentiality and by storing the information securely.

289. One Member State **(CY)** has no significant problems.

290. Three Member States **(AT, BG** and **DK)** have reported no experience on the matter.

B13. Can you please describe under which circumstances your Authority would consider that a delay is not "likely to mislead the public"?

291. The circumstances under which Authorities would consider that a delay is not "likely to mislead the public" are the following ones:

292. **AT**: The question is always considered on a case by case basis but in general it can be said that a delay is not likely to mislead the public when the inside information does not change the appreciation that the market has on the issuer or on the financial instruments issued by this issuer.

293. **BE**: This criterion is extremely difficult to assess. At the very least they consider that issuers should refrain from any communication that is inconsistent with the information withheld, if not they lose the benefit of the delay mechanism.

294. **BG**: The regulator would consider on a case by case basis according to the nature of the information which should be disclosed. At this moment the regulator does not have such experience.

295. **CY**: Such an event has not arisen yet.

296. **CZ**: It has not been a situation yet in which they would consider if the delay of publishing of inside information would not be likely to mislead the public.

297. **DE**: Pursuant to section 15 (3) sentence 1 of the WpHG, issuers are exempt from disclosure duties regarding inside information as long as necessary to protect their legitimate interests, and provided that (i) there is no reason to expect a misleading of the general public and (ii) the issuer can guarantee the confidentiality of such information. An imbalance of information prevails throughout the period during which an issuer has knowledge of information that may have a significant impact on prices, but does not disclose it. Although this imbalance of information does not constitute misleading per se, during the period of such exemption, issuers must not actively issue any guidance that is in contradiction to the undisclosed inside information.

298. **DK**: The regulator cannot in general describe under which circumstances a delay is not likely to mislead the public. It will depend on a case by case assessment.

299. **EE**: It has not formed any formal guidance or opinion on this. The issue is problematic - considering the definition of inside information, a delay in disclosure of such information would in most cases be likely to mislead the public. Their general view is that the delay in disclosure of inside information is likely to be misleading if it is in stark contradiction with the general understanding or sentiment of the market participants about the respective issuer, based on the information disclosed.

300. **EL** has reported the following cases: a) If, while delaying the public disclosure of inside information, the issuer does not make any announcements containing contradictory information about the company and thus creating false impressions to the public. b) if, there are no transactions undertaken by persons related to an issuer who have access to inside information c) If the delay of public disclosure of inside information by the issuer, is not likely to have led investors to take opposite investment decisions in relation to a corporate event occurring during the period of the delay.

301. **One member says that in** general they could say that when the inside information does not change the appreciation that the market has on the issuer or on the financial instruments issued by this issuer they would consider that a delay would not be likely to mislead the public.

302. **FI**: When delayed information is positive or if there are already some expectations or information on the market concerning the issuer's situation.

303. **FR**: With regard to the Recommendation of 28 July 2009, "mislead the public" would be to not inform the market of the degradation of the company's accounts or of any new fact affecting its activity, even if the procedure of prevention of bankruptcy is kept secret. If the prevention fails, the company goes under a procedure of bankruptcy that must be disclosed to the market.

304. **HU**: If the given information – once disclosed to the public – would induce reactions which are in line with market expectations concerning the financial instrument and the issuer at the time of the delay.

305. **IE**: This will be decided on a case-by-case basis.

306. **IS**: If the information is only delayed for a short period of time and does not change the opinion of the public but would, if made public, confirm its opinion.

307. **IT**: In general, it holds the view that this condition should be examined on a case-by-case basis: the omission of disclosing inside information might be evaluated as misleading when current public information on the issuer leads an investor to assess and make an investment decision contrary to what it would be reasonably expected if the information delayed were divulged. In addition, the mentioned condition is certainly met if there exists the intention to mislead the public.

308. **LT**: There are no general rules and should be judged in a case by case basis. For instance, when previously disclosed information contradicts or differs from the last one that an issuer wants to keep confidential the regulator asks to disclose the information immediately.

309. **LU**: A delay would not be likely to mislead the public if strict confidentiality is maintained, Chinese Walls are in place, there are no precise rumours in the market showing that there is an unpublished inside information, there are no price movements as well as no volume movements different from those of the regular trading and that market integrity and investor confidence is preserved at the highest level possible.

310. **LV** has reported the case when the issuer is negotiating the acquisition of another company and a disclosure of the information could influence the results of negotiations.

311. **MT**: A delay is not likely to mislead the public when the information available is incomplete or when a delay in issuing inside information would mean that the information will be issued when it is more complete and more precise.

312. **PL**: The regulator considers the information to be likely to mislead the public when the information is considered not to be aligned with the information that is on the market in relation to that specific issuer.

313. **PT**: In general where no information on a specific fact or business could be expected from the company by market participants.

314. **RO**: The legitimate reasons for delaying the disclosure of the inside information included in the national legislation are those set by the directive 2003/124 implementing Directive 2003/6/EC. Legitimate interests for delaying public disclosure shall relate to the following circumstances: a) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer; b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such the issuer requires the separation between these bodies, provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public.

315. **SE**: As the regulated market/MTF has the responsibility, they are the ones with practical experience.

316. **SI**: The issuer should prove that delay is not likely to mislead the public in the way as defined in Article 386 (3) of the ZTFI and Article 5(3) and (5) of Agency's by-law as: ARTICLE 386(3): (3) For the purposes of the second paragraph hereunder, legitimate interests may, in particular, relate to the following non-exhaustive circumstances: 1. negotiations that are underway or the related circumstances, if it is likely that public disclosure would seriously impact the outcome or the normal progress of negotiations; in particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer, 2. decisions taken or contracts made by the management of an issuer which need the approval of another body of the issuer in order to become effective, where the status structure of such issuer requires the separation between these bodies, provided that public disclosure of information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public. Article 5 Decision on special rules for inside information and investment recommendation reporting (1) The issuer may, at its own discretion, postpone the publication of inside information in order to protect its justified interest, provided that they meet the requirements from the second paragraph of Article 386 of the ZTFI in line with the conditions and in the manner as defined hereinafter in this Article, of which the regulator must be informed in accordance with Article 6 hereof. (2) It shall be deemed unlikely that the postponement of the publication in line with this Article could be misleading the public if the contents of this information are not contrary to the currently valid expectations of investors or the public regarding the movement of market price of securities of this issuer. (3) Legitimate interest of the issuer from the second paragraph of Article 386 of the ZTFI is also shown when the issuer must verify the authenticity of inside information. (4) The issuer shall be obliged to maintain the confidence of inside information the publication of which was postponed so that it ensures adequate control over the access to this information, its use, in particular by: - allowing access and use of inside information only to persons who need it urgently for meeting their obligations which are put on the list from Article 7 hereof accordingly, - establishing efficient system for rejecting access to such information to persons other than those on the list referred to in the previous indent of this paragraph, - taking the necessary measures to ensure that any person from the first indent of this paragraph with access to such information acknowledges the rights and duties entailed and is aware of the sanctions attaching to the misuse or unauthorised circulation of such information. In the case of natural person or legal entity that receives such information on the basis of a contractual relationship, such contract or agreement must, regardless of its form or content, contain an explicit written clause on the obligation of non-disclosure of inside information and the obligation to compile an appropriate list from Article 7 hereof which the issuer may always request to obtain, - set up measures that enable immediate public disclosure in accordance with this Decision, if the issuer fails to provide confidential treatment of inside information regardless of the measures from previous indents of this paragraph. The probability of such disclosure is primarily shown in a significant change of market price of the issuer's securities or a significantly increased volume of trading in the issuer's securities without any logical basis in the previously published issuer's regulated information. (5) Notwithstanding the provisions of this Article, an issuer may not postpone the publication of inside information if the contracts or agreements from the third paragraph of Article 386 of the ZTFI have been validly disclosed and are in a significant part binding, even though they contain a mutual non-disclosure clause. (6)The issuer may postpone the publication of an individual constituent part of inside information, when this is believed reasonable, in the same manner and under the same conditions as those applying to the postponement of the publication of inside information hereunder.

317. **UK** has reported that delaying disclosure of inside information will not always mislead the public. For example, they consider that a delay in disclosure is unlikely to mislead the public in circumstances where the inside information that has arisen would not contradict earlier

statements made to the market by the issuer or involve an implicit endorsement of a specific misapprehension known to be generally held in the market.

318. Two Member States **(NO** and **SK)** have reported no experience on the matter.

B14. Did you have enforcement action undertaken by your Authority or court cases so far?

319. Nine Member States **(AT, BE, DE, EE, EL, IS, LU, NL PT)** have reported that they have undertaken enforcement action, whereas twenty Member States **(BG, CY, CZ, DK, ES, FI, FR, HU, IE, IT, LT, LV, MT, NO, PL, RO, SE, SI, SK, UK)** have not undertaken any enforcement action.

B15. If you have enforcement action undertaken by your Authority or court cases so far please describe the most relevant examples.

320. The most relevant examples of enforcement actions undertaken by Member Sates are the following:

321. **AT**: An issuer was fined for not having disclosed inside information as soon as possible. The issuer claimed that it delayed the public disclosure of the relevant inside information although it did not inform without delay the regulator of this decision. The regulator regarded the decision as invalid and imposed a fine.

322. **BE**: These cases have not yet reached an official or public status, but they are situated in the context of the financial crisis.

323. **DE**: The most relevant cases occurred in which an issuer didn't publish without undue delay or not in the stipulated way (e.g. information was published in a press release instead of in an Ad-hoc Disclosure).

324. **EE** has reported the following example: they have issued precepts requiring issuers to publish inside information or comment on information, which has leaked and been published in the media. Information about changes in an issuers business was published in a newspaper, which was considered inside information by the regulator and had not been disclosed by the issuer. The regulator issued a precept to the issuer, requiring the issuer to immediately comment the information in the newspaper and to disclose any inside information in accordance with the requirements stemming from the MAD. No fines have been issued and no court cases have emerged so far.

325. **EL** has reported the following examples: a) Listed Company A had launched an offer for the acquisition of Company B. The information has leaked to the press, but company A has not confirmed the information officially. Company A has claimed that the delay of the public disclosure of the information was necessary for the protection of the interest of the company. The regulator has decided that company A should have informed the public as soon as the information lost its confidentiality and thus has imposed a fine to company A. b) Listed Company A had entered into an agreement in principle with a bank regarding the main terms of full and final settlement of company A debts. However, this information was disclosed to the public via the Daily Official List Announcements of the Athens Exchange a week after the date of the abovementioned agreement. The regulator has considered this information as "inside" and therefore the company ought to have informed the investors without undue delay. As a result a fine has been imposed to the company.

326. **IS** has reported the following example: an issuer was fined the highest amount ever decided by the regulator for not making public inside information for 4 months. When the information leaked to the press the share price dropped significantly. The issuer stated that it had decided to delay the publication and that that delay had been for 5 weeks while negotiations were

ongoing. The regulator though found information which confirmed the existence of the information for 4 months prior to the leak. Another case was an issuer in grave financial difficulties but did not make public its difficulties until a month later. Under the investigation it failed to show documents or any kind of confirmation that a conscious decision had been made to delay the publication.

327. **NL** has reported the following example: the law stated that an issuer is deemed to have kept insider information confidential provided it has taken measures. The court ruled that the single fact that measures have been taken meant the issuer could not be deemed to have leaked the information, even if the measures proved ineffective. The law was amended in line with the wording of the directive.

328. **PT**: There are several decisions by the regulator which condemn issuers for carrying out an administrative offence related to the non compliance of the obligations (i) to ensure the confidentiality of inside information, and (ii) to promptly disclose it. In these cases, the inside information has not been made public by the issuer, but its confidentially has not been kept and thus such information has been disclosed by newspapers' websites. Examples of inside information in these circumstances are negotiations related to acquisition of companies by listed ones; the termination of the contract with a football coach and the signing up with other coach (in a listed football company); the negations of a memorandum of understanding between a listed oil company and a foreign oil company.

Appendix

Article 6 paragraph 2 of Directive 2003/6/EC

"An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. Member States may require that an issuer shall without delay inform the competent authority of the decision to delay the public disclosure of inside information."

Section C – Notification of transactions by persons discharging managerial responsibilities – Art. 6.4 of the Directive 2003/6/EC in combination with art. 6 of Directive 2004/72/EC

329. This section is related to the MAD options and discretions in relation to some provisions of the duty of the persons discharging managerial responsibilities and, where applicable, persons closely associated with them, to notify the existence of transactions conducted on their own account relating to shares of said issuer, or to derivatives or other financial instruments linked to them (hereafter the "managers' transactions") as well as the duty to grant public access to the information relating to such transactions.

330. The present part of this report takes also into account the outcome of the CESR-Pol MAD DG Survey on notification of transactions by persons discharging managerial responsibilities (CESR/09-216, March 2009) (hereafter the "CESR-Pol survey").

C1: Do you require that managers' transactions are also notified to someone else (e.g. the issuer, regulated market) than the competent authority?

331. In eleven Member States **(AT, BE, BG, CZ, EE, HU, LV, MT, NL, SE and SI)** the manager's transactions have only to be notified to the competent authority.

332. In eleven Member States **(CY, DE, ES, FR, IT, LT, LU, PL, PT, RO and SK)** managers' transactions have to be notified to the competent authority as well as to another entity / other entities than the competent authority. In seven Member States **(EL, FI, IE, IS, NO, LT and UK)** the managers' transactions have to be notified also or only to another entity than the competent authority.

333. In one Member State **(DK)** the provisions relating to the duty of notification of managers' transactions are more specific and the details thereof can be read under C2.

C2: If yes, please explain to whom and provide the reasons for that

334. Nine Member States **(DE, ES, FR, IT, LU, PL, PT, RO and SK)** request that the managers' transactions are also notified to the issuer.

335. **RO** specifies that the financial intermediary who conducted the transactions on behalf of the managers has the obligation to inform the market operator as soon as possible in order to allow the market operator to make the information public before the beginning of the next trading session.

336. In six Member States **(DK, EL, IE, FI, LT and UK)** the managers' transactions are notified to the issuer.

337. In **DK** only the persons discharging managerial responsibilities have to notify their transactions to the issuer whereas the persons closely associated with persons discharging managerial responsibilities have to notify their transactions to the persons discharging managerial responsibilities who in turn must notify the transactions to the competent authority.

338. **EL** specifies that managers must immediately notify the issuer and the issuer shall forward the notification within the following working day to the investors and to the competent authority. The issuer is obliged to submit to the competent authority a complete list of all persons discharging managerial responsibilities and their related persons. This list has to be submitted to the competent authority in an electronic form (dedicated software for this purpose) and has to be updated upon any change.

339. In **IE** the managers' transactions are notified to the issuer who is obliged to publicly disclose the transactions directly via a Regulatory Information Service (RIS) or indirectly by notifying the Company Announcements Office (CAO) of the Irish stock Exchange.

340. **UK** specifies that the issuer must notify the managers' transactions to the market through a RIS and this disclosure is appropriate and is sufficient as disclosure to the competent authority as the competent authority can access the RIS information.

341. In one Member States **(IS**) the managers' transactions are notified to the issuer and the regulated market.

342. In **IS** managers' transactions are notified to the issuer and the regulated market. The issuer notifies the regulated market on behalf of the persons discharging managerial responsibilities.

343. In **NO** the mangers' transactions are only notified to the regulated market and not to the competent authority at all. The regulated market reports possible violations of the notification requirements to the competent authority

344. In one Member State **(CY),** manager's transactions are notified to the competent authority, the Cyprus Stock Exchange and the issuer.

Reasons

345. The main reason for the notification of the managers' transactions to the issuer in most of the aforementioned countries is that the issuer is in charge of the public disclosure of the information relating to those transactions.

346. In three Member States **(EL, DK** and **PL)** the issuer has also to notify the managers' transactions to the competent authority. In (**PL**) the investor notifies the regulator and the issuer and the issuer subsequently notifies the company operating the regulated market and the public (posting the information on his website).

347. **FR** specifies that beyond the information purpose, it assists the issuer in preparing the management report required by law for the information of the shareholders and which contains a summary statement of the transactions that have been made during the past financial year.

348. In **CY** where information is destined to be published in any media of mass communication, the issuer is obliged to notify the managers' transactions in advance to the Cyprus Stock Exchange and to the competent authority, so that the official announcement or posting in the Cyprus Stock Exchange Internet site is made as soon as possible and precedes their publication. The issuer is responsible for the notification of the managers' transactions. The Cyprus Stock Exchange is responsible for the publication of the managers' transactions on its internet site and the issuer is also responsible for the publication on its internet site if he has one.

Issues of interest

Q2 CESR-Pol survey[4]: Do "Directors" have to notify directly to the regulator or indirectly, via the issuer, who subsequently transmits the notification to the regulator?

[4] CESR/09-216, March 2009)

349. In eighteen Member States **(AT, BE, BG, CY, CZ, EE, FR, DE, HU, IT, LU, LV, MT, NL, PL, RO, SE, and SK)** the mangers' transactions are directly notified to the competent authority.

350. In **LU** persons discharging managerial responsibilities and persons closely associated with them of issuers having their registered office in Luxembourg shall declare their transactions to the competent authority and to the issuer.

351. In eight Member States **(DK, EL, IE, IS, LU, PT, ES, and UK)** the managers' transactions are notified to the competent authority indirectly.

352. In one Member State **(SI)** managers' transactions are notified directly to the competent authority and are also notified indirectly to the competent authority under the provisions on notifications on qualifying holdings.

353. In **DK** persons closely associated with persons discharging managerial responsibilities have to notify their transactions to the persons discharging managerial responsibilities who in turn must notify the transactions to the competent authority.

354. In **LU** issuers having their registered office in a third country shall declare to the competent authority, as soon as they have knowledge of transactions of the persons discharging managerial responsibilities or persons closely associated with them, provided that Luxembourg is the Home Member State according to article 10 of the directive 2003/71/EC on prospectuses.

355. In **UK** the issuer must notify the managers' transactions to the market through a RIS and this disclosure is appropriate and is sufficient as disclosure to the competent authority as the competent authority can access the RIS information.

356. In two Member States **(FI and NO)** managers' transactions are not at all notified to the competent authority.

357. In **NO** the mangers' transactions are only notified to the regulated market and not to the competent authority at all. The regulated market reports possible violations of the notification requirements to the competent authority

358. In **FI** notifications are not transmitted to the regulator. NCSD (Nordic Central Securities Depository) is the centralised register and the competent authority has direct access to it.

C3: Are you satisfied with the practical application of the option as regards whom to notify?

359. All Member States except **DK** are satisfied with the practical application of the option as regards whom to notify.

C4: Have you encountered any problems with the option you have chosen?

360. Only one Member State **(DK)** reported that it has encountered some problems with the option it has chosen.

C5: If yes, please provide a description of the problems encountered

361. **DK** reported a problem relating to the two tier disclosure model that increases the possibility for delayed notification to the competent authority.

C6: If you have encountered any problems are there any plans (thoughts) to change your option?

362. Two Member States **(DK** and **NO)** have plans / thoughts to change their legislation.

363. In **DK** the competent authority considers changing the legislation so that the managers' transactions have to be notified directly to it.

364. In **NO** the competent authority has proposed to the government that it shall receive the power to issue violation charges for persons failing to comply with the rules on managers' transactions. The Ministry of Finance is currently working on the said proposal of the competent authority.

C7: Has your Authority issued any further guidance on how the notifications of managers' transactions have to be submitted?

365. All Member States except seven **(BG, DK, FI, HU, IT, LT** and **SK)** have issued specific guidance on how the notification of managers' transactions should be done.

C8: If yes, please provide further details.

366. In four Member States **(DE, MT, NO** and **PL)** the notification of mangers' transactions should be made in written form.

367. **DE** specifies that this written form includes faxes and letters but an electronic submission (email) is not accepted.

368. In **PL** the written submission should assure confidentiality so that for example a registered mail is accepted whereas there is objection to submission by fax.

369. In **MT** the Article 10 of Legal Notice 108 of 2005 (as amended by L.N. 322 of 2005) states that: ' Persons subject to a notification obligation in regulations 8 and 9 of these regulations may provide the completed form prescribed in the relevant Schedule to these regulations to be submitted to the competent authority: a) in written form by mail, b) electronic mail; and c) telecopy or fax telecopy or fax: provided that in all the above cases the means used are secure and allow the competent authority to identify the sender with reasonable certainty. Persons subject to a notification obligation may also provide the information required to the competent authority by telephone, telecopy or fax: provided that in this case, confirmation is notified by means of a completed form in accordance with the applicable Schedule to these regulations within the time limits referred to in concerned regulation. In **NO** the managers' transactions can be sent to the regulated market by fax or email.

370. Eight Member States **(CZ, EL, ES, FR, IE, IS, LU** and **UK)** set up a specific standard format that has to be filled in and specify the relevant detailed information the notification of managers' transactions should contain. **SE** is in process of publishing a standard format.

371. Six Member States **(EE, EL, FR, LU, NL** and **PT)** accept the notification of mangers' transactions in electronic format.

372. The competent authority in **EL** has created a software system enabling the issuer to comply with its obligations more easily and promptly. For this purpose an electronic form is available on the internet site of the Athens Stock Exchange, which enables the issuers to transmit the referred notification concurrently to the competent authority (by email, by receiving electronic protocol) and to the public (through the internet site of the Athens Stock Exchange).

373. In **FR** the competent authority specifies furthermore that the clarifications contained in the FAQ contain details on how notifications by a third-party on behalf of the mangers (e.g. the manager's account keeper) should be made.

374. **RO** specifies that the intermediary through which the transactions are made, has the obligation of informing the market operator as soon as possible, so as to allow the market operator to make public that information before the beginning of the next trading session. For the purpose of notification the intermediary has the obligation to request, and the initiate person has the obligation to reveal their quality of acting.

Issues of interest

Question 21 of the MAD survey[5] of supervisory powers: When does your Authority require the transactions to be notified?

375. According to Article 6 paragraph 1 of the directive 2004/72/EC the notification shall be made within five working days of the transaction date to the competent authority.

376. Twenty-one Member States require that the notification of the managers' transactions should be made within 5 working days (**AT, BE, BG, CZ, DE, EE, ES, FR, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK** and **SI)**.

377. **HU** requests that the notification shall be done immediately after the conclusion of the transaction.

378. In **IS** transactions done by insiders must be notified to the issuer without delay and the issuer has to notify to the competent authority immediately. If the insider is also a manager, the issuer is requested to send the information on the day of the transaction to the Icelandic Stock Exchange.

379. In **CY** the notification shall be made before the commencement of the stock exchange meeting on the working day following the day during which the transaction was made. **NO** requests also the notification to be done immediately and no later than the start of trading of the regulated market on the day following the transaction.

380. Managers' transactions have to be notified in **EL** to the issuer within 2 working days and the issuer shall transmit the mangers' transactions to the competent authority and to the public within the next working day from its receipt.

381. **DK** requests that the mangers' transactions should be notified at the latest on the first trade day after the transaction.

382. **IE** and **UK** request that the mangers' transactions have to be notified within 4 working days.

383. In **FI** the notification takes place within 7 days, which generally means 5 working days..

Q25 CESR-Pol survey[6]: Does the 5-day period for notification include those days to receive the information from the intermediary responsible for executing the order?

384. In twenty-two Member States (**BE, BG, CZ, EE, ES, FI, FR, DE, EL, HU, IE, IS, IT, LT, LU, LV, MT, PT, RO, SE, SI** and **UK)** the notification period includes those days necessary to receive the information from the intermediary responsible for executing the order.

[5] CESR/09-216, March 2009)
[6] CESR/09-216, March 2009)

385. In four Member States **(AT, NL, PL** and **SK)** the 5-day period does not include those days necessary to receive the information.

386. **NO** specifies that their notification requirements diverge from most of other European countries. The notification has to be given -at the latest- the day after the transaction was carried out before the opening hours of the exchange. In **CY** the notification must take place the day after the trade date. In **DK** the notification shall be made to the issuer no later than on the next business day after the transaction. If the "director" has not received the information on the next business day after the transaction the notification shall be given as soon as possible and no later than two business days after the transaction.

C6: If you have encountered any problems are there any plans (thoughts) to change your option?

387. One Member State considers clarification needed regarding "transaction date": a) from which the 5 day period should be counted, b) whether it should be the transaction date or the settlement date as well as whether certain kind of derivatives should also be included.

C9: Has your authority issued further guidance on the meaning of giving public access "as soon as possible"?

388. The competent authority of eleven Member States **(CY, DE, IE, EL, ES, NO, IT, LT, PT, RO** and **UK)** has issued further guidance on the meaning of giving public access "as soon as possible".

389. No further guidance on this matter has been issued by the competent authority of seventeen Member States **(AT, BE, BG, CZ, DK, EE, FI, FR, HU, IS, LU, LV, MT, NL, PL, SE, SI and SK).**

C10: If yes, please provide further details

390. In **DE** the issuer shall publish the notification without undue delay, on its website, provided the issuer has an internet presence. As a rule regarding "undue delay", the publication should be available on the website no later than on the business day following the notification. In **PT**, the publication has to be done as soon as the mangers' transactions have been notified. **EL, IE and UK** require the public disclosure of the mangers' transactions at the latest at the end of the following business day of having received the notification. In **LT** the issuer shall immediately publish the information relating to the managers' transactions but no later than 24 hours from the receipt of the notification and shall store the information in the Central Regulated Market Information Base. In **CY** and in **RO** the public disclosure should be done before the commencement of the stock exchange meeting on the working day following the day during which the transaction was done whereas in **IT** issuers shall publish the managers' transactions not later than the end of the trading day following their receipt. In **ES** the competent authority makes publicly available the information within 3 days from the receipt of the communication. In **NO** the notification shall be sent to the regulated market immediately and no later than before the start of trading on the regulated market on the day following the execution of the transaction.

C11: Has your authority issued any further guidance on the methods / means of an adequate public disclosure of managers' transactions?

391. Twenty-one Member States **(AT, BG, CY, DE, IE, IT, EL, ES, FI, FR, IS, LT, LU, MT, NO, PL, PT, RO, SE, SI and UK)** have issued further guidance on the methods / means of an adequate public disclosure of managers' transactions whereas the remaining eight Member States **(BE, CZ, DK, EE, HU, NL, LV and SK)** have not issued such further guidance.

C12: If yes, please provide further details.
Question 6 of the CESR-Pol survey: By which means are the transactions published?

392. Four Member States **(BG, ES, FR and PT)** publish the information relating to the mangers' transactions on the internet site of the competent authority.

393. **FR** specifies that the publication is done under the responsibility of the manager. In **BG** the competent authority shall make public the information received through the public register kept by it. In **DK** and **LV** notifications are published on the internet site of the competent authority, which is the Central Storage of regulated Information in Denmark and Latvia respectively. **SK** specifies that additionally to the publication on the internet site of the competent authority, the information on mangers' transactions is also published in a Bulletin.

394. In four Member States **(FI, IT, LU and PL**) the issuer has to post the information on its internet site. **IT** recommends the issuer to publish the managers' transactions on its website under a dedicated section that should be named "internal dealing".

395. In two Member States **(IE and UK)** the managers' transactions are made public via a Regulatory Information system (RIS) of the stock exchange.

396. In **NO** the transactions are published via the exchange information system, that system is linked also to other news distributors.

397. In **EL** managers' transactions are considered as being regulated information and have to be made public according to the national legislation implementing the directive 2004/109/EC on the harmonisation of transparency requirements. The managers' transactions are published a) immediately on the website of the regulated market, b) on the Daily Official Price Bulletin of the Athens Stock Exchange, or in case of other regulated market, in its official bulletin, c) on the website of the issuer.

398. **AT** legislation provides that managers' transactions have to be disclosed in such a way as to ensure the best public access to them. This disclosure has to comprise at least one of the three specifically mentioned electronically operated systems (Reuters, Bloomberg and Dow Jones Newswires).

399. In **DE** the notification has to be disclosed throughout Europe using a bundle of media. The notification has to be sent to an electronic news dissemination system (e.g. Reuters, Bloomberg, vwd-DowJones in Germany), a news agency, a news provider, a financial website and a financial newspaper. The number of media covered depends on the markets where the issuer's shares are admitted to trading. If the shares are only admitted to trading on an organised market in Germany, it is sufficient to enclose only national German media, in at least one of those – usually the electronic news dissemination system – that is capable of dissemination throughout Europe. If shares are admitted to several organised markets in the EU /EWR, the media shall include at least one newspaper and one financial website of the countries in question.

400. In **LT** the issuer shall immediately publish the information relating to the managers' transactions but no later than 24 hours from the receipt of the notification and shall store the information in the Central Regulated Market Information Base.

401. In **SI** the information is published on the internet site and in the press. Information regarding managers' transactions (as well as persons connected to managers) is accessible in the register of the competent authority and could be obtained upon request. However, much of these data is published in Slovenia due to provisions of the Transparency Directive since managers have to report each change of voting rights in public companies to the competent authority and to this particular public company (having in mind that much of transactions are done with shares). Public companies then publish this information. Currently it is not yet possible to

access the home page of the competent authority in order to find this information. But this is foreseen in the by-law (in advance) of the competent authority. The fact is that there has been a shift to electronic reporting in the last years while no managers' transactions reporting is yet done in electronic form.

402. In **CY**, for the purpose of the Market Abuse Law, where it is stated the obligation of public disclosure by issuers, this shall be made in the three following ways: (a) by announcement to the Cyprus Stock Exchange which lists it immediately on its internet site and, (b) by announcement to the Cyprus Securities and Exchange Commission and (c) by announcement to the Internet site of the issuer, provided that the issuer maintains an Internet site.

403. In **MT** information regarding managers' transactions is only provided by the competent authority in writing to the individual who requested such information. The competent authority states that as of to date it hasn't not yet received any requests from the public for information concerning transactions by persons discharging managerial responsibilities within an issuer of financial instruments registered in Malta. Should the Authority receive such requests, it would provide the required information by way of a letter.

Issues of interest

Q4 CESR-Pol survey[7]: Who is responsible for the publication of the "Directors" transactions?

404. In fourteen Member States **(AT, BE, BG, CZ, DK, EE, ES, FR, LV, MT, NL, SI, SK and SE)** the competent authority is responsible for the publication of the managers' transactions. **AT** specifies that "directors" may decide whether they disclose on their own or whether the competent authority should do.

405. In twelve Member States **(FI, DE, EL, IE, IS, IR, IT, LT, LU, PL, PL and UK)** the responsibility lies within the issuer.

406. In two Member States **(CY and NO)** the responsibility lies within the regulated market. **CY** specifies furthermore that the entity responsible for the publication is the Cyprus Stock Exchange and the issuer if he has an internet site.

407. In **HU** the manager itself is responsible for the publication of the managers' transactions.

408. In **RO** the intermediary through which the transactions are concluded has the obligation to inform the market operator as soon as possible, so as to allow the market operator to make that information public prior to the beginning of the next trading day.

409. In **SI** the competent authority has to ensure publication of transactions in a way the register it keeps should be publicly available.

C13: Does your legislation require an additional public access to the information relating to managers' transactions on an individual basis?

410. All Member States except **MT** reported that they do not provide an additional access to information concerning managers' transactions as on an individual basis.

411. In **MT** the competent authority is required to provide, a member of the public with information concerning transactions by persons discharging managerial responsibilities within an issuer of financial instruments registered in Malta.

C14: If yes, please provide the reasons for the additional public access

[7] CESR/09-216, March 2009)

412. **MT** specified that the measure is aimed to increase transparency of information and investor confidence.

C15: Are you satisfied with the practical application of the option to require (or not to require) additional public access to information relating to managers' transactions on an individual basis?

413. All Member States are satisfied with the practical application of the option to require (or not to require) additional public access to information relating to managers' transactions on an individual basis.

C16: Have you encountered any problems with the option you have chosen? And C17: If yes, please provide a description of the problems encountered. C18: If you have encountered any problems are there any plans (thoughts) to change the option?

414. None have been reported.

C19: Did your Member State decide that, until the total amount of transactions has reached five thousand Euros at the end of a calendar year, no notification is required or notification may be delayed until 31 January of the following year?

415. Sixteen Member States **(AT, BE, BG, CZ, DE, DK, EL, FI, FR, NL, IT, LV, MT, PL, PT, and SK)** have decided that, until the total amount of transactions has reached five thousand Euros at the end of a calendar year, no notification is required or notification may be delayed until 31 January of the following year.

416. **BG** however has set another threshold namely 2500€.

417. In **BE** the notification of transactions of 5000 € may be delayed but is not lifted.

418. In **FR** when cumulated amount of the transactions exceeds the threshold, the "director" is required to notify not only any new transaction but also those transactions executed prior to crossing the threshold, with a mention indicating that they were previously excluded from the notification requirement.

419. In **DE,** the moment the total amount of the transactions reaches 5000 €, all transactions have to be disclosed.

420. In **HU** all managers' transactions have to be notified to the HFSA but they have only to be disclosed to the public when the total amount reaches 5 000 € annually.

421. In **PL** the notification of managers' transactions is delayed till 31 January of the following year.

422. **PT** sets as time reference not the calendar year but the date of the last disclosure. Every time a disclosure is made, the 5000 € limit is reset. Once the threshold of 5 000 € is reached, all transactions have to be notified.

423. Thirteen Member States **(CY, IE, EE, ES, HU, IS, LT, LU, NO, RO, SE, SI and UK)** have not decided that, until the total amount of transactions has reached five thousand Euros at the end of a calendar year, no notification is required or notification may be delayed until 31 January of the following year.

C20: Please describe the reasons why your legislation has implemented / not implemented the option that until the total amount of transactions has reached five thousand Euros at the end of a calendar year, no notification requirement is required or may

be delayed until the 31 January of the following year (article 6.2 of the implementing directive 2004/72/EC).

424. For those Member States that have implemented the said option the most quoted reason is that Member States wanted to reduce administrative burden (**BE, CZ, DK, FR, and NL)** and to avoid the notification and disclosure of managers' transactions of low value. For ten Member States such transactions are less significant for the supervision of the financial market **(CZ, EL, FI, FR, NL, IT, LV, MT, PL, PT).**

425. **BG** stated that their market is rather shallow and a deal of a couple of thousand Euros can easily influence the market price.

426. The Member States having not implemented said option stated the following reasons.

427. **CY, EE, HU and LT** state that their markets are small so that they prefer a full transparency of all managers' transactions.

428. **LU** considers the threshold as too low.

429. For **RO**, as compared with the size of the market the amount of 5 000 € is not relevant.

430. **NO** states that already before the implementation of the MAD the notification duty of managers' transactions already existed so that they didn't want to change their legislation in this respect.

431. **IE and UK** wants to have full transparency of the managers' transactions. UK considers all managers' transactions of interest to the market. The competent authority of the **UK** believes that requiring all transactions to be disclosed makes it clearer what transactions are disclosable, as determining whether a transaction is above or below a threshold may be difficult, particularly in respect of derivative transactions which may require complex valuation. The previous **U**K regime required disclosure of all transactions and the competent authority believes that the market accepts and understands this approach.

432. **SI** specifies that all transactions are important information for the market and necessary for the supervision of the market.

C21: Based on your practical experience, are you satisfied with the option chosen?

433. All Member States except two **(EE, and IT)** are satisfied with the option chosen.

C22: Has your Authority encountered any problems with the option chosen.

434. Four Member States **(BE, BG, ES and IT)** reported explicitly having encountered problems with the option chosen.

C23: If yes, please provide a description of the problems

435. In **BG** the threshold of 2 500 € is considerably high as the prices of some shares are rather low and there is the possibility of market manipulation even before reaching the threshold.

436. **ES** reported that in addition to the problems encountered regarding the interpretation of the term "manager" or "person closely associated", they encountered problems with the obligation to report all the transactions since it generates a lot of work to the supervisory authority that has to deal with a huge number of notifications which some times are not useful to the market.

437. **IT** reported an excessive number of managers' transactions that have been notified and disclosed.

438. With regard to the answer to question C24, one Member States **(BE)** mentioned also some problems. **BE** reported that the option is not activated very often. Some managers chose to notify anyway, because otherwise they might forget to notify.

C24: If no, please give further explanations / please indicate a threshold which is more appropriate

439. Two Member States **(CZ and DK)** suggest a threshold of 10 000 €. **DK** specifies that such a threshold would be expected to reduce the number of notifications up to 50 %

440. **LU** has not a precise threshold in mind. Nevertheless, in the opinion of the competent authority the threshold should be a relative one taking into account share options received by managers and significant market operation in such shares.

441. Three Member States **(CY, IS and UK)** are of the opinion that no other threshold should be fixed.

442. **NO** wants that all the managers' transactions have to be notified and disclosed.

C27: Does your authority intend to make any change to managers' transactions regime currently in place?

443. Only two Member States **(BE and LU)** state that there are any thoughts / plans to make any change to managers' transactions regime currently in place.

444. For the competent authority in **BE** if the MAD-review would offer options to simplify / reduce the notification duty they would seriously consider to propose this to their ministry of finance. Actually, in the framework of the MAD-review, the competent authority pleaded for transactions related to the remuneration policy of the issuer (stock options, bonus shares …) to be exempted from the notification duty.

445. **LU** indicates that it doesn't think that multiple changes in the legislation would benefit the market and therefore prefers waiting for the forthcoming amendments to the MAD to be adopted by the EC institutions.

Issues of interest

C24a CESR-Pol survey: As regards the optional threshold, allowing "Directors" either to omit notification, either to delay notification – Is there a threshold? (Please specify the applicable threshold if different from € 5000).

446. In thirteen Member States **(AT, BE, BG, CZ, DK, FR, DE, EL, IT, LV, MT, PT and SK)** there is a threshold. Ten Member States (**BE, CZ, DK, FR, DE, EL, IT, MT, PT and SK)** have adopted the threshold of 5000 €. In **AT** the threshold is less than 5000 €. In **BG** the stated threshold is 2500 €.

447. In **IS** an issuer must, without delay, send notification of managers' transactions to the regulated market where the financial instruments are admitted to trading or where their admission has been thought or to the MTF where the financial instruments are admitted to trading. The regulated market or the MTF in question shall make the information public, provided the market value of the transaction is at least ISK 500 000 or the total transfer of holdings of the manager in question of shares in the issuer over the preceding four weeks amounts to at least ISK 1 000 000.

C24b of the CESR-Pol survey: As regards the optional threshold, allowing "Directors" either to omit notification, either to delay notification – Is there a threshold? If yes, does it allow for the omission of the notification or the delay of notification (where possible, specify the delay in the comments)

448. Six Member States **(AT, CZ, DK, DE, EL and LV)** state that the threshold allows for the omission of the notification. **DE** specifies that when the total amount of the transactions (manager and persons closely associated) reaches 5 000 € all transactions have to be disclosed. In **LV** there is no notification duty when the amount of the transaction or the amount of transactions during a calendar year is < 5000 €.

449. In five Member States **(BE, FR, IT, MT and PT)** the threshold allows for the delay of notification. In **FR** when cumulated amount of transactions exceeds the threshold, the "Director" is required to notify not only any new transaction but also those transactions executed prior to crossing the threshold, with a mention indicating that they were previously excluded from the notification requirement. In **MT** no notification is required until the total amount of transactions of a "Director" has reached the equivalent of 5000 € at the end of each calendar year. **PT** specifies that the duty to notify arises once the amount reaches 5000 € since the last report. When this threshold is reached, all transactions have to be notified.

C25: Did you have enforcement or court cases so far against persons failing to comply with article 6 paragraph 4 of the directive 2003/6/EC and article 6 of the implementing directive 2004/72/EC

a) <u>Enforcement cases for failure of compliance with the notification duty of managers' transactions</u>

450. Fourteen Member States **(BG, CZ, DE, DK, EE, EL, FI, IT, LU, MT, NL (a fine), NO, PL and RO)** reported that they have enforcement or court cases so far against persons failing to comply with the notification duty of managers' transactions.

451. **BG** reported on enforcement cases of persons discharging managerial responsibilities and persons closely associated to them who failed to report their transactions to the competent authority. The competent authority has drawn up statements for establishment of administrative violation. Following that, the Vice-Chairperson of the competent authority issued penal decrees which are the legal instrument whereby fines could be imposed on persons having committed violations of the relevant securities legislation.

452. **DE, DK, EE, and FI** (basic declaration, declaration of holdings or declaration of changes in holdings to be filed with an insider register had been delayed) and **RO** reported that there have been enforcement cases for not correct notification of the managers' transactions.

453. In **EL** administrative sanctions have been inflicted to issuers who did not submit to the competent authority a complete or updated list of persons discharging managerial responsibilities. **CZ, EL** reported that administrative sanctions have also been inflicted in case of failure to the obligation of the notification of managers' transactions.

454. **IT** have reported that from the transposition of MAD it has punished about 20 persons failing to comply with article 6 paragraph 4 of the MAD directive and article 6 of the implementing directive 2004/72/EC (50% of cases for not having disclosed the information at all and 50% for delay in the disclosure).

455. **LU** issued injunctions where persons discharging managerial responsibilities deliberately did not notify the managers' transactions.

456. **MT** inflicted an administrative fine in one case for failure to notify transactions by a person discharging managerial responsibilities within an issuer. Details of administrative sanctions imposed by MT may be found on www.mfsa.com.mt under Announcements/Sanctions and Penalties'.

457. In **NO**, when a person fails to comply with the requirement of notification of managers' transactions, the competent authority can either provide with a warning or send the case to the public prosecutor. Each year the competent authority reports persons failing to comply with the rules on managers' transactions to the prosecuting authority. In 2007 competent authority reported 10 persons and in 2008 the competent authority reported 9 persons to the prosecuting authority. The prosecuting authority usually issues a fine to the relevant person.

458. **PL**: The enforcement cases concerned delays in sending the notification or lack of notification.

b) Enforcement cases for failure of compliance with the duty of adequate public disclosure of managers' transactions

459. Eleven Member States **(BG, DE, DK, EE, EL, FI, LU, MT, NL, PL and RO)** Member States **(DE, DK, EL, IS, IT, NL and LU)** reported that there have been some enforcement cases for failure of compliance with the duty of adequate disclosure of managers' transactions. **LU** specified that it has issued some injunctions where the issuer did not adequately disclose managers' transactions

c) Enforcement cases for failure of compliance with the threshold of five thousand Euros

460. Twelve Member States **(BG, CZ, DE, EL, FI, IT, MT, NL (a fine), LV, NO, PL, PT and SE)** reported having enforcement or court cases so far against persons failing to comply with the threshold of 5000 Euros.

Appendix

Article 6. 4 of the MAD *"Persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall, at least, 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. Member States shall ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible."*

Article 6 of the Directive 2004/72/EC
Mangers' transactions

"6.1. *For the purposes of applying Article 6(4) of Directive 2003/6/EC, and without prejudice to the right of Member States to provide for other obligations than those covered by that Article, Member States shall ensure that all transactions related to shares admitted to trading on a regulated market, or to derivatives or other financial instruments linked to them, conducted on the own account of persons referred to in Article 1 points 1 and 2 above, are notified to the competent authorities. The rules of notification to which those persons have to comply with shall be those of the Member State where the issuer is registered. The notification shall be made within five working days of the transaction date to the competent authority of that Member State. When the issuer is not registered in a Member State, this notification shall be made to the competent authority of the Member State in which it is required to file the annual information in relation to the shares in accordance with Article 10 of Directive 2003/71/EC.*

6.2 *Member States may decide that, until the total amount of transactions has reached five thousand Euros at the end of a calendar year, no notification is required or notification may be delayed until the 31 January of the following year. The total amount of transactions shall be computed by summing up the transactions conducted on the own account of persons referred to in Article 1 point 1 with the transactions conducted on the own account of persons referred to in Article 1 point 2.*

6.3. *The notification shall contain the following information:*

-name of the person discharging managerial responsibilities within the issuer, or, where applicable, name of the person closely associated with such a person,
-reason for responsibility to notify,
-name of the relevant issuer,
-description of the financial instrument,
-nature of the transaction (e.g. acquisition or disposal),
-date and place of the transaction,
-price and volume of the transaction."

Section D. Measures to ensure that the public is correctly informed – Article 6.7

461. This section is related to the measures that may be taken by Authorities to ensure that the public is correctly informed under Article 6.7 of MAD.

Results from the 2006 CESR survey

462. In fifteen Member States **(AT, CZ, EL, ES, FI, FR, IE, HU, MT, PT, IT, LU, LT, HU, RO)** Authorities use and supervise directly the measures in place.

Which measures do members consider necessary in order to ensure that the public is correctly informed

463. Thirteen Member States **(CY, CZ, DK, ES, FR, IT, LT, LU, NO, PL, PT, SK, UK)** indicate that the Authority has the power to require the publication of the relevant information.

464. Nine Member States **(DK, ES, IT, LT, LU, NO, PL, PT, SI)** report that the Authority can halt trading in the financial instrument concerned in the case information is not published.

465. Six Member States **(DK, IT, LT, LU, SK, UK)** declare that the Authorities have the power to publish the information themselves in the case the issuer does not fulfil his obligations

466. Five Member States **(AT, BG, EL, FI, IT)** declare generally that the Authorities can take all measures which are possible in the normal course of supervision and four Member States **(AT, BG, IT, and LU)** can impose administrative fines for non-compliance.

How do the authorities supervise these measures and how they use them?

467. Six Member States **(EL, DK, IT, NO, SE, RO)** have declared that the Authorities supervise these actions in the course of normal supervision or on an on-going basis. In **NO** such supervision is conducted in close cooperation with the regulated market. The competent authority has the overall responsibility for the legislation on the duty of disclosure, but the regulated market has operational responsibility for monitoring the way in which issuers adhere to this legislation.

468. The measures include continually checking media that information is disseminated correctly, e.g. by checking issuers web-sites and annual reports and media **(DK, IT, SE)**, also in cooperation with the stock exchange **(NO).**

469. In **PT** the Authority operates according to procedures (which are triggered in case of abnormal changes in prices/transactions or existence of rumours not corresponding to inside information already published) which include contacts with the more active financial intermediaries, and contacts with the issuer or a third party in order to ascertain the reason of the event. They may even inform the public that information has been asked from the issuer or, in an ultimate measure, order the suspension of the negotiation.

470. In **FR** the Authority describes its system of supervision as escalating involving several steps: (1) Contact by phone of the issuer concerned (2) Letter sent to the issuer (3) Power of injunction of the FR Authority to urge for remedial action to be taken (4) investigations might be initiated. The authority may ask the court to order the person responsible for the practice discovered 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 legal pecuniary obligation payable to the Trésor Public for executive of order. (5) Possible sanction.

Results from the 2009 CESR survey

D1 Are you satisfied with the practical application of the measures taken to ensure that the public is correctly informed?

471. All 29 Member States declare that the Authorities are satisfied with their practical application of the measures they have available under Article 6.7 MAD.

D2-3-4 Have you encountered any problems in the application of the measures implementing article 6.7? If yes, please provide us with a description of the problems encountered. If you have encountered any problems are there any plans (thoughts) to change such measures?

472. No Member State has reported any problems encountered by the Authority in the application of the measures implementing Article 6.7 MAD.

473. Accordingly, there are no descriptions provided of plans to change the measures implementing Article 6.7 MAD. MT is satisfied with the measures taken to ensure that the public is correctly informed, with the exception of the requirements on the delay of disclosure of inside information as this option has not been availed of in practice. In this regard, MT stated that it is currently considering the issue of a circular to the listed companies and sponsoring stockbrokers wherein their attention is drawn to this requirement and the importance of informing promptly the Authority about the delay in publication of price sensitive information.

D5-6 Did you have enforcement action undertaken by your Authority or court cases so far? If yes, please describe the most relevant examples.

474. Twelve Member States **(AT, DE, EE, EL, FR, IS, IT, LV, MT, NL, NO, UK)** indicate that the Authorities have experiences of enforcement actions regarding Article 6.7 MAD.

Frequency of enforcement cases quoted by Member States in the examples given

475. In their examples given, the Authorities of one Member States **(DE)** with big markets quote very few cases of minor importance and a few cases every year. The Authorities of six Member States **(EE, EL, IS, IT, NL, NO)** use the word "several" to indicate their number of cases. For the remaining four Member States **(AT, LV, MT, UK)** the number of cases is not explicitly mentioned.

Type of measures quoted in the examples given

476. In the examples of most relevant enforcement cases given by the aforesaid twelve Member States **(AT, DE, EE, EL, FR, IS, IT, LV, MT, NL, NO, UK)**, six Authorities (**AT, EE, IS, LV, MT, , UK**) quoted the application of fines, four Member States **(EL, FR, IT, NO)** the request to provide the necessary information to the public, and 1 Member State **(EL)** the suspension of trading.

477. Some of the examples provided do not refer to the actual option to apply any necessary measure under Article 6.7 in order to safeguard the compliance with paragraphs 1 to 5, i.e not to the measures themselves. Rather they refer to actual cases of non-compliance under paragraphs 1 to 5 in the Article, to which paragraph 7 refers (see below).

Type of infringements quoted in the examples given

478. In the examples given by the aforesaid thirteen Member States **(AT, DE, EE, EL, FR, IS, IT, LV, MT, NL, UK)**, the following types of infringements were quoted:

- Delay in disclosing information under Article 6.1 (1: UK);
- Breach of information requirements in take-over cases (2: EL,NL)
- Breach of manager's reporting obligations (2: EE, EL);
- Other.

479. The detailed description of enforcement cases provided by the aforesaid thirteen Member States **(AT, DE, EE, EL, FR, IS, IT, LV, MT, NL, UK)** is reported below.

Delay in the obligation to disclose information under article 6.1 (UK)

480. **UK** - The UK Authority fined Woolworths Group plc £350,000 in respect of a breach of the rule which implements Article 6.1 of Directive 2003/6/EC. These provisions impose the obligation on issuers to release inside information as soon as possible and to avoid the creation or continuation of a false market in listed securities. Woolworths was fined in relation to its delay in disclosing a significant variation to the terms of a major supply contract of one of its subsidiaries. The UK Authority published a Final Notice on 11 June 2008 regarding this matter.

481. Further examples of enforcement actions taken by the UK Authority to ensure the public is properly informed are: The UK Authority published a Final Notice on 19 January 2009 in respect of a £200,000 penalty (pre-settlement discount) imposed on Wolfson Microelectronics plc for delay in releasing news concerning the loss of a significant percentage of business from a major customer. The Final Notice appears on the FSA's website.

482. In another case, a fine of £350,000 (pre-settlement discount) was imposed by the FSA on Entertainment Rights plc for a 78 day delay in disclosing a significant variation to the terms of a major distribution agreement. The Final Notice appears on the FSA's website.

Breach of information requirements in take-over cases (EL,NL)

483. **EL** - There are several cases in which the EL Authority has undertaken enforcement action so far. In order to ensure that the public is correctly informed, we ask the listed companies (either by sending a letter or by making a phone call) to provide all the necessary information to the public. In certain cases that the companies fail to comply with our requests, the EL Authority may suspend the trading of their shares, (cross-referring to question B15 above**).**

a) Listed Company A had launched an offer for the acquisition of Company B. The information had leaked to the press, but company A has not confirmed the information officially. Company A has claimed that the delay of the public disclosure of the information was necessary for the protection of the interest of the company. The EL Authority has decided that company A should have informed the public as soon as the information lost its confidentiality and thus has imposed a fine to company A.

484. **NL**: With respect to several take-over bids, the NL Authority had the strong impression that price sensitive information leaked before the relevant companies made the take-overs public. Relevant elements for the NL Authority were (repeating) rumours, unusual increasing share prices and the knowledge within the companies that the rumours were true.

Breach of manager's reporting obligations (EE, EL)

485. **EL**: Administrative sanctions have been imposed in various cases where

a) PDMRs failed to fulfil their obligation to notify or to notify on a timely basis their transactions,

b) issuers failed to inform the public about transactions that have been submitted to them by PDMRs,

c) issuers that failed to comply with their obligation to submit to EL Authority a complete or updated list of their PDMRs according to article 13 par. 3 of Law 3340/2005.

486. **EE**: The EE Authority has issued precepts to issuers in relation to the maintenance of insider lists, also several enforcement cases where persons have been fined for breach of managers' transaction reporting obligation. There have not been any court cases so far.

Other/General cases

487. **AT**: The AT Authority has imposed administrative fines for non-compliance with the obligation to inform the public. In a recent case the AT Authority has imposed a fine because the issuer has not informed the public about the resolution of the board on a prognosis of the result of ordinary business activities.

488. **DE**: There have been cases in which issuer did not publish or did not publish in a timely manner; very few cases of minor importance.

489. **FR**: There are few cases every year where the FR Authority on its own or, more often, by requesting the Court, orders or ask the Court to order companies to inform the public. Most of the time, the topics are related to the publication of accounts.

490. **IS**: There have been several fines regarding failure to notify within the timeframe in which the Authority issued administrative fines.

491. **IT**: The IT Authority has required several times listed issuers for which Italy is the home Member State to publish information and documents needed to inform the public concerning inside information. The most relevant examples are requests concerning information incompleteness.

492. **LV**: The LV Authority applied administrative sanctions in cases when the procedure of disclosure of information set by the Law was not observed.

493. **MT**: On the 2nd August 2006 an administrative penalty of Lm 100 (Equivalent to app. €233) was imposed on the author and editor of the article titled 'Maltacom shares plunge but seen to level off and possibly recover'. The penalty was imposed given that elements of this article breached the regulation The Prevention of Financial Markets Abuse (Fair Presentation of Investment Recommendations and Disclosure of Conflicts of Interest) Regulations. Please also note the reply to question 26 of Section C. On the 23rd July, 2008 an administrative penalty of Euro 9,290 was imposed on a person for failure to submit the required notifications of the transactions made under a nominee account in the shares of the company in which he is discharging his managerial responsibilities.

494. It is worth reporting also what is said above under sections B regarding Article 6.2 and C regarding Article 6.4, which is of relevance for a reading of the cases in relation to article 6.7. In particular, under the sections B and C:

495. Nine Member States **(AT, BE, DE, EE, EL, IS, LU, NL PT)** declare that the Authority has experience of enforcement cases in relation to Article 6.2 and the option given to member states for issuers to choose to delay the information (see Section B, question 14 above);

496. Twelve Member States **(BG, CZ, DE, EL, FI, IT, MT, NL (a fine), LV, NO, PT and SE)** state that they have experience of enforcement cases in relation to failure to comply with Article 6 (4) MAD and Article 6 of implementing directive 2004/72 (see Section C question 25 above).

497. Not all of these Authorities reoccur in the responses in relation to article 6.7 which may suggest that not all respondents had articles 6.2 and 6.4 in mind when responding to the question regarding article 6.7. Rather Authorities seem to have been addressing measures under Article 6.1 when responding to questions regarding 6.7.

498. It can be noted there is no reporting of cases with reference to the decision in Article 6.2 of an issuer's decision to delay, at his own responsibility, the publication of inside information.

Annex

Article 6.7 states: *"With a view to ensuring compliance with paragraphs 1 to 5, the competent authority may take all necessary measures to ensure that the public is correctly informed."*

Section E. Content of a Suspicious Transaction Report (STR) – Article 6.9 of Directive 2003/6/EC & Articles 7, 8, 9 and 10 of 2004/72/EC

499. This section is related to the MAD option whereby Member States can impose obligations in relation to the content of a Suspicious Transaction Report (STR) in addition to those obligations laid down under Article 9 of 2004/72/EC and set out in the standard reporting format in the Level 3 – first set of CESR guidance (CESR/04-505b).

Responses to the 2009 Questionnaire

E1: ***Does your Authority require any extra information to be submitted in writing in addition to what is required in the standard reporting format set out in the 'Level 3 – first set of CESR guidance?***

E2: ***If yes, please provide details and outline the benefits, reasons for this***

500. Two Member States, **DE** and **MT** require extra information to be submitted in writing in addition to what is required in the standard report format set out in the Level 3 set of CESR guidance.

501. **DE**: Not only details about the (natural) person actually filing the report (on behalf of the reporting party) are required, but also details about the (legal) person, who is legally subject to the reporting requirement. If the transaction concerns a derivative, additional information is required about the underlying asset, strike price, price multiplier and expiry date. Also an order number related to a transaction is required and the currency that is applicable for the transaction. Regarding the identities of persons carrying out transactions and other persons involved both private and business addresses are required. Information is also required about the legal and economic relationship between the principal and the person acquiring rights or incurring liabilities from the transaction, if they are separate entities. The reason for the requirement of some additional information is to get a clearer picture of the situation.

502. **LU**: Strictly speaking, there is no extra information to be submitted in addition to what is required in the standard reporting format set out in the Level 3 – first set of CESR guidance but the Circular CSSF 07/280 of 5 February 2007 on implementation rules of the law of 9 May 2006 on market abuse, as amended specifies in a more comprehensive way the detailed information that has to be incorporated in the format for STRs. The details are as follows. • Notifying person: 1. Name, address and capacity of the financial intermediary 2. Name, first name and telephone number of the natural person making the notification, and, if different, of the person to be contacted by the CSSF • Financial instrument (issuer, type, ISIN code) • Market (specify the name and the venue of the market and whether it is a "regulated" market" or not) • General description of the transaction 1. Orders: entry date and time, quantity, trade direction (purchase, sale), characteristics (order type, validity, etc…), type of the trading market (e.g. block trade) 2. Execution: date and time, market price, negotiated quantity, total price, further information on the transaction if any • Reasons for the suspicion that the transaction might constitute market abuse • Identification of the person carrying out the transaction and of any other person involved in the transaction 1. Natural person: name, first name, address, telephone number, date and place of birth, nationality, account number, any other useful information (profession, position held, relationship, etc…) 2. Legal person: company name, head office, telephone number, account number, any other useful information (registration date, etc…) and identity of the instructing party within the company • Further significant information • List of accompanying material, if any.

503. **MT**: In addition to the requirements of the Level 3 – first set of CESR guidance notes, Article 11 of the PFMA requests the following information in the format stipulated in Schedule II of

the same Act: • the Name, Address, Telephone number and Date of birth of the person/persons/entity – on behalf of whom the transaction/s has/have been carried out. • the capacity in which the person is making the notification. Therefore whether the person making the notification is: [i] dealing on own account, [ii] on behalf of third Parties, [iii] as underwriter or, [iv] other. a confirmation by the person completing the form of whether the competent authority and/or the law enforcement authorities and/or a Regulated Market, already been advised by telephone, written communication or otherwise. If this is the case, the organisation and person contacted needs to be inserted. – This is requested in order to maintain appropriate records of the suspicious activity reported through different channels. • also the following declaration is included in the form: 'I, as the undersigned person making the notification, understand that where any of the information requested in this form has not been submitted due to it being available at the time of notification shall provide the competent authority with any remaining information as soon as it becomes available.' – This was included to ensure that the person reporting the suspicious transaction is aware that s/he is required to provide the competent authority with additional information on the transaction which is available to him/her at a date following the said report.

E3: ***What is your definition of "reasonable ground for suspicion", if any?***

E4: ***Has your Authority issued any guidance on the assessment of 'reasonable ground for suspicion' (Yes – No)***

E5: ***If yes, please provide details.***

504. No Member State submitted a definition as to what constitutes "reasonable ground for suspicion". Seven Member States **CZ, EE, ES, FI, MT, NO and PT** and have issued guidance on the assessment of reasonable grounds for suspicion.

505. **CZ**: We described some examples of suspicious transactions.

506. **EE**: The EFSA has issued guidance on suspicious transaction reporting which includes guidance on the definition on the assessment of "reasonable ground for suspicion" – a transaction may seem unusual, taking into consideration the circumstances and context of the specific case. The guidance lists the possible signals of insider trading and refers to the list of possible signals of market abuse (based on the CESR Level 3 guidance.

507. **ES**: There is not a legal definition of the term "reasonable ground for suspicion". However, the CNMV has issued a document setting our criteria on the detection and reporting of suspicious transactions where some signs of possible suspicious transactions are defined but the term "reasonable ground for suspicion" is not defined.

508. **FI**: According our standards "Suspicions may be considered reasonable if parties subject to the obligation to notify find, on the basis of their overall experience, irregularities in a customer's securities transactions or other transactions (for example, a securities or derivatives transaction or a combination of several securities transactions). The obligation does not require that parties subject to the obligation to notify expressly investigate backgrounds of securities transactions or other transactions. It is enough that parties subject to the obligation to notify otherwise comply with the set requirements. Fulfilment of the notification obligation is subject to discretion on a case-by-case basis. The notification shall be submitted if, on the basis of a securities transaction or other transaction, there is reason to suspect abuse of inside information or manipulation of share price".

509. **MT**: As per Regulation 9(2) of the PFMA (Disclosure and Notification) Regulations, 2005 [LN 108 of 2005] subject persons are to decide on a case-by case basis whether there are reasonable grounds for suspecting that a transaction involves market abuse. In this regard, as explained in the MFSA PFMA Guidance notes, notification of suspicious transactions requires sufficient indications that the transaction constitutes market abuse. Certain transactions by themselves

may not seem suspicious but, when linked to other transactions or events, may lead one to suspect market abuse.

510. **NO**: Pursuant to Kredittilsynet's Circular 14/2005 Chapter 6 (only available in Norwegian), the term "reasonable ground for suspicion" shall not be strictly interpreted. A person might have an obligation to report a transaction, even if it less than a 50 % chance that the transaction constitutes market abuse.

511. **PT**: In August 2008, CMVM issued a paper related to the report of suspicious transactions. This paper takes into account Level 3 – First set of CESR Guidance and contains information on (i) who is obliged to report, (ii) transactions covered, (iii) possible signals, (iv) to whom should the report be made, (v) electronic standard reporting format, (vi) duty of secrecy, (vii) duty to report and duty to refrain from taking part in certain transactions.

E6: ***Does your Authority set any materiality threshold for Suspicious Transaction Reports (STRs)?***

E7: ***If yes, please provide details.***

512. No Member State has set any materiality threshold for suspicious transaction reports.

E8: ***Does your Authority require/receive STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market?***

513. Seventeen Member States (**BE, CZ, FI, DE, DK, HU, IE, IT, LT, LU, NL, NO, PL, PT, ES, SE** and **UK)** do require/receive STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market.

E9: ***As the reporting requirement applies to transactions, does your Authority encourage persons to voluntarily report suspicious unexecuted orders to trade? (Please see for reference paragraph 26 of third set of guidance of CESR for the MAD). (Yes – No)***

E10: ***If yes, please provide details.***

514. Eight Member States, **CY, EE, FR, IT, LT, NL, PT** and **SI**, require and ten Member States, **BE, DK, EL, ES, HU, IE, IS, NO, SE** and **UK** encourage persons to voluntarily report suspicious unexecuted orders to trade. One Member State, **CZ**, has issued guidance in relation to reporting suspicious unexecuted orders to trade and one Member State, **DE**, refers to the CESR guidance.

515. **BE**: This encouragement is not embedded in specific guidelines, but is given through contacts with compliance managers, on the basis of the merits of the case at hand.

516. **CY**: According to article 40 of the Market Abuse Law: 'Any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction or orders to trade might constitute insider dealing or market manipulation shall notify the Commission without delay'.

517. **CZ**: We have published guidance to this topic.

518. **DE**: (E.g. BaFin refers to the CESR guidance).

519. **DK:** This encouragement is not embedded in specific guidelines, but is given through contacts with compliance managers, on the basis of the merits of the case at hand.

520. **EE**: The applicability of STR obligation to unexecuted orders is derived from the articles of the Securities Market Act: Article 192 stipulates that investment firms are required to report to the EFSA of a reasonable suspicion of market abuse; Article 1882 defines market abuse as

misuse of inside information and market manipulation; Article 1886 defines misuse of inside information includes both trading based on inside information and attempt to trade; Article 18815 definition of market manipulation includes both transactions and orders.

521. **EL**: We have not issued any written guidance on such issue; however, during our contacts with the compliance officers of investment firms, we have made them clear that we would appreciate the receipt of such notifications.

522. **ES**: In the document where the CNMV's criteria on STRs are set, it is specifically mentioned that the CNMV recommends that firms also report any transaction which they reject on the basis of grounded suspicions that, if executed, might violate the regulation on market abuse.

523. **FR**: The GR AMF in its article 315-43 explicitly requires the reporting of suspicious orders transmitted to the market, regardless of whether they have been executed or not.

524. **HU**: In the context of client's pending orders the HFSA suggested that it would appreciate if these transactions were reported to HFSA.

525. **IE**: Prescribed persons are encouraged to report unexecuted orders to trade.

526. **IS**: The Authority gives an annual seminar for compliance officers where this is stressed. In addition to that the authority also stresses the importance of this report to the staff of financial undertakings whenever it gives lectures on related matters.

527. **LT**: The reference deciding whether to report suspicious trading is made to manipulative behaviour related to false or misleading signals and to price securing (2003/124/EC Article 4) which also include manipulative behaviour while placing orders.

528. **LU**: There is no explicit or active encouragement to notify suspicious orders. However, the CSSF undertakes all necessary steps once it has received a suspicious order report.

529. **NL**: The reporting requirement not only applies to transactions, but to orders as well. This requirement only applies to investment firms.

530. **NO**: Kredittilsynet has not published anything in its Circulars regarding voluntary reporting but we would encourage persons asking us to report such unexecuted transactions if there is reasonable ground to suspect market abuse.

531. **PT**: According to the Portuguese law (article 382 Securities Code), STRs apply when the person becomes "aware of circumstances that may be qualified as a crime against the securities market or that of other financial instruments". As placing orders with no intention of executing is a type of practice which would constitute market manipulation, the law is wide enough to cover STRs both on executed and on unexecuted orders. Besides the obligation to report suspicious transactions, financial intermediaries have previous (in a chronological way) obligations to carefully and diligently examine orders and to refrain from taking part in transactions capable of putting the market's orderly functioning, transparency and credibility at risk. Therefore, in case of a suspicious order, the financial intermediary should refrain from executing it.

532. **SE**: We do not encourage proactively, however if the question arises, we encourage such reporting.

533. **SI**: Agency's by-law, Decision on suspicious transactions' reporting, Article 3 defines the content of the report among others (point 1 of paragraph 1): - data on transaction; financial instrument that is subject of transaction including symbol of financial instrument and information about organized financial market or financial market where the transaction has been executed or declaration that transaction has not been executed.

534. **UK**: Yes, we encourage but do not mandate reporting of suspicious unexecuted orders to trade. We provide advice via our market abuse helpline and via various fora such as speeches and firm meetings that we are interested to see STRs on unexecuted trades.

E11: ***Has your Authority issued any guidelines to firms in relation to the systems and controls they should have in place to identify suspicious trades? (Please see paragraph 36 of the third set of guidance of CESR for the Market Abuse Directive.) (Yes – No)***

E12: ***If yes, please provide details.***

535. Nine Member States - **BE**, **CZ**, **EE**, **FI**, **FR**, **IT**, **LU**, **ES** and **UK** - have issued guidelines to firms in relation to the systems and controls they should have in place to identify suspicious trades.

536. **BE**: We have an FAQ on this, but it is more or less a replication of what is in the CESR's advice.

537. **CZ**: We provided all market participants with our guidance to inform us informal about all suspicious transactions.

538. **EE**: The EFSA's guidelines on STR-s include guidance in line with paragraph 36 of the third set of guidance of CESR for the Market Abuse Directive, stating that the investment firm is not required to have in place specific systems, but it must have in place internal regulations, systems, mechanisms or else, which guarantee that the STR obligation is met.

539. **ES**: In the CNMV's criteria on STRs it is said that the CNMV believes that information processing systems used to support the systematic detection of potentially suspicious transactions could be useful in very large firms or in those that engage in highly complex brokerage or portfolio management activities. However, these systems may be inefficient in smaller firms, where the detection of suspicious transactions may rely entirely on employees and the systems already in place. Therefore, each firm must decide whether these information processing systems are appropriate for its business. Firms that opt to rely on specific systems should define the most appropriate detection parameters, depending on their size and operations, and not uncritically adopt systems specifically designed for firms of a different size or in a different field. It is important to point out that information systems are not a substitute for the efforts of the firm's employees and executives but, rather, an additional support; it is ultimately the firm's responsibility to evaluate the reasonableness in each case. Employees in the departments involved, with their training, knowledge of the market and the client, and experience, should employ their best efforts in identifying potentially suspicious transactions.

540. **FI**: According our standards "Parties subject to the obligation to notify must have internal guidelines and procedures on the submission of notification so that employees understand their duty to observe suspicious securities transactions and the obligation to notify them to the FIN-FSA. The internal guidelines must include instructions on such issues as to whom, within the organisation, any suspicions of unusual securities transactions and other suspect transactions are reported."

541. **FR**: The AMF has not issued guidelines per se, but its GR (art. 315-44) explicitly refers to the provisions of the CESR guidance on the application of the MAD relating to the systems and controls to put in place. These provisions are of similar worth and value as the own texts of the AMF. Besides, the AMF was involved in the drafting of a professional guide issued to its members by the AMAFI, the French association of investment firms.

542. **LU**: Circular CSSF 07/280 of 5 February 2007 on implementation rules of the law of 9 May 2006 on market abuse, as amended specifies that the professional shall make the necessary

arrangements in order to proceed with a specific analysis of the relevant transaction each time he reasonably suspects it could constitute market abuse. However, there is no obligation for a systematic a posteriori review of all transactions previously executed by the person concerned, nor is there any obligation to adopt structural provisions similar to those covered by article 27 of the law on market abuse applicable to MTF operators. Despite the fact that the professional is not obliged by Law to detect and prevent all market abuses deriving from transactions in which he intervenes, he shall nevertheless take all necessary measures in order to fulfil his new obligations.

543. **NL**: The explanatory memorandum of the law implementing the MAD notes that investment firms are not required updating their computer systems, nor are they required to actively monitor for suspicious trades.

544. **UK** We have undertaken thematic work to assess systems and controls at a number of firms and we have published good practice on our website in our Market Conduct newsletter: STR FAQs http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter14.pdf STR review http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter18.pdf We have encouraged firms to introduce the following systems and controls to assist in their STR reporting obligations: • Firms are encouraged to educate staff about market abuse and the STR regime. Compliance staff is to undertake detailed and continuous training. There should be some auditing of training for key staff. Firms are encouraged to monitor trades. There should be independent checking applied by compliance. In situations where volume precludes monitoring all trades the firm should address methods of identifying key situations to monitor such as size, profit or timing. Clients making large profits should be identified and reviewed. Firms should be aware of abuse using related instruments such as derivatives to effect market abuse. Firm's senior management must ensure their firm has systems and controls appropriate for the nature and scale of their business. We encourage firms to assess the adequacy of their controls against our findings on good practice. Firms are encouraged to undertake retrospective checks to identify trades that were not identified as suspicious at the time. Firms are required to keep up to date and comprehensive Know Your Client (KYC) data to support the STR regime. We encourage the FSA firm supervisors to monitor the STR returns of their firms and ensure that our recommendations are understood by the firms. We see this work as ongoing.

E13: ***Have you encountered any problems with the option you have chosen to require / not require STRs for OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market? (Yes – No)***

E14: ***If yes please provide us with a description of the problems encountered.***

E15: ***If you have encountered any problems are there any plans (thoughts) to change your option?***

545. One Member State, **FR**, has encountered problems with the option they had chosen - not to require STRs for OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market. One Member State, **PL**, noted the importance of information on derivative financial instruments to Competent Authorities.

546. **EL**: Although we have not encountered any problems, we are considering requiring/receiving STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market because STRs for OTC derivative instruments constitute an extremely useful alert for the initiation of an investigation. Additionally, during the investigation of a market abuse case, it is necessary to acquire information about the OTC derivative instruments whose underlying financial instrument is under investigation.

547. **FR**: The report of the Task Force on OTC derivatives, approved by the CESR members in May 2009, showed that the use of derivatives is widespread across the membership and that these instruments are particularly suitable for the purpose of committing market abuse, for they

grant both secrecy and leverage. CESR OTC Task Force recommended that the European Commission be requested to amend the Directive 2006/6/EC to make the reporting of STRs on OTC derivatives mandatory. The AMF shares this view and is considering changing its option.

548. **PL**: The crisis shows that information on the derivative financial instruments may be of great importance for the Authority.

E16: ***Did you have enforcement action undertaken by your Authority or court cases so far against persons failing to comply with Article 6 paragraph 9 of MAD? (Yes – No)***

E17: ***If yes, please describe the most relevant examples.***

549. Four Member States (**EL**, **NL**, **RO** and **SE)** have taken enforcement action or court cases against persons failing to comply with Article 6 paragraph 9 of MAD.

550. **EL**: In most of the cases where the HCMC has imposed administrative sanctions for market abuse, administrative sanctions have also been imposed on the persons professionally arranging the relevant transactions. More specifically, in such cases the HCMC has investigated whether the persons professionally arranging the relevant transactions might reasonably have suspected that the involved transactions constituted market abuse and, if so, whether they notified the HCMC accordingly.

551. **NL**: In September 2007, the AFM imposed a € 21,781 fine for failure to report a suspicious order. An investment firm's main client initiated a trade equalling 12.5% of the daily turnover in a certain fund. A public bid on said fund was announced the next day. The AFM deemed the investment firm should have suspected insider dealing.

552. **RO**: Sanctions were imposed upon the compliance officers within investments firms that failed to notify CNVM in respect of certain facts or information that should have provided reasonable grounds for suspicion.

553. **SE**: Six cases have been reported to the public prosecutor, of which three have been tried in court so far. When Finansinspektionen finds that there is reason to believe failure to report STR´s, we will report this to the public prosecutor. The prosecutor decides then if the case should be tried in court. The first case of failure to report STR´s was prosecuted. The deputy director of a netbroking firm was prosecuted and found not guilty by the court. The court found the law to be too vaguely formulated regarding at what level of suspicion a report should be made by the netbroker. The court also discussed how far the reporting obligation reaches for a brokerage firm to report STR´s. The court pointed out that market surveillance is the responsibility of the regulated markets and MTFs. There has also been another court case where a Swedish MTF was tried for failure to report STR´s in seven cases. It was the head of trading who was prosecuted as he also was responsible for market surveillance and reporting to Finansinspektionen. He was found not guilty by the court of appeals.

E18: ***Please outline any practical difficulties your Authority has encountered in relation to STRs.***

554. Seven Member States, **(EL**, **HU**, **LT**, **MT**, **NO**, **PL** and **PT)**, stated that the low number of STRs received is an issue. Three Member States, **BG**, **EE** and **FI,** noted the difficulty in proving the liability of the investment firm if a transaction or order is not reported. One Member State, **CY**, noted that there is no formal system to assess whether or not the 'requirement to report' is being met in practice. One Member State, **LU**, notes that financial institutions have encountered problems differentiating between financial instruments that are only admitted to trading on a regulated market from those who are only admitted to trading on an MTF. One Member State, **DK**, notes the need to gather more information than that provided in the STRs. One Member State, **NL**, notes that investment firms are not required to

update their computer systems, nor are they required to actively monitor for suspicious trades. One Member State, **UK**, finds the STR regime to be extremely valuable in identifying possible cases of market abuse, however they note some areas for improvement – (a) "defensive reporting" where firms make reports when there are no reasonable grounds for suspecting that a transaction constitutes market abuse; (b) firms focussing on the quantity of reports rather than the quality; (c) some firms have too high a threshold for considering a STR; (d) lack of reporting concerning transactions which, while they may not have provided reasonable grounds at the time may retrospectively be seen as suspicious.

555. **BG**: According to our law (as well as to the Directive) the notification for suspicious transaction should be made on the basis of the investment intermediary own assessment for each specific case, although some objective criteria are listed in the law. It must be pointed out that these criteria should not necessarily be deemed in themselves to constitute market abuse. According to mentioned above it is difficult for the regulator to prove a premeditation, to engage administrative penalty and to impose sanctions when discovers a failure for notification because this may not be market abuse in relation to the assessment of the investment intermediary.

556. **CY**: There is no formal system to assess whether or not the 'requirement to report' is being met in practice.

557. **CZ**: We do not have any.

558. **DE**: (n/a)

559. **DK**: The DFSA often need to gather further information than provided in the STRs.

560. **EE**: The liability of the investment firm if a transaction or order is not reported, which in the view of the EFSA should have been seen as suspicious – the question of how comprehensive systems or controls the investment firms should have in place and the definition of suspicion in practice.

561. **EL**: It should be noted that at present we have received a limited number of STRs per year.

562. **FI**: It is hard to prove that the broker/firm should have had the knowledge of suspicious trade.

563. **HU**: The low number of STRs received.

564. **IE**: None encountered to date.

565. **IS**: So far there has been no usage of the STR form but the reports are made in a more informal manner.

566. **LT**: Though STRs number increased in recent years, however, the quality is insufficient. The intermediaries send only reports on simple possible market manipulation cases which are easy to detect and lack sophisticated cases or reports on possible insider dealing.

567. **LU**: Financial institutions faced some problems for sorting out the transactions in financial instruments that are only admitted to trading on a regulated market or for which such a request has been made from those who are only admitted to trading on an MTF or for which such a request has been made

568. **MT**: The Authority has not encountered any practical difficulty in relation to STRs. The only concern is the minimal number of reports received which may be interpreted as meaning that the system is not working as it should. In this regard, please note that on the 7th August, 2006 the MFSA issued a circular to persons professionally arranging transactions in financial instruments.

569. **NL**: The explanatory memorandum of the law implementing the MAD notes that investment firms are not required updating their computer systems, nor are they required to actively monitor for suspicious trades.

570. **NO**: The Authority has not encountered any practical difficulties in relation to STRs. However, it should be noted that the authority considers the number of STRs received as low.

571. **PL**: The number of STRs in Poland in the opinion of the Authority is low.

572. **PT**: It is worth to note that, despite the nature of the law (which encompasses STRs related to any financial instrument, traded either in regulated markets or MTFs, and about executed and unexecuted orders), since the entrance into force of the mandatory report regime, there were two STRs.

573. **RO**: N/A

574. **SE**: No practical difficulties encountered so far.

575. **SI**: No practical difficulties have been encountered in relation to STRs so far

576. **UK**: In general, we have found the STR regime to be extremely valuable in identifying possible cases of market abuse with over 1000 reports submitted to the FSA. However there are some areas for improvement: • There are occasions of "defensive reporting" where firms make reports when there are no reasonable grounds for suspecting that a transaction constitutes market abuse. Often in these cases firms are focussing on the quantity of reports rather than the quality. • Conversely, some firms have too high a threshold for considering a STR. • We have seen a lack of reporting concerning transactions which, while they may not have provided reasonable grounds at the time may retrospectively be seen as suspicious.

E19: ***Does your Authority intend to make any changes to the STR regime currently in place? (Yes – No)***

E20: ***If yes, please provide details.***

577. Three Member States, **FI**, **FR** and **EL**, intend to make changes to the STR regime currently in place. Two Member States **FR** and **EL** are considering requiring/receiving STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market. One Member State, **FI**, states that it intends to give more guidance on examples for reporting.

578. **EL**: Although we have not encountered any problems, we are considering requiring/receiving STRs on OTC derivative instruments whose underlying financial instrument is admitted to trading on a regulated market because STRs for OTC derivative instruments constitute an extremely useful alert for the initiation of an investigation. Additionally, during the investigation of a market abuse case, it is necessary to acquire information about the OTC derivative instruments whose underlying financial instrument is under investigation.

579. **FI**: FIN FSA states that it intends to give more guidance on examples for reporting.

580. **FR**: As mentioned above, the current scope of the Market Abuse Directive covers only transactions in instruments admitted to trading on a regulated market. The reporting obligation should be extended to OTC derivatives where the underlying asset is an instrument admitted to trading on a regulated market (or OTC derivatives "linked" to such an instrument). This request stems from the AMF's broader concern with improvement in the detection of market abuse, including abuse using OTC derivatives. The AMF may consider amend the French legislation for that purpose, but greater efficiency would be obtained

through a coordinated approach at the European level, including an amendment to the Market Abuse Directive following the ongoing review of this piece of European legislation.

Appendix

Article 6.9 of MAD – "*Member States shall require that any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay.*"

Article 7 of Commission directive 2004/72/EC

Suspicious transactions to be notified

For the purposes of applying Article 6(9) of Directive 2003/6/EC, Member States shall ensure that persons referred to in Article 1 point 3 above shall decide on a case-by-case basis whether there are reasonable grounds for suspecting that a transaction involves insider dealing or market manipulation, taking into account the elements constituting insider dealing or market manipulation, referred to in Articles 1 to 5 of Directive 2003/6/EC, in Commission Directive 2003/124/EC (1) implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation, and in Article 4 of this Directive. Without prejudice to Article 10 of Directive 2003/6/EC, persons professionally arranging transactions shall be subject to the rules of notification of the Member State in which they are registered or have their head office, or in the case of a branch, the Member State where the branch is situated. The notification shall be addressed to the competent authority of this Member State.

Member States shall ensure that competent authorities receiving the notification of suspicious transactions transmit such information immediately to the competent authorities of the regulated markets concerned."

Article 8 of 2004/72/EC

Timeframe for notification

Member States shall ensure that in the event that persons, as referred to in Article 1 point 3, become aware of a fact or information that gives reasonable ground for suspicion concerning the relevant transaction, make a notification without delay.

Article 9 of 2004/72/EC

Content of notification

1. Member States shall ensure that persons subject to the notification obligation transmit to the competent authority the following information:

(a) description of the transactions, including the type of order (such as limit order, market order or other characteristics of the order) and the type of trading market (such as block trade);

(b) reasons for suspicion that the transactions might constitute market abuse;

(c) means for identification of the persons on behalf of whom the transactions have been carried out, and of other persons involved in the relevant transactions;

(d) capacity in which the person subject to the notification obligation operates (such as for own account or on behalf of third parties);

(e) any information which may have significance in reviewing the suspicious transactions.

2. Where that information is not available at the time of notification, the notification shall include at least the reasons why the notifying persons suspect that the transactions might constitute

insider dealing or market manipulation. All remaining information shall be provided to the competent authority as soon as it becomes available.

Article 10 of 2004/72/EC

Means of notification

Member States shall ensure that notification to the competent authority can be done by mail, electronic mail, telecopy or telephone, provided that in the latter case confirmation is notified by any written form upon request by the competent authority.

Section F. Supervisory and investigatory powers – Article 12 of MAD, directive 2003/6/EC

581. This section analyses the supervisory and investigatory powers that are necessary for the exercise of the functions of the competent authorities with regard to the directive.

F1: If the powers set out under 12.2 (a) – (h) MAD are not exercised by your Competent Authority directly, have you encountered any problems for not having these direct powers?

582. For seventeen Member States **(BG, CY, CZ, DE, DK, FR, HU, IE, IS, IT, LU, LV, MT, PL, SK, SI, UK),** the question raised a 'NOT APPLICABLE' answer since these powers are exercised directly by them.

583. Among the Member States who do not exercise directly these powers, a majority of them (seven) have not encountered any problems **(AT, BE, EL, LT, PT, RO, SE).** However, **EL** remarks that in general, they have not encountered problems apart from obtaining existing data traffic records from the telecommunication's providers.

F2: If yes, please provide the problems.

584. The five Member States **(EE, ES, FI, NL, NO)** who have encountered problems mention the following ones:

585. **EE**: Powers referred to under (d) are exercised by application for grant of permission to administrative judge who shall, without holding a court session, immediately hear the application and adjudicate the grant of permission. In practice, this can be time consuming.

586. **ES**: The only powers that the CNMV cannot exercise directly are:
- Access to existing telephone and data traffic records. There is a conflict between MAD and directive 2002/58/CE the transposition of which into Spanish domestic legislation does not explicitly include the CNMV as an authority that can access these data.
- Freezing/sequestration of assets: this has to be done through judicial authorities.

587. **FI**: We do not have direct power to require existing data traffic records, which might be useful power in our direct use. At the moment only the police have such power.

588. **NL**: The AFM may access any document, but this requires a written order. This is particularly burdensome when sending requests for the client details corresponding with transaction reports. It takes time to wait for information requested from or through supervisors abroad. The AFM may request phone and data records, but it cannot request lists of outgoing calls made and the times at which they were made, nor can it request such records automatically. The AFM may request the freezing of assets, but such requests need to be addressed to the public prosecutor, which takes too much time in case of a hacked account.

589. **NO**: Kredittilsynet exercises most of the powers mentioned in art. 12.2 directly. Kredittilsynet has however encountered some problems related to the practical application of art. 12.2 (d), but has proposed to the government to amend Norwegian legislation related to the application of this article in MAD. The proposed amendment will give Kredittilsynet easier access to existing telephone and existing data traffic records. The Ministry of Finance is currently working on the proposal.

F3: Are you satisfied with the practical application of the option to sharing these powers?

590. The same abovementioned seventeen Member States **(BG, CY, CZ, DE, DK, FR, HU, IE, IS, IT, LU, LV, MT, PL, SK, SI, UK)** have provided a 'NOT APPLICABLE' answer.

591. Some Member States have indicated if they were satisfied with the option they had chosen (either exercising directly or sharing their power). Among them, seven are satisfied **(AT, BE, BG, EL, IT, PT, SE):**

F4: If yes, please describe.

592. **BG**: We are satisfied with the practical application of the option because we do not share these powers. For small and emerging markets like the Bulgarian with limited number of market participants is quite efficient to exercise directly these powers. The deputy chairman of the FSC may even request the Bulgarian National Bank to withdraw temporarily the authorization of a bank to pursue business as an investment intermediary in case of a market abuse committed by a bank.

593. **IS**: The Authority has close collaboration with the Stock Exchange on market surveillance which has been very effective.

594. **PT**: CMVM exercises its powers directly, except for the right, for the purposes of crime investigations, to require existing telephone and existing data traffic records, which requires a previous authorization from a judiciary authority (article 385/1c)/6 /7/8 Securities Code). According to the law, following the request from CMVM, which should be presented in a duly reasoned way, the authorisation to obtain the records shall be granted within forty eight hours by the competent magistrate of the Public Prosecution, and his decision must be notified to a judge for the purposes of ratification. The obtainment of the records shall be deemed validated if no decision refusing ratification is issued by the judge within the following forty eight hours. Until now, CMVM has request two authorisations and both were granted unconditionally within the time framework foreseen in the law.

595. **SE**: We have encountered no problems with the option.

596. Ten Member States are not satisfied **(EE, ES, FI, LT, LV, MT, NL, NO, RO, SI)**.

597. **FI** develops its position: We are not able to get enough evidence (data traffic records) without sending the case to the police. **NL** mentions that this only relates to the sharing of the powers to freeze assets **NO**: Kredittilsynet exercises most of the powers mentioned in art. 12.2 directly. Kredittilsynet has however encountered some problems related to the practical application of art. 12.2 (d), but has proposed to the government to amend Norwegian legislation related to the application of this article in MAD. The proposed amendment will give Kredittilsynet easier access to existing telephone and existing data traffic records. The Ministry of Finance is currently working on the proposal.

F5: Have you encountered any problems with the option you have chosen?

598. 20 Member States **(AT, BE, BG, CZ, DE, FR, HU, IE, IS, IT, LT, LU, MT, NL, PL, PT, RO, SI, SK, UK)** have not encountered any problems with the option they have chosen.

599. For three Member States **(CY, DK LV),** the question raised a 'not applicable' answer.

600. Six Member States have encountered problems **(EE, EL, ES, FI, NO, SE).**

F6: If yes please provide us with a description of the problems encountered.

601. **EE**: Powers referred to under (d) are exercised by application for grant of permission to administrative judge who shall, without holding a court session, immediately hear the application and adjudicate the grant of permission. In practice, this can be time consuming.

602. **EL**: There has been no problem in obtaining existing telephone records from supervised entities. Regarding existing data traffic records from telecommunication providers we have experienced refusals by them to provide us the requested data on the basis that such a request is against personal data protection and constitutional provisions. However, following a recent amendment of Law 2225/1994 on confidentiality of personal data (by virtue of article 84, par. 2 b of l. 3606/2007), confidentiality of such personal data (data traffic records) may also be lifted now for the ascertainment of infringements of market abuse. The HCMC has now the power to obtain data traffic records by applying to the judicial authorities. Thus far, this new procedure has not been tested and we anticipate that in practice it will be very time-consuming. The power of the HCMC to obtain such data directly would certainly improve the efficacy of the investigations.

603. **One member considers** not having access to telephone and data traffic records sometimes impedes us to follow a line of investigation.

604. **FI**: We are not able to get enough evidence data traffic records) without sending the case to the police.

605. **NO**: Kredittilsynet has encountered some problems related to the practical application of art. 12.2 (d), but has proposed to the government to amend Norwegian legislation related to the application of this article in MAD. The proposed amendment will give Kredittilsynet easier access to existing telephone and existing data traffic records. The Ministry of Finance is currently working on the proposal.

606. **SE**: We have the legal right to require data traffic record from investment firms and formally also from telephone operators, but according to a court decision the secrecy provisions in our data protection rules overrule this right concerning telephone operators.

F7. If you have encountered any problems are there any plans (thoughts) to change your option?

607. Two Member States (**EL, NO**) have plans to change their option:

608. **EL**: We are looking forward to the European Commission's proposal for possible changes of the relevant provisions of MAD which will empower the competent authorities to obtain these data directly.

609. **NO**: Kredittilsynet has encountered some problems related to the practical application of art. 12.2 (d), but has proposed to the government to amend Norwegian legislation related to the application of this article in MAD. The proposed amendment will give Kredittilsynet easier access to existing telephone and existing data traffic records. The Ministry of Finance is currently working on the proposal.

610. One Member State (ES) provides that they have reported the problem with the lack of power to access telephone and data traffic records directly to our domestic authorities and to the European authorities but, for the time being, there are no plans to change the option.

F8: Does your authority exert additional powers to those mentioned in article 12 of the directive (e.g., seizure of documents, temporary prohibition from leaving the national territory, etc.)?

611. As seen in table 1 below, 11 Member States (**BG, CY, DE, EE, EL, FR, IE, IT, PL, PT, UK**) exert additional powers.

F9: If yes, please describe

612. As seen in table 1 below, these additional powers may pertain to obligating persons to comply with market abuse provisions (**BG, DE, EE, UK**) or to gathering evidence in the course of an investigation by e.g., seizing documents, freezing assets, searching of premises (**CY, EL, FR, IE, IT, PL, PT, UK**).

F10: How does your authority exert these additional powers? Directly? In collaboration? By delegation? By application to the competent judicial authorities?

613. Nine Member States (**BG, CY, DE, EE, EL, IE, IT, PL, PT**) out of 11 exercise these additional powers directly on their own. More specifically, in **EL** the competent authority may proceed with confiscating documents, books or other data, including electronic means of storage and transmission of data, situated in the place of business of any person professionally arranging transactions or regulated by the authority. There are 4 exceptions (**FR, IT, PT, UK**), where some of these powers must be applied to the competent judicial authorities.

Member State	Does your authority exert additional powers?			How does your authority exert these additional powers?			
	yes	no	If yes, please describe	Directly	In collaboration	By delegation	By application to the competent judicial authorities
AT		X		N/A	N/A	N/A	N/A
BE		X		N/A	N/A	N/A	N/A
BG	X		Power to obligate the issuer to disclose the information under the MAD, Article 6, para. 1.	Yes	No	No	No
CY	X		Seizure of documents.	Yes	No		
CZ		X		N/A	N/A	N/A	N/A
DE	X		Issuance of any orders appropriate and necessary for the enforcement of compliance with the prohibitions and requirements of the market abuse regime	Yes	No	No	No
DK		X		N/A	N/A	N/A	N/A
EE	X		Issuance of a precept to set other demand in addition to those mentioned in the act, to ensure compliance with the Securities Market Act. Those mentioned include e.g. amendment of internal rules or rules of procedure of professional market participants. During on-site inspections of professional market participants and issuers, the EFSA has the right to enter all their premises and take into its possession data.	Yes	No	No	No
EL	X		The HCMC may proceed with confiscating documents, books or other data, including electronic means of storage and transmission of data, situated in the place of business of any person professionally arranging transactions or regulated by HCMC.	Yes	No	No	No
ES		X		N/A	N/A	N/A	N/A
FI		X		N/A	N/A	N/A	N/A
FR	X		- Searching of premises - Seizure of documents (on request and under control of the judicial authority).	No	No	No	Yes
HU		X		N/A	N/A	N/A	N/A
IE	X		Power to remove and retain any of the relevant records inspected or produced for such period as may be reasonable to facilitate further examination.	Yes	No	No	No
IS		X		N/A	N/A	N/A	N/A
IT	X		Seizure of documents.	Yes	No	No	Yes
LT		X		N/A	N/A	N/A	N/A
LU		X		N/A	N/A	N/A	N/A
LV		X		N/A	N/A	N/A	N/A
MT		X		N/A	N/A	N/A	N/A
NL		X		N/A	N/A	N/A	N/A
NO		X		N/A	N/A	N/A	N/A
PL	X		Seizure of documents during onsite inspections concerning the supervised entity.	Yes	No	No	No

PT	X		To the extent the same are necessary for investigating or supporting any proceedings entrusted to it, CMVM may seize, freeze or inspect any documents, irrespective of their form, valuables, items related to the suspected offences or seal items not seized in the facilities of persons and entities subject to its supervision. In the context of preliminary crime investigations conducted by CMVM, it may also request from the competent judiciary authorities economic precautionary measures.	Yes	No	No	Yes
RO		X		N/A	N/A	N/A	N/A
SE		X		N/A	N/A	N/A	N/A
SI		X		N/A	N/A	N/A	N/A
SK		X		N/A	N/A	N/A	N/A
UK	X		The FSA has the power: - to apply for a search warrant issued by a justice of the peace to authorise a police constable to conduct a search to obtain a search warrant for the purpose of gathering evidence relating to an investigation into market abuse, amongst other activities, - to apply to a court for an injunction concerning a person who may be engaged or may have been engaged in market abuse to act or restrain from acting as the court may direct to remedy the market abuse. The court may also prohibit the person from disposing or otherwise dealing with any asset.	No	Yes + justice of the peace authorises a constable to execute the search warrant	No	Yes

F11: Please fill out the following table explaining which powers your authority has in relation to article 12 paragraph 2 of directive 2003/6/EC

614. The Member States were asked to indicate for each of their supervisory and investigatory powers (to have access to any document, to demand information from any person, to summon and hear any person, to carry out onsite inspections, to require existing telephone and data traffic records, to require the cessation of any practice that is contrary to the provisions adopted in the implementation of MAD, to suspend trading of the financial instruments concerned, to request freezing and/or sequestration of assets, to request temporary prohibition of professional activity) how they exert them (Directly? In collaboration? By delegation? By application to the competent judicial authorities?) and the type of problems they may encounter.

615. The responses are given for each of these supervisory and investigatory powers.

Power to have access to any document

616. The whole Membership exerts the power to have access to any document in any format whatsoever and to receive a copy of it. In all cases, this power is exercised directly.

Problems encountered

617. Some Member States have elaborated on problems encountered, according to which there may be legal or material limits to this power to access.

618. Some of these limits are related to the notion of professional secrecy (**FR**) or to procedural rules (**NL**). Besides, some cases have been referred to the Court, either on the regulator's initiative (**IS**) or on appeal by an investigated person **(PT**). The scope of the persons concerned can also be a limit (**LV, PL**).

619. **FR**: There is one legal exception to the power of the AMF to have access to any document: it is set up by the Monetary and Financial Code under which professional secrecy cannot be invoked against the AMF except by representatives of the law (i.e. lawyers). Regarding journalists, art. 56-3 of the Code of Criminal Procedure states that "a search of the premises of a press or audio-visual communications business may only be made by a judge or prosecutor who ensures that such investigations do not violate the freedom of exercise of the profession of journalist and do not unjustifiably obstruct or delay the distribution of information".

620. **NL**: The AFM may access any document, but this requires a written order. This is particularly burdensome when sending requests for the client details corresponding with transaction reports.

621. **IS**: The Authority has not yet had any problems with the execution of this power. In the cases where it has met reluctance it has merely had to explain that if refused, the Authority would just have to get a court order and assistance of the police, which would ultimately result in the same access.

622. **PT**: CMVM already had this power before the transposition of the MAD so the supervised entities are used to receive and meet CMVM's demands for information. However, recently, following an appeal to the court of a CMVM conviction decision on an administrative offence, it was contested whether the information provided by a financial intermediary to the CMVM, when the regulator exercises its supervisory powers to request information, could be used

against such entity in an administrative offence procedure, or whether it could not, due to the application of the rights to remain silent and against self-incrimination. The first judicial decision was in favour of this later interpretation, but in an appeal decision it was decided that the method of collection of evidence used by the CMVM is foreseen in the Securities Code and therefore such evidence is lawfully collected and can be used in a procedure against the financial intermediary. There is already a second court decision confirming and reinforcing this view.

623. **LV**: Only regarding person's activity in the financial and capital market.

624. **PL**: In the course of administrative proceedings only. In other cases the law applies to supervised entities only.

Other comments

625. **DE**: A standard procedure during investigation is to address written requests for information, e.g. client identification and to request related documents.

(a) Power to demand information from any person

626. The whole Membership exerts the power to demand information from any person. In all cases, this power is exercised directly, with one exception (**RO**).

Problems encountered

627. The problems encountered are roughly similar to those related to the abovementioned power to have access to any document. In addition, timeliness is sometimes presented as a problem, especially when the cases are referred to the Court, even though the final decision is in favour of the regulator (**EE),** or when the information is requested from or through foreign supervisors (**NL**). The scope of the persons concerned can also be a limit (**LV, PL**).

628. **EE**: The EFSA has encountered problems in a case where information was required from an issuer who contested it in administrative court, claiming it was disproportionate and the information was not necessary for the investigation (in a possible insider trading case). The court decision was in the EFSA's favour but the investigation was substantially delayed.

629. **NL**: It takes time to wait for information requested from or through supervisors abroad.

630. **LV**: Only regarding person's activity in the financial and capital market.

631. **PL**: In the course of administrative proceedings only. In other cases the law applies to supervised entities only.

Other comments

632. **DE**: In manipulation cases it is a standard procedure to request information from all kind of persons; however those who seem to be the suspects of a manipulation are not directly contacted prior to the report to criminal authorities (and possible searches) for tactical reasons; hearings usually are not done during the investigation phase, but are done during enforcement procedure.

633. **IS**: The Authority has not yet had any problems with the execution of this power. In the cases where it has met reluctance it has merely had to explain that if refused, the Authority would just have to get a court order and assistance of the police, which would ultimately result in the same access.

(b) Power to summon and hear any person

634. The whole Membership exerts the power to summon and hear any person, with an exception (**DK**). In all cases, this power is exercised directly, with an exception (**RO**).

Problems encountered

635. Among the problems encountered is the professional secrecy of journalists (**FR, PT**). The other limits to exercising this power are the procedural delays and difficulties linked to cooperation with non-CESR Member States (**DE**, **FR, IS**) as well as the scope of the persons concerned (**LV, PL**).

636. **One Member** identified the summary proceedings searching competences like prosecutors; in criminal proceedings no own competences but only parallel right to access for administrative purposes.

637. **FR**: In addition to the abovementioned provisions concerning the representatives of the law with regard to professional secrecy, the journalists are free not to disclose the origin of information collected in the course of their activities when heard as witnesses). Besides, there may be practical difficulties in case where the summoned persons are not national residents since the AMF has to request for the cooperation of the concerned foreign authority which, in some non-CESR member countries, may take a lot of time (especially when these authorities are not spontaneously cooperative or when they need a governmental prior approval).

638. **IS**: The person can be difficult to reach or be abroad.

639. **PT**: People summoned usually present themselves to CMVM. However, in some cases, like the case of journalists, they do not answer the questions related to the sources of news, since, according to the law, they have the right of professional secrecy which allows a refusal to reveal sources. Their silence is not liable for any penalty and may only be lifted by a criminal court. Nevertheless, according to the press law, they are liable if they choose not to reveal the sources of news that may imply administrative or criminal sanctions.

640. **LV**: Only regarding a person's activity in the financial and capital market.

641. **PL**: In the course of administrative proceedings only. In other cases the law applies to supervised entities only.

C) Power to carry out onsite inspections

642. The whole Membership exerts the power to carry out onsite inspections, with an exception (**DK**). In most cases, this power is exercised directly, with two exceptions (**BE, LT**). **EL** exercises the power to carry out onsite inspections directly. However, whilst conducting an on-site inspection at a credit institution a representative of the central bank is also present. In six Member States **(IT, LT, LU, LV, PL, SE)**, the power can be exercised directly in case of inspections at the premises of supervised entities".

Problems encountered

643. Among the problems encountered are the legal limits (**IE, IT, LT, LU, LV, PL,** and **SE**) or to the material limits to the power of the regulators (**FR, IS)**.

644. **FR**: As the AMF does not necessarily inform the inspected persons in advance, it may sometimes happen (although in a very few cases) that they are not available the day of the inspection.

645. **IE:** The Regulations provide that except with the consent of the occupier, a private dwelling shall not be entered (other than a part of the dwelling used as a place of work) unless a warrant has been obtained from a judge of the District Court.

646. **IS**: The person can be difficult to reach or be abroad.

647. **IT**: Application to the competent judicial authorities for persons not subject to Consob's supervision

648. **LT**: This is valid only for individuals who are under supervision, for other companies application to judicial authority is required.

649. **LU**: The CSSF can only carry out onsite inspections in the professional areas of the professionals of the financial sector (i.e. the entities under the supervision of the CSSF)

650. **LV:** Only regarding financial and capital market participants.

651. **PL**: Relates only to the supervised entities.

652. **SE**: The power is only granted for inspection of investment firms and credit institutions carrying out securities business.

Other comments

653. One Member reported that in manipulation cases dealing with false or misleading information via the internet, e.g. in fora the Authority usually issues orders to internet service provider to store the information; after report to public prosecutor criminal authorities request the stored information to include them into the proceedings; in trade based cases the Authority often receives telephone records (content of communication) established by the trading company or the exchange, (but not on the ground of MAD, but other legal grounds in the exchange law and labour law).

654. **PT**: When needed CMVM may ask for the cooperation of authorities, e.g. the police.

(d) Power to require existing telephone and data traffic records

655. The whole Membership exerts the power to require existing telephone and data traffic records, with an exception (**FI**). Despite this apparent consensus, the effective ways of exercising this power show some dissimilarity.

656. In most cases (18 Member States: **AT, BG, CY, CZ, DK, FR, HU, IE, LT, LU, LV, MT, NL, PL, RO, SE, SK, UK**), this power is exercised directly. However, it may be also applied to the competent judicial authorities (**EE, EL, ES, PT**) or delegated to another authority (**IS, NO, SI**). In **IT**, the authority can directly require existing telephone records from entities subject to its supervision; an application to judicial authority is needed to gather existing telephone records from entities not subject to the authority's supervision and to obtain data traffic records from the relevant provider.

Problems encountered

657. The numerous comments provided show that this power faces serious alleviations, the most current being the actual availability of the data (**EE**, **IE**, **LT**, **LV)**, **NL** mentions that it is

burdensome when sending requests for the client details corresponding with transaction reports. It takes time to wait for information requested from or through supervisors abroad.). The question of personal data is especially controversial. Whilst the professional ones are not a matter of discussion, some Member States point out that the power to require personal telephone and data traffic records collides with the protection of privacy as stated by directive 2002/58/EC (**CY, ES**). In addition, some Member States have been able to obtain from their Parliaments to lift confidentiality in case of infringements of market abuse (**EL, NO**), but some others are not allowed to (**FI**), even though they are aware that private conversations could be proof of market abuse (**LU**).

658. **CY**: Difficulties in obtaining such data because of the existing conflict between EPD and MAD.

659. **EE**: The EFSA needs to acquire permission from administrative judge. According to law, the process is not very time consuming - the permission shall be granted immediately by an individual judge without holding a hearing. In practice the process is still not most convenient and efficient.

660. **EL:** The HCMC has the power to require existing telephone and data traffic records, either directly or by requesting the assistance of the special Financial Crime Unit of the Ministry of Economy and Finance (YP.E.E.). There has been no problem in obtaining existing telephone records from supervised entities. Regarding existing data traffic records from telecommunication providers we have experienced refusals by them to provide us with the requested data on the basis that such a request is against personal data protection and constitutional provisions. However following a recent amendment of the law on confidentiality of personal data, confidentiality may also be lifted now for the ascertainment of infringements of market abuse by applying to the Public Prosecutor. (See also our response of Q.5-6).

661. **ES**: There is a conflict between MAD and directive 2002/58 and this conflict also exists in the Spanish domestic legislation. This conflict should be solved by amending European legislation.

662. **FI:** We do not have direct power to require existing data traffic records, which might be useful power in our direct use. At the moment only the police have such power.

663. **IE**: Possible problem with data being retained for limited periods.

664. **LT**: This is valid only for individuals who are under supervision, for other companies application to judicial authority is required.

665. **LU**: The CSSF has only access to "professional" data traffic records obtained by the professionals of the financial sector but not from service providers. Sometimes, private conversations could also contain highly valuable information for the investigation and the proof of a market abuse.

666. **LV**: Only regarding financial and capital market participants.

667. **NL**: The AFM may request phone and data records, but it cannot request lists of outgoing calls made and the times at which they were made, nor can it request such records automatically.

668. **NO**: Kredittilsynet has encountered some problems related to the practical application of art. 12.2 (d), but has proposed to the government to amend Norwegian legislation related to the application of this article in MAD. The proposed amendment will give Kredittilsynet easier access to existing telephone and existing data traffic records. The Ministry of Finance is currently working on the proposal.

669. **PT**: The only problem CMVM faced was of a technical nature regarding the fact that entities, due to the e-privacy directive obligation to erase or make anonymous traffic data which are no longer needed for the purpose of transmission of a communication, had not kept the relevant

records and, consequently, they were not able to present them. Last year, the law that transposed directive 2006/24 (on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks) provided an obligation to keep data for a year.

Other comments:

670. **One Member** reported that in manipulation cases dealing with false or misleading information via the internet, e.g. in fora the Authority usually issues orders to internet service provider to store the information; after report to public prosecutor criminal authorities request the stored information to include them into the proceedings; in trade based cases the Authority often receives telephone records (content of communication) established by the trading company or the exchange, (but not on the ground of MAD, but other legal grounds in the exchange law and labour law).

671. **FR**: The AMF can obtain from telecommunication operators and internet services providers the listing of the telephone and electronic calls and communications. Besides, the AMF has access to the telephone voice recordings of the traders and of relevant persons, other than traders, who are involved in business relationships with clients, whenever the compliance officer deems it necessary in view of the amounts involved and the risks incurred with regard to the order, and for a period of the last six months. For other persons, voice recordings are not available, even on judicial request.

672. **IS**: The Authority has not yet had any problems with the execution of this power. In the cases where it has met reluctance it has merely had to explain that if refused, the Authority would just have to get a court order and assistance of the police, which would ultimately result to the same access.

(e) Power to require the cessation of any practice that is contrary to the provisions adopted in the implementation of MAD

673. The whole Membership exerts the power to require the cessation of any practice that is contrary to the provisions adopted in the implementation of MAD, with one exception (**AT**). This power is exercised directly, with one exception (**RO**).

674. According to the information provided, the regulators have not yet encountered or identified any problems.

675. The comments are the following:

676. **AT**: The FMA does not have the power to formally order the cessation of market abuse activities. Nevertheless the FMA can punish persons engaging in market abuse activities according to Article 48 ASEA and Article 48c ASEA and initiate the punishment of insiders according to Article 48b ASEA in conjunction with Article 48i paragraph. 2 ASEA and 48q ASEA until the cessation of practices which are contrary to the provisions adopted in the implementation of the directive.

677. **One Member** reported that it usually becomes aware of a market manipulation and investigates it in order to report the outcome to the criminal authorities as it is obliged to do.

678. **SE**: We only have the power for investment firms and credit institutions carrying out securities business.

(f) Power to suspend trading of the financial instruments concerned

679. The whole Membership exerts the power to suspend trading of the financial instruments with no exception. In most cases, this power is exercised directly, apart from three Member States where it is exercised in collaboration with other authorities (**EE, FR**) or delegated to another authority (**PL**).

680. According to the information provided, the regulators have not yet encountered or identified any problems.

681. **DE**: Usually trading halts only last for a short period of a few hours as this is a very strong measure, which can be very expensive for market participants not involved in any manipulation; market manipulation cases cannot be clarified in such a short period of time as a few hours, therefore this powers is not helpful in manipulation cases.

(g) Power to request freezing and/or sequestration of assets

682. Two Member States (**DE, DK)** do not have the power to request freezing and/or sequestration of assets. Where applicable, the majority of the Member States (17) exercises this power directly, but there are several exceptions since a total of 11 of them exercise it in collaboration with the competent judicial authorities (**BE, MT, PL**) or by application to them (**EL, ES, FR, IT, LT, MT, NL, NO**).

Problems encountered

683. The question of timeliness may be a limit to such power (**EE, NL**) as well the conditions of application or cooperation (**ES**, **FR**).

684. **EE**: The power to freeze assets for a maximum of ten days may in some cases be too short period. In these cases, criminal proceeding need to be commenced but the gathering of enough evidence for this may require more time.

685. **ES**: This power has to be exercised by application to the judicial authorities. However, since we have never used this power it is not totally clear what the procedure is to request from the judicial authorities the freezing/sequestration of assets.

686. **FR**: The freezing of assets needs for the AMF to know the exact composition of the banking accounts of the concerned persons. In France the AMF has an access to the Inland Revenue database which includes the list of the accounts of the taxpayers residing in this country. Abroad, this need may raise a practical or even legal difficulty, especially when the differences of legislations make the actual enforcement of such proceeding inapplicable.

687. **NL**: The AFM may request the freezing of assets, but such requests need to be addressed to the public prosecutor, which takes too much time in case of a hacked account.

Other comments

688. **EL**: The HCMC may also apply to the Public Prosecutor with a request to freeze and/or sequestrate assets.

689. **PL**: The Authority has the right to freeze the assets for up to 48 hours. The Public Prosecutor can decide to prolong the period for up to 3 months.

(h) Power to request temporary prohibition of professional activity

690. Three Member States (**DK, NL,** and **SE**) do not have the power to request temporary prohibition of professional activity. Where applicable, almost all the Membership exercises this power directly, with one exception (**BE**). In **IT** the competent authority can directly exercise this power vis-à-vis entities and persons (such as the financial salesmen) under its direct supervision. For other cases the power is exercised by application to the relevant professional association.

691. According to the information provided, the regulators have not yet encountered or identified any problems.

Appendix: text of article 12 of directive 2003/6/EC

The competent authority shall be given all supervisory and investigatory powers that are necessary for the exercise of its functions. It shall exercise such powers: (a) directly; or (b) in collaboration with other authorities or with the market undertakings; or (c) under its responsibility by delegation to such authorities or to the market undertakings; or (d) by application to the competent judicial authorities.

Without prejudice to Article 6(7), the powers referred to in paragraph 1 of this Article shall be exercised in conformity with national law and shall include at least the right to:(a) have access to any document in any form whatsoever, and to receive a copy of it; (b) 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; (c) carry out on-site inspections; (d) require existing telephone and existing data traffic records; (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive; (f) suspend trading of the financial instruments concerned; (g) request the freezing and/or sequestration of assets; (h) request temporary prohibition of professional activity.

This Article shall be without prejudice to national legal provisions on professional secrecy.

Section G. Professional secrecy – Article 13 of Directive 2003/6/EC

692. This section analyses the obligation of professional secrecy as it is captured in article 13 of the Directive.

G1: Does your legislation provide for cases where the information covered by professional secrecy may be disclosed?

693. All the Members without any exception have legislations providing for cases where the information covered by professional secrecy may be disclosed.

G2. If yes, please provide details on the precise conditions explaining the reasons for the possible exemptions.

694. **AT**: Article 48q ASEA provides that the FMA may disclose to the public every measure or sanction imposed for infringement of the provisions adopted in the implementation of Directive 2003/6/EC, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved or delay, frustrate or jeopardize official proceedings.,

695. **BE**: There's a whole range of exceptions, most of them for obvious reasons, such as cooperation with other regulators or with judicial authorities.

696. **BG**: Any information constituting a professional secret may be disclosed only: 1) to judicial authorities, the prosecution, the investigation and the policy authorities in initiated criminal proceedings, and before court, liquidator or assignee in bankruptcy - in civil and commercial proceedings in the cases of liquidation or insolvency of a supervised person, provided that the information does not prejudice the interests of third parties; 2) to banking supervision authorities and State Agency "National Security" authorities, under terms and according to a procedure established by joint instructions, in as much as this is indispensable for them to perform their functions; 3) to auditors performing audit on supervised persons, and conservators, liquidators or assignees of supervised persons, the Fund for Compensating Securities Investors and the Guarantee Fund, in as much as this is indispensable for them to perform their functions; 4) to clearing houses or other persons who, according to law, effect clearing and settlement on the markets in financial instruments in the Republic of Bulgaria in so far as this is necessary for the performance of their functions - in the event of non-performance or possible non-performance by market participants; 5) with the explicit permission in writing of the supervised person; 6) as summarised date in a way to preclude identification of the person whom it concerns. (FSCA art. 25, paragraph. 1, item 1-6) Any information constituting a professional secret may be provided to the authorities of a member-country exercising financial supervision on the sole condition that they comply with the confidentiality of the information and use it for the purposes of executing their functions. (FSCA art. 25, paragraph. 4).

697. **CY**: According to article 30(4) of Law 73(I)2009 of the Commission: 'The disclosure of confidential information by the persons mentioned in sub-section (1) shall be allowed- (a)as long as the Commission, decides that for reasons of public interest or protection of investors or transparency it has to make public in whole or summarily any decisions or conclusions taken or prepared pursuant to the provisions of this Law, the Regulations issued pursuant to this Law, and in general the relevant legislation concerning the capital market and the Commission. (b)in the context of civil or criminal proceedings, where the Commission is

requested to testify in a court of Law (c)in the event that the Commission reports to any other relevant authorities inland or abroad

698. **CZ**: Financial market supervision (employees of CNB or another EEA member states authority etc.), another person related to the regulated subject (liquidator, insolvency trustee, external auditor etc.), legislative (legislative bodies of central administrative authorities dealing with legislation in the area of the financial market), law enforcement (law enforcement authorities, the courts in connection with insolvency proceedings), human rights protection (the Ombudsman). Information can be disclosed only purposefully, with guaranteed professional secrecy.

699. **DE**: According to Sec. 8 of the German Securities Trading Act disclosure or utilisation of information about facts which have come to the knowledge of persons who work or who have worked for BaFin in the course of their activities is not deemed made without authorisation, if facts are communicated to 1. public prosecutors' offices or courts having jurisdiction in criminal cases and administrative of-fence cases, 2. bodies, and persons commissioned by such bodies entrusted by law or by order of public authorities with the supervision of stock exchanges or other markets on which financial instruments are traded, of trading in financial instruments or currencies, of credit institutions, financial services institutions, investment companies, financial enterprises or insurance undertakings, 3. central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, or other public authorities responsible for overseeing payment and settlement systems or 4. entities commissioned with civil or commercial proceedings concerning the liquidation or insolvency of an investment firm, market operator or regulated market provided these bodies require the information for the performance of their functions. Theses exemptions derive from EU-regulations such as Art. 12 (1) (b) and (d) MAD and Art. 49, 54 and 58 MiFID.

700. **DK**: Employees of the Danish FSA shall be subject to liability under sections 152-152e of the Criminal Code to keep secret any information they receive in the course of their supervisory duties. The same shall apply to persons performing services as part of the operations of the Danish FSA, and experts acting on behalf of the Danish FSA or the Danish Securities Council. This shall also apply after the termination of the employment contract or any other contract. The provisions of this subsection shall apply correspondingly to employees of the Danish Commerce and Companies Agency as part of their performance of the secretariat function for the Danish Securities Council, cf. section 83(2). (2) Consent from the individual who the duty of confidentiality aims to protect shall not The provision in subsection (1) shall not prevent the Danish FSA or the Danish Securities Council from divulging on their own initiative confidential information in summary or abbreviated form, if neither the individual limited company under section 7 nor others covered by this Act nor their customers can be identified

701. **EE**: The Financial Supervision Authority Act provides that confidential information may be disclosed to: 1)courts and investigative bodies hearing a criminal matter in connection with acts detected during financial supervision or the acts of a subject of financial supervision or the head or an employee thereof if such acts contain elements of a criminal offence; 2)administrative courts in matters relating to the conduct of financial supervision; 3)employees of the Bank of Estonia and public servants of the Ministry of Finance if this is necessary for the performance of their duties, on the condition that they are required to maintain professional secrets pursuant to law; 4)a court, liquidator of a subject of financial supervision, interim trustee or trustee in bankruptcy in the liquidation or bankruptcy proceedings of a subject of financial supervision, and to a moratorium administrator of a credit institution or special regime trustee of an insurance company to the extent necessary for the performance of their duties; 5)the Guarantee Fund to the extent necessary for the performance of its functions; 6)the auditor of a subject of financial supervision to the extent necessary for the activities of the auditor; 7)an international organisation in the case specified in § 46 of this Act, or a competent authority or person in the case specified in § 47 of this Act; 8)the registrar of the Estonian Central Register of Securities, to the extent provided for in the Funded

Pensions Act and the Guarantee Fund Act; 9)a depositary, to the extent provided for in the Investment Funds Act and the Funded Pensions Act. 10)an operator of a securities settlement system for the performance of its regular functions in connection with a possible violation by a member of the settlement system.

702. **EL**: Article 76 par. 13 of Law 1969/1991 provides an exhaustive list of the circumstances under which information covered by professional secrecy may be disclosed (eg. following a written order of the criminal judicial authorities or following a request for assistance by a foreign competent authority).

703. **ES**: Basically the exemptions covered by the Spanish legislation are:-when the information is requested by the criminal authorities or anti money laundering authorities;- when other authorities need it for the discharge of the functions they are entrusted with by law.

704. **FI**: The Financial Supervisory Authority shall, have the right to disclose information to: 1) the Ministry of Social Affairs and Health, the Ministry of Finance, the Government Guarantee Fund and any other authorities supervising financial markets or responsible for the smooth functioning of financial markets, for the discharge of their duties; 2) the prosecuting and pre-trial investigation authorities of Finland or other EEA member states for the prevention and investigation of offences; 3) the financial market authorities of other EEA member states, or any other authorities responsible for the smooth functioning of the financial markets of another EEA member state; 4) the accounting board in connection with the consultation proceedings referred to in chapter 8, section 2, subsection 3 of the Accounting Act to the extent necessary for fulfilment of the supervisory duties provided in section 37 of this Act; 5) the corporate trade board of the Central Chamber of Commerce referred to in chapter 6, section 17 of the Securities Markets Act; 6) a Finnish authority or an authority of another EEA member state whose duties include participation in liquidation or bankruptcy proceedings or any similar proceedings against an authorised supervised entity or equivalent foreign supervised entity; 7) a Finnish authority or an authority of another EEA member state responsible for overseeing the bodies involved in liquidation or bankruptcy proceedings or any similar proceedings against an authorised supervised entity or equivalent foreign supervised entity; 8) a Finnish authority or an authority of another EEA member state responsible for overseeing persons conducting statutory audits of the accounts of a supervised entity or other financial market participant; 9) the independent actuaries of EEA member states who exercise judicial review of insurance companies, and the bodies responsible for overseeing such actuaries; 10) the authorities and bodies of EEA member states legally responsible for monitoring compliance with company law and for investigating offences; 11) the national central bank of Finland or another EEA member state, or another body exercising similar duties in the capacity of monetary policy authority, or any other authority responsible for payment systems oversight; 12) authorities or bodies referred to above in this subsection of a non-EEA country. The Financial Supervisory Authority shall have the right to disclose only information that is necessary for the discharge of duties by each of the authorities referred to in subsection 1 and, where information is disclosed to a foreign authority, on condition that the foreign authority is subject to the same confidentiality obligations as the Financial Supervisory Authority in respect of such information. The Financial Supervisory Authority shall, confidentiality obligations notwithstanding, have the right to disclose information on supervised entities, foreign supervised entities and other financial market participants to the auditors of the supervised entity, foreign supervised entity or other financial market participant. The Financial Supervisory Authority may not disclose confidential information received from the supervisory or other authorities of another state or obtained in the course of inspections conducted in another state, without the express consent of the supervisory authority having provided the information or any other relevant supervisory authority of the foreign state in which the inspection was conducted. Such information may be used solely for the discharge of the duties referred to in this Act, or for the purposes for which the consent was given

705. **FR**: The obligation of professional secrecy is waived only vis-à-vis the judicial authority in two cases: bankruptcy filing or criminal procedure. Moreover, in furtherance to a recent ordinance

of 2009 (that has not yet been passed as a provision of the Monetary and Financial Code), the AMF will be authorised to ask for confidential information on suspicious activities to the department of the Ministry of Finance in charge of anti-money laundering.

706. **HU**: The obligation of professional secrecy should not apply if disclosure is ordered by law or to the authorities specified by law (investigating authorities/public prosecutor acting within the scope of criminal procedures, courts, OLAF, National Bank of Hungary, State Audit Office, Tax and Financial Control Authority, Hungarian Competition Authority, national security service, consumer protection authority...)

707. **IE:** Pursuant to Section 33AK of the Central Bank Act 1942 disclosure of confidential information is permitted (subject to certain restrictions) to among others any institution of the European Community and for the purposes of criminal proceedings.

708. **IS**: If a court rules that the information shall be provided and if other laws require it. This can be necessary if a case is brought to the courts and also if it is necessary with regards to requirements made by other laws.

709. **IT:** Request from the Criminal Public prosecutor in connection with criminal proceedings.

710. **LT**: The following shall not be considered divulging of confidential information prohibited under Article 13: 1) provision of information on financial brokerage firms and the licensed credit institutions in such a generalized form that it is not possible to determine the identity of any specific person; 2) forwarding of information for the investigation or hearing of a criminal case in the manner prescribed by criminal laws; 3) disclosure of information in civil cases concerning bankruptcy or forced winding up of a financial brokerage firm or a credit institution; 4) exchange of information due to cooperation agreements with the entities from third countries; Such agreements may be entered into with the supervisory authorities, also natural and legal persons responsible for: 1) supervision of credit institutions, other financial institutions, insurance undertakings and the oversight of financial markets; 2) execution of winding-up and bankruptcy as well as similar proceedings in respect of financial brokerage firms; 3) performance of statutory audit of financial statements of financial brokerage firms, credit institutions, other financial institutions and insurance undertakings in the course of the exercise of the oversight functions or the administration of the investment insurance systems the course of the exercise of the oversight functions ; 4) supervision of persons participating in the execution of winding-up and bankruptcy as well as similar proceedings in respect of financial brokerage firms; 5) supervision of persons performing the statutory audit of financial statements of insurance undertakings, credit institutions, financial brokerage firms and other financial institutions.

711. **LU**: External auditors and experts are released from their professional secrecy rules during the investigations done by the CSSF or the judicial authorities on possible market abuses. Without prejudice to the obligations to which they are subject in judicial proceedings under criminal law, the agents of the CSSF are subject to professional secrecy rules. In addition, the legal provisions provide for necessary exemptions in the context of cooperation according to MAD and the relevant MOU (CESR MOU, IOSCO MOU).

712. **LV:** The information could be disclosed to law enforcements authorities in accordance with procedures set by the Law.

713. **MT**: Article 17 of the Malta Financial Services Authority Act stipulates the following regarding professional secrecy: 'Other than for the proper discharge of their duties or functions under this or any other Act, or as may be otherwise provided in any other law, the members of the Board of Governors or of any other organ of the Authority, and the officers and employees of the Authority shall treat any information acquired in the discharge of their duties as confidential, and shall not, directly or indirectly, disclose such information to any other person, except with the consent of the person who had divulged the information. For the

purposes of this sub-article, "employees" and "officials" shall include former employees and officials. (2) Without prejudice to the foregoing provisions of this article, the Authority may, pursuant to a written request, disclose information to: (a) a foreign competent authority or body carrying out similar or equivalent functions in order to assist the same in matters related to the regulation and supervision of financial services; (b) any other body or authority formed or established under Maltese law on matters in respect of which such body or authority may have a regulatory, supervisory, judicial or licensing function in terms of law: Provided that the Authority shall disclose the requested information where required or requested to do so within the terms of Malta's international commitments, or where so required within the terms of understanding assumed in bilateral or multilateral agreements for the exchange of information and other forms of collaboration with overseas regulatory authorities including a request arising under a Memorandum of Understanding concluded with the Competent Authority.' Yes disclosure of confidential information is possible as per the above. However, this is in line with Malta's international commitments including commitments to exchange information with other CESR Members. The same rules apply to persons and entities engaged by the Authority for the carrying out of specific tasks.

714. **NL**: Dutch Code of Civil Procedure relating to making a statement as a witness or party in the personal appearance of parties or an expert in civil cases with regard to data or information obtained in the performance of his/her statutory function, in so far as it concerns confidential data or information regarding a financial undertaking which has been declared bankrupt or dissolved by a judicial decision. The preceding sentence shall not apply to confidential data or information regarding an undertaking which is or was involved in an attempt to enable that undertaking to carry on its business. Section 1:92 1. Notwithstanding Section 1:89 (1) the supervisor may supply confidential data or information obtained in the performance of its function laid down by this Act to a body entrusted with exercising criminal procedural powers or to an expert entrusted with an instruction by such a body, in so far as the demanded data or information is necessary for the performance of such an instruction. 2. If the body, meant in the first subsection, intends to exercise the power to demand the transmission of an object subject to attachment or the power to demand inspection or a copy of documents as meant in Section 96a, 105 or 126a of the Dutch Code of Criminal Procedure, or Section 18 or 19 of the Economic Offences Act, and the demand refers to confidential data or information as meant in Section 1:89 (1), the body shall provide the supervisor with the opportunity to express its view in this respect before exercising its power. Section 1:93 1. Notwithstanding Section 1:89 (1), the supervisor may furnish confidential data or information obtained in performing the function laid down by this Act to: a. the European Central Bank, a foreign or national central bank or another foreign body entrusted with a similar function, acting in its capacity of monetary authority, in so far as the data or information are intended for the performance of its monetary function; b. an auditor entrusted with the statutory audit of the annual accounts of a financial undertaking, in so far as the confidential data or information refers to that financial undertaking and is necessary for the audit; c. an actuary entrusted with the statutory audit of a financial undertaking, in so far as the confidential data or information refers to that financial undertaking and is necessary for the audit; d. the holder of a market in financial instruments recognized under Section 5:26 (1) with a view to the control of the compliance with the rules applicable to that market; or e. the Dutch Healthcare Authority, to the extent that the data or information are useful for the exercise of its statutory duties. 2. The supervisor shall not supply any confidential data or information under the first subsection if: a. the purpose for which the confidential data or information will be used is insufficiently determined; b. the intended use of the confidential data or information does not fit in the framework of the supervision of financial markets or of persons working on those markets; c. the supply of the confidential data or information would be incompatible with Dutch law or public order; d. the secrecy of the confidential data or information is insufficiently safeguarded; e. the supply of the confidential data or information is reasonably or might reasonably be contrary to the interests which this Act seeks to protect; or f. it is insufficiently safeguarded that the confidential data or information shall not be used for purposes other than for which it is supplied. 3. In so far as the data or information, meant in the first subsection, are obtained from a Supervisory Authority, the supervisor shall not supply them to the other

supervisor or another Supervisory Authority, unless the Supervisory Authority from which the data or information was obtained has expressly agreed to supplying the data or information and, where appropriate, has agreed to use them for a purpose other than for which the data and information was supplied. 4. If a body or person as meant in the first subsection requests the supervisor which has supplied the confidential data or information under the first or second subsection to be allowed to use that confidential data or information for a purpose other than for which it was supplied, the supervisor shall only grant the request: a. if the intended use is not in violation of the first or second subsection; or b. in so far as that body or person might obtain the disposal of that data or information in a manner not provided in this Act from the Netherlands with due regard to the applicable statutory procedures for that other purpose; and c. after consulting Our Minister of Justice if the request meant in the opening words refers to an investigation into criminal offences. Section 1:93a If, pursuant to Part 3.6.2, the Netherlands Central Bank exercises supervision on a consolidated basis of a Dutch investment firm or Dutch credit institution, it shall inform Our Minister and the authorities meant in Section 1:93, first subsection, under a, in so far as it concerns them, without delay of emergency situations regarding financial undertakings that are the object of the consolidated supervision which could be detrimental to the stability of the financial system in the Member State where the latter undertakings are established.

715. **NO**: Pursuant to the Norwegian legislation, board members and employees of Kredittilsynet (including accountants and persons with other expert knowledge engaged to perform assignments within Kredittilsynet's area of responsibility) are covered by professional secrecy. The professional secrecy implies that the board members and employees must treat as confidential any information about a customer's affairs which may come to their knowledge in the course of their work. The employees and board members must not make use of such information for commercial purposes. The following exemptions apply to the professional secrecy: The duty of confidentiality does not apply to disclosure of information to Norges Bank (Central Bank of Norway) or to supervisory authorities in other EEA states. Neither does the duty of confidentiality prevent Kredittilsynet from passing to a regulated market, to a securities register or a clearing house, such information on circumstances as is necessary for the discharge of these institutions' statutory functions. Moreover, the duty of secrecy does not prevent Kredittilsynet from reporting or providing information regarding violation of law to the prosecuting authority or to the public authority within whose jurisdiction the matter specifically falls (e.g. tax authorities). When Kredittilsynet in the course of its work learns of circumstances involving money laundering, information to this effect shall be forwarded to the National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim). In addition, where supervision of the business activities of investment firms and clearing houses and of compliance with the provisions of the Securities Trading Act gives cause to suspect that someone has suffered or will suffer loss as result of non-compliance with provisions of or pursuant to law, Kredittilsynet may inform that person of the circumstance in question.

716. **PL**: The list of the exemptions is presented in the ACT on trading in financial instruments (art. 149-152). The main reason of the exemptions is proper functioning of the supervisory institutions and jurisdiction.

717. **PT**: Information covered by professional secrecy (article 354 Securities Code and 383 and 386 Penal Code) may be disclosed according to: 1.General provisions of exchange of information (article 355 Securities Code) with: a. Other national regulators (the Bank of Portugal and the Portuguese Insurance Institute); b. The operators of regulated markets and MTFs; cither operators of settlement systems, clearing houses, central counterparties and central securities depositories; d. Authorities intervening in processes of insolvency or recuperation of the entities referred to in b. and c. and of financial intermediaries and financial advisers; e. Managing entities of sinking funds and of investor compensation schemes; f. Auditors and authorities with supervisory capacity of auditors; g. European Central Bank, the supervisory authorities of the EU Member States or the entities that therein carry out the

functions similar to that referred to above; h. Supervisory authorities of Non-EU Member States and the entities that therein carry out the functions similar to that referred above, if, and in so far as is necessary for the supervision of the markets in financial instruments and for the individual and consolidated supervision of the financial intermediaries. 2. Provisions related to the exchange of information with foreign counterpart institutions, cooperation and assistance in the context of the European Union and precautionary measures in international cooperation (articles 376/2/b) and 376/5; 377/2, 3, 4, 7 and 8 and 377-A/1 Securities Code); 3. The CMVM's duty to inform the competent entities of an offence, which comes to its notice and that occurs outside its competence (article 364/2 Securities Code); 4. The right of access of citizens to administrative files and records (under article 268 Constitution of the Portuguese Republic and Administrative law). In fact, the professional secrecy is not a se a limitation to this right which offers situations where information subject to professional secrecy may be disclosed, provided that no limitation to the right of access applies (judicial secrecy, secret of companies, private intimacy, State secrets, and commercial or industrial secrets).

718. **RO**: The members and the employees who are working or have worked with C.N.V.M, as well as the representatives and the employees of the entities to which C.N.V.M. has delegated one or more prerogatives, which it has been invested with by law, must comply, with respect to the information obtained during or as a result of exercising their duties and which have not been made public, with the legal framework applicable to professional secrecy. Delivery of information shall not be considered a breach of this obligation in the following cases: for the purpose of international cooperation and especially whenever CNVM grants assistance for the exchange of information and cooperation in investigation. This type of assistance includes without being limited to: a) providing public or non public information about or related to a natural or legal person subject to the regulation, supervision or control of C.N.V.M.; b) providing copies of the records kept by regulated entities; c) collaborating with persons who hold information about the subject of an investigation.

719. **SE**: In the Secrecy Act there is a provision giving Finansinspektionen and the regulated Markets, which are responsible for supervision of disclosure of insider information, the possibility to share information.

720. **SI**: Article 488a of ZTFI defines exchange of professional secrecy as follows: (Persons allowed to disclose confidential information) (1) Agency may disclose confidential information to the following persons in the Republic of Slovenia and other Member States: 1. Supervisory authorities responsible for the supervision of supervised financial undertakings; 2. Judicial and other authorities performing actions in the process of compulsory liquidation or bankruptcy of the bank or in other similar proceedings; 3. Auditors in charge of auditing financial statements of supervised financial undertakings; 4. Persons or authorities managing guarantee claims of investors; 5. Authorities responsible for supervising authorities that perform activities in the process of compulsory liquidation or bankruptcy of the bank or in another similar proceedings; 6. Authorities responsible for supervising auditors that perform the tasks of auditing financial statements of supervised financial undertakings; 7. Judicial authority, state prosecutor's office or the police if such information is required for the proceedings conducted within their competencies; 8. The central bank or another body with similar tasks and responsibilities as the central monetary authorities or another body responsible for payment systems supervision; 9. Ministry responsible for finance or state authority of another Member State responsible for the implementation of the laws governing supervision of credit institutions, financial institutions, investment firms or insurance undertakings; however only to the extent necessary for the implementation of their tasks and responsibilities in the field of monitoring the financial system and preparation of legislation and 10. Central securities clearing corporation or other clearing corporation or settlement system according to the act governing financial instruments market in connection with the performance of clearing and settlement transactions concluded on one of the markets in the Republic of Slovenia if Agency deems that his information is necessary in order to provide for appropriate action to be taken by such corporation regarding non-compliance or eventual non-compliance by participants in these markets. 11. Authorities responsible for competition

protection and for supervision of and protection of money laundering and terrorist financing if this information is necessary for performance of their functions. 12. Tax Authority if this is necessary for performance of its function. 13. Regulated securities market operator as the information relates to data and measures addressed to stock exchange members or issuers of financial instruments if Agency assumes that information is necessary for that company in order to assure that securities market function in orderly manner. 14. Authority competent for supervision over irreconcilability of public services and for profit activities or competent authority for corruption prevention if it is necessary for performance of its functions in accordance with the law. (2) The person to whom Agency discloses the information pursuant to paragraph (1) of this Article may use this information only for the exercise of its supervisory competencies and tasks from paragraph (1) of this Article and shall be bound to safeguarding the confidential information from Article 228 of this Act. (3) Agency may also disclose confidential information to persons from paragraph (1) of this Article, who are persons of individual third countries, subject to the following conditions: 1. That it has concluded a cooperation agreement with this third country on mutual exchange of information with the persons in the Republic of Slovenia and other Member States referred to in paragraph (1) of this Article 2. That persons of a third country use the rules on compulsory safeguarding of confidential information in that country, of which the contents is laid down by Articles 228 and 229 of this Act and 3. That the information that is the subject of disclosure to a third-country person is intended solely for the purpose of exercising supervisory competencies or performing tasks by persons from paragraph (1) of this Article. (4) If Agency obtains confidential information from the supervisory authority of another Member State or during the operational auditing of a branch of a Member State bank according to Article 284 of this Act, it may disclose this information only subject to the approval by the supervisory authority of this Member State.

721. **SK**: The confidentiality obligation shall not be deemed violated, if information is disclosed to: a) persons authorised to exercise supervision for the purposes supervision; b) a court of law for the purposes of civil court proceedings; c) law enforcement authorities for the purposes of criminal prosecution; d) the National Bank of Slovakia for the purposes of the bank supervision which it exercises; e) the criminal police service and the financial police service of the Police Forces for the purposes of performing their duties established by a separate law; f) tax authorities for the purposes of tax proceedings; g) the Office for Personal Data protection; h) the Slovak Intelligence Service in regard to the performance of its duties under separate regulations.

722. **UK**: Section 348 of the Financial Services and Markets Act 2000 restricts the disclosure of confidential information. The Treasury has issued regulations under section 349 of the Act that provide exemptions in certain specific circumstances permitting the disclosure of confidential information. The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 – SI 2001/2188 (as amended) provide the following disclosure gateways: • Under Regulation 3 – for the purpose of enabling or assisting the person making the disclosure to discharge any public function of the FSA. This exemption is subject to directive restrictions. • Under Regulation 4 – for the purposes of criminal investigations or proceedings; • Under Regulation 5 – for the purposes of certain other proceedings e.g. civil proceedings in which the FSA is a party. • Under Regulation 9 – to certain other persons specified in Schedule 1 of the Regulations for the purposes of specified functions. This exemption permits disclosure of directive information to certain specified bodies for specified purposes, including certain overseas regulators provided there is a co-operation agreement in place in accordance with the relevant directive. • Under Regulation 12 - to certain other persons specified in Schedules 1 or 2 of the Regulations for the purpose of specified functions This exemption permits disclosure of non-directive information to certain specified bodies for specified purposes, including certain overseas regulators. For disclosure to a non-EEA regulatory body under this gateway, there is no requirement to have an MoU or equivalence assessment in place.

G3: Are you satisfied with the practical application of the possibility to disclose information covered under professional secrecy under certain conditions?

723. The twenty–nine Members applying an exemption to professional secrecy are all satisfied with this provision.

G4, G5 and G6: Have you encountered any problems with the option you have chosen, what kind of problems and are there any plans (thoughts) to change your option?

724. No Member except **AT** declares having problems as regards this option to disclose information under professional secrecy under certain conditions. In **AT**, the application of the provision causes difficulties. E.g., it is not clear what "disproportionate damage" exactly means. There are no clear parameters provided as to when such disclosure may be done. Therefore, this Member has decided to change its option.

Appendix

Article 13 of directive 2003/6/EC

"The obligation of professional secrecy shall apply to all persons who work or who have worked for the competent authority or for any authority or market undertaking to whom the competent authority has delegated its powers, including auditors and experts instructed by the competent authority. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by law."

Section H. Disclosure of measures or sanctions – Article 14(4) Directive 2003/6/EC

725. This section is focused on the policies adopted by the Authorities regarding the disclosure of measures or sanctions imposed for infringement of the provisions adopted in the implementation of MAD according to Article 14.4 of MAD.

726. The Section takes account of the responses provided by Member States to the 2006 Questionnaire and to the 2009 Survey.

Disclosure of sanctions and measures imposed by Authorities

Disclosure of *every* measure and sanction

727. Nineteen Member States **(BE, BG, CY, CZ, EL, FR, HU, IE IS, IT, LT, LU, LV, MT, NO, PL, RO, SK UK)** stated that they disclose directly to the public every measure or sanction 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.

728. The publication of every measure or sanction may either be required by a provision incorporated in the law or derive from the general policy adopted by the Authority. There are also differences concerning the form and the content of a published sanction or measure. This 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. Namely:

729. Five Member States **(BG, CZ[8], IE[9], IT, LT)** declare that the Authority is required to publish every measure or sanction, unless the disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved.

730. Eight Member States **(CY, HU, IS, LV[10], MT, NO, RO, SK[11])** report that, in practice, every measure or sanction is published as a matter of general policy of the Authority. However, in **MT** the policy provides for the removal of certain notices after a period of time[12]. **NO** declares that the Authority can disclose sanctions or measures imposed as long as no other Act or provision determines otherwise.

731. Five Member States **(BE, EL, FR, LU, PL)** declare that the disclosure is made – or, in **BE, FR** and **LU** can be made – on a non-named basis. More in details:

- **BE** indicates that the publication describes the facts, but may occur on a no-name basis.

- **FR** reports that the Authority usually discloses its measures or sanctions on its website, namely or not, depending on the case, on a decision of the Enforcement Committee**.**

[8] In practice, in CZ the Authority publishes only the sentence of ruling (i.e. express determination of the tort committed and the punishment for it)

[9] With the exception of private reprimand or caution.

[10] LV declares that the information regarding sanctions applied to issuers by the Authority is being disclosed. Mainly it relates less serious issues (undue disclosure of inside information, preparation and update of the list of insiders, notification of managers transactions).

[11] SK declares that the Authority issues an official journal, where it publishes the statement of enforceable decision, eventually its justification or a part of justification, which it will determined to be published.

[12] As mentioned below, in FR the Enforcement Committee may decide that measures or sanctions be published on the Authority's website namely.

- **EL** declares that the general practice applied is to publish a press release which refers to the sanctions imposed and the legal grounds on which such sanctions were based, but the full text of the decision is only notified to the persons concerned.

- **LU** declares that the regulation provides that the Authority may disclose every measure or sanction to the public, but the Authority already publishes any sanctions on an anonymous basis in its annual report.

- **PL** state that the legislation does provide for the disclosure of sanctions imposed on issuers as well as on the natural persons (without stating their name).

Disclosure of certain measures or sanctions

732. Ten Member States **(AT, DE, DK, EE, ES, FI, NL, PT, SE, and SI)** declare that the Authority does not publish every measure or sanction imposed for infringement of the provisions adopted in the implementation of MAD is published[13].

733. Apart from the criteria set in Article 14.4 of MAD (ie if the disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved), in its decision-making, the publication may depend on different criteria:

Gravity of the case and proportionality

734. In **ES, FI** and **PT** only serious or very serious sanctions are to be published (in **PT**, irrespective of a final judgment having already been obtained or not), whilst minor sanctions or measures are not disclosed.

735. **DE** declares that the principle of proportionality of administrative measures is taken into account.

Public interest and investor protection

736. Four Member States **(DE, DK, EE,** and **SE)** declare that sanctions and measures are disclosed to the public only where the publication is of a public interest **(DK, SE)** or it is necessary for the protection of investors **(EE, DE).** In particular, **DK** declares that decision is taken on a case-by-case basis, but that measure or sanction shall be disclosed in cases of interest for the public in matters of a principle nature and in matters with far-reaching, significant consequences for stakeholders in the securities market. **SE** declares that the Authority publishes all decisions that are of public interest[14].

Professional secrecy and confidentiality

737. Three Member States **(DE, EE,** and **SI)** declare that concerns relating to professional secrecy and confidentiality are taken into account by the Authority in deciding on the publication of the measures or sanctions imposed. In particular, **SI** specifies that the legislation does not provide for the disclosure of the Agency's every measure of sanction due to legislation of individual data protection.

Other

[13] 2 Member States (DE, DK) it is reported that the Authority has a right to disclose the measures or sanctions imposed for infringement of the provisions adopted in the implementation of MAD.
[14] Publication of details in each case is limited by the Secrecy Act.

738. **DE** declares that, in deciding on publication of measures and sanctions, the possible liability of the Authority for damages caused to third parties by such publications is also taken into account. Moreover, reference was made to a general reservation of the legislator as well as the Authority against pillorying someone.

739. **NL**: The AFM may not publish measures pending appeals, which introduces a further time lag in addition to the time required for an investigation between the infringement and publication.

740. In **UK**, the Authority is required to provide a final notice on the enforcement action to the person subject to such action and to publish such information about the matter to which the final notice relates as it considers appropriate. The authority must not publish the information if it would be unfair to the person or prejudicial to the interests of consumers. Publication generally includes placing the final notice on the authority web site and is often accompanied by a press release.

741. **AT** declares that Article 14.4 was literally transposed.

Reasons why the legislation provides for the disclosure by the Authority of every measure or sanction or does not provide for the disclosure of every measure or sanction requirement

742. Twelve Member States **(BE, BG, CY, CZ, DK, EL, HU, IT, LT, PL, RO, UK)** referred to reasons of better transparency to give information to the market.

743. Among those that provide for publication the following reasons were given:
- as a deterrent measure to discourage similar breaches of the law **(BG, EL, HU, IS, LT, PL, UK)**;
- as an additional sanction against the violator **(BG, EE, ES)**;
- enhancement of public confidence **(BG)**;
- reasons of public interest **(CY)** and investor protection **(EL, RO)**;
- showing Authority's activities **(PL)**;
- better functioning of the market **(DK)**)

Two Member States **(AT, SK)** did not provide specific reasons.

Individual responses from the Member States

744. In **AT** there are no specific reasons. Article 14 § 4 of the directive 2003/6/EC was literally transposed.

745. In **BE** the legislation replicates the option provided for in the MAD, on the basis of the consideration that transparent decision-making is essential in the enforcement policy + on the basis of experiences abroad (tendency for more transparency).

746. In **BG** the public disclosure of the drawn up administrative sanctions regarding the individuals committed violations of the MAD regime is an instrument for influence (educational and precautionary) on the relevant violators and on the rest participants on the market of financial services. On one hand the introduction to the public of the undertaken supervisory measures by the competent authority aims to ensure the observing of the legislation in the scope of the market abuse and to reduce the cases of trading with inside information and market manipulation. At the same time the introducing of the proposed option provides for better transparency of authorities activities which aims at enhancement of the public confidence and gives opportunity for conducting public control regarding the supervisory authority proceedings.

747. In **CY** for reasons of public interest and transparency.

748. In **CZ** the transparency of the authority was to be intensified.

749. In **DE**, according to Sec. 40b of the German Securities Trading Act the authority can disclose to the public any final and unappeasable measure provided the disclosure is appropriate and necessary in order to effectively counteract undesirable developments which may adversely affect the orderly conduct of trading with financial instruments or the provision of investment services or non-core investment services or which may result in serious disadvantages for the capital market unless such disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved. There is no obligation to disclose all measures or sanctions. Instead, before using its rather restricted competence to disclose measures, the authority has the duty to analyze the case in detail and take a discretionary decision. The restrictions are based on Art. 14 (4) MAD and concerns about professional secrecy, proportionality of administrative measures, possible liability of the authority for damages caused to third parties by such publications and general reservations of the German legislator as well as the authority against pillorying someone.

750. In **DK** every measure or sanction shall be disclosed in cases of interest for the public in matters of a principle nature and in matters with far-reaching, significant consequences for stakeholders in the securities market. The reason is to increase transparency which can contribute to a better functioning of the market.

751. In **EE** the Financial Supervision Authority Act provides for the authorities right to disclose its administrative measures and sanctions if this is necessary for the protection of investors, clients of financial supervision subjects or the public or for ensuring the lawful or regular functioning of the financial market. The regulation therefore follows the general approach of confidentiality of information received or produced in the course of financial supervision, providing for the possibility to disclose the information if necessary. The possibility to disclose sanctions and other measures taken by the authority serves in practice as an additional sanction (administrative fines are relatively low but the publication of the sanction is damaging to the reputation of the person).

752. In **EL**, when an enforcement decision is taken by the Board of Directors of the authority for the imposition of administrative sanctions to any supervised person (legal person or individual), the general practice applied is a published press release which refers to the sanctions imposed and the legal grounds on which such sanctions were based. The full text of the decision however is only notified to the persons concerned. The authority has adopted the above policy in order to a) discourage any other person from being involved into market abuse schemes b) promote transparency and investor's protection.

753. In **ES** the legislation provides for the publication of very serious and serious sanctions imposed by the authority when the sanction is final in the administrative sphere. The reason for this publication is that very frequently the publication of a sanctions has a higher deterrent effect than a fine or any other sanction or measure that can be imposed on the wrongdoer.

754. In **FI** there is a choice not to make public every sanction or measure in cases the failure is a minor one. The reason is that there is no need to make all minor sanctions or measures public.

755. In **FR** the authority usually discloses its measures or sanctions on its website, namely or not, depending on the case, on a decision of the Enforcement Committee.

756. In **HU**, as a general principle, the authority publishes all of its resolutions. This serves the purpose of transparency and it may be a guideline for the market on the authorities' law enforcement activity; which behaviours – in the authorities' interpretation – may constitute market manipulation or insider dealing and which behaviour is deemed unfair and adverse from the perspective of a fair and transparent market.

757. In **IE**, regulation 45 of the Regulations imposes an obligation to disclose specified sanctions. This obligation may be waived if it is considered that the disclosure may seriously jeopardize the financial markets or cause disproportionate damage to the parties involved. The only sanction that is not disclosed is a private reprimand or caution.

758. In **IS** the Authority discloses these measures as this is considered to function as an effective deterrent.

759. In **IT** the reason is information of the market.

760. In **LT** the legislation provides for the disclosure of every measure or sanction for precautionary reasons in order to prevent similar breaches of the law.

761. In **LU** article 14 § 4 of the directive 2003/6/EC was literally transposed.

762. In **LV** the information regarding sanctions applied to issuers by the authority is being disclosed. Mainly it relates less serious issues (undue disclosure of inside information, preparation and update of the list of insiders, notification of managers' transactions).

763. In **MT** in terms of the PFMA Art 22 (3) the authority has the right to make public the name of the person sanctioned, the particular breach of the provisions of the PFMA and the administrative sanction imposed. In terms of the same article of the Act the authority is required to withhold such public disclosure where it deems that such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. It is the authorities' policy to publish all sanctions and penalties. This policy was adopted in 2003 and was revised on the 17th July, 2009 to provide for the removal of certain notices after a period of time. This change is deemed fair, considering that, in most jurisdictions, even criminal records are cleared after some time. A copy of this policy may be retrieved from the authority's web-page.

764. In **NL** the authority cannot publish an instruction. This is in line with national practice governing the exercise of this power.

765. In **NO**, public disclosure of documents in the public administration is an important principle. Pursuant to the "Act relating to public access to documents in the public administration" of 2006 no. 16, the authority can disclose sanctions or measures imposed, as long as no other Act or provision determines otherwise. The obligation may inter alia be waived if the documents contain information regarding an individual's personal affairs, or technical devices and procedures, as well as operational or business matters which for competition reasons it is important to keep secret in the interest of the person whom the information concerns. .

766. In **PL** the legislation does provide for the disclosure of sanctions imposed on issuers as well as on the natural persons (without stating their name). It enhances transparency of the market, sends message to the market participants and shows Authority's activities.

767. In **PT**, according to the law (article 422 Securities Code), a decision by authority that convicts the agent for carrying out a serious or very serious administrative offence shall be disclosed through the authorities website, wholly or by means of a statement drawn up by the authority. If a judicial review has been lodged, specific reference to said review should be made. The law defines the seriousness of the administrative offences. Any court decision that confirms alters or repeals a decision by the authority or the lower court in the sense of conviction is disclosed in the same terms. The disclosing does not apply: 1. to fast-track summary proceedings, 2. if suspension of the sanction applies, 3. if the illegality of the acts or the guilt of the perpetrator are reduced, and 4. if the authority considers that disclosure of the decision may be detrimental to investors' interests, severely affect the financial markets or cause actual damages to persons or entities involved, clearly disproportionate to the seriousness of the acts imputed. Irrespective of a final judgment having already been obtained or not, any court

decisions concerning crimes against the market shall be disclosed by the authority in the terms referred to above.

768. In **RO** the authority makes available to the public any measure or sanction imposed for the failure to comply with the provisions of the law and of the regulations adopted in its application, except for the situations when, by public disclosure, the normal functioning of the market might be jeopardized or significant damages might be caused to the parties involved, in order to ensure a high level of transparency of the market and its actors towards the investors. Such a measure is intended to contribute to the investors' protection.

769. In **SE** all decisions of the authority are public but not automatically published. However, the authority publishes all decisions of public interest.

770. In **SI** the legislation does not provide for the disclosure of the Agency's every measure of sanction due to legislation of individual data protection.

771. In **SK** it is a result of transposition of MAD into the legislation, chosen by Slovak legislator (Ministry of Finance of the Slovak Republic). The authority is not aware of any such reason.

772. In **UK**, section 390 of the Financial Services and Markets Act 2000 requires the authority on taking enforcement action to provide a final notice to the person subject to such action. Section 391 requires the authority to publish such information about the matter to which the Final Notice relates as it considers appropriate. The authority must not publish the information if it would be unfair to the person or prejudicial to the interests of consumers. Publication generally includes placing the Final Notice on the authority web site and is often accompanied by a press release. The authorities Enforcement Guide, section 6.10 state that "Publishing final notices is important to ensure the transparency of authority decision making; it informs the public and helps to maximize the deterrent effect of enforcement action."

Satisfaction with the practical application of the option; effectiveness of the option

773. All Member States but four (**AT, DE, EE, and NL**) declare that the Authority is satisfied with the practical application of the option and consider the option effective in its application. These four Member States **(AT, DE, EE, and NL)** do also not consider the option effective in its application.

Problems encountered with the option chosen

774. Seven Member States **(AT, DE, EE, ES, IS, NL, PT)** have reported problems relating to the option chosen.

775. The type of problems encountered varies across Members. The problems reported include: (i) issues on the interpretation and constitutionality of the relevant provision **(AT)**; (ii) inability of a retroactive application for sanctions having punitive purposes **(PT)**; (iii) appeal against the decision of the Authority **(EE, IS)**; (iv) delay in the publication of the sanction until a decision from the Court of Appeal **(ES, NL)**; (v) failure to use the competence to disclose in practice due to restrictive conditions and reservations **(DE)**.

776. The description of problems provided by individual Member States is reported below.

777. In **AT**, the practical application of the conditions under which disclosure of information is prohibited (because it would seriously jeopardize the financial market or cause disproportionate damage to the parties involved) is unclear. Furthermore there are doubts on the constitutionality of the provision because the person concerned has no right to be heard before the disclosure.

778. In **DE** the authority has not made any use of the competence to disclose measures due to restrictive conditions and reservations.

779. In **EE**, although the disclosure of the administrative measures or sanctions has not been contested in court so far, the current regulation requires every such disclosure to be motivated and could therefore be challenged in court.

780. In one Member state courts or tribunals delays the publication until it has made a decision in this regard, this means that the publication of the sanction is delayed.

781. In **IS** in one case the financial undertaking that received an administrative fine that was going to be made public sued the Authority for not granting it an exemption from the disclosure. The case was though dropped as the undertaking went bankrupt.

782. In **NL**, the authority may not publish measures pending appeals, which introduces a further time lag in addition to the time required for an investigation between the infringement and publication.

783. In **PT**, the problems encountered relate to the punitive (or not) nature of the measure (disclosure of conviction decisions) and, if considered punitive, the likelihood of retroactive application. The question that arose was whether the measure could be applied to events that occurred prior to the entry into force of the law establishing the disclosure of decisions. The disclosure of decisions was contested in three cases, all based on the punitive nature of such disclosure and consequent inability for retroactive application. In all three cases the judicial decision denied its punitive nature thus allowing its application to facts preceding the entry into force of the law that provided for such disclosure.

Enforcement action undertaken by the Authorities or Court cases

784. **NL** reports that there have been several instances where market participants requested provisional court orders to delay publication.

785. **FR** declares that the Court may accept the request of the plaintiff (filed by the end of the fourth week following the decision of the Enforcement Committee) if it considers the seriousness of the damage done in terms of good repute. Moreover, the sanctioned person may appeal against the decision of the Enforcement Committee for consideration of the merits.

786. Five Member States **(FI, IE, and LV, MT, UK)** provided information about sanctions and measures applied by the respective Authority in 2009.

787. The other Member States declare that there were no enforcement actions undertaken by the Authority directly related to the option chosen.

788. No court case directly relating to the option was reported.

Guidance issued by the Authority in order to assess whether the disclosure "would seriously jeopardised the financial market", or "cause disproportionate damage to the parties involved"

789. **In the UK** the FSA's The Enforcement Guide, section 6.9 explains that as required by the Financial Services and Markets Act 2000, the authority will not publish information in connection with a Final Notice that would be unfair to the person concerned or prejudicial to the interests of consumers. This would include, for example, where publication could damage market confidence or undermine market integrity in a way that could be damaging to the interests of consumers. In section 6.18 of the Enforcement Guide, the authority addresses behaviour in the contest of a takeover bid. In circumstances where behaviour to which a Final Notice relates has occurred in the context of a takeover bid, the authority will consult with the

Takeover Panel over the timing of publication if the authority believes that publication may affect the timetable or outcome of the bid and will give due weight to the Takeover Panel's views.

Annex

Article 14(4) of MAD states: *"Member States shall provide that the competent authority may disclose to the public every measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved."*

Section I. Assistance requested by the competent authority of another Member State – Article 16.4 of Directive 2003/6/EC

790. The analysis of this provision of the Directive is aimed to assess those "gold-plating" provisions that Member States may have introduced in their domestic legislation regarding the causes to deny the assistance requested by the competent authority of another Member State.

791. No competent authority has reported that its domestic legislation foresees additional reasons to deny assistance or to deny undertaking joint investigations with an authority of another Member State to those established in the MAD.

I1: Does your legislation foresee any other reasons to deny assistance than those stated in article 16 paragraphs 2 and 4 of the MAD?
I2: If yes, please provide details

792. None competent authority has reported that its domestic legislation foresees additional reasons to deny assistance to an authority of another Member State to those established in the MAD.

I3: Have you encountered any problems so far in your requests for cooperation with other competent authorities, in this regard?
I4: If yes please provide details.

793. Regarding problems encountered with the causes to deny assistance, all competent authorities have reported not to have any problem in this regard.

794. However, two competent authorities have reported issues regarding cooperation:

795. **BG**: so far the FSC has encountered only two cases in which there were some issues as regards the timely provision of the responses.

796. **FR**: the differences of approach in the application of national legal provisions to the acts under investigation inside the European Union may cause difficulties with regard to cooperation. For instance, the requests for cooperation sent by the AMF are at the stage of administrative proceedings in France, while they may be considered as criminal proceedings abroad. In such cases, cooperation is impossible for legitimate although unfortunate reasons.

I5. Does your domestic legislation foresee any other reasons to deny undertaking joint investigating with an Authority of another CESR Member State, other than those stated in article 16 paragraph 4 of MAD?
I6. If yes, please provide details.

797. No competent authority has reported that its domestic legislation foresees additional reasons to deny undertaking joint investigations with the competent authority of another Member State to those established in the MAD.

I7. Have you encountered any problems so far while seeking to undertake joint investigations with an Authority of another CESR Member State?

798. Regarding problems encountered while seeking to undertake joint investigations with the competent authority of another Member State, all competent authorities have reported not to have any problem in this regard.

799. However, two authorities have reported the following issues regarding cooperation: **CY**: since it is the requested authority that does the investigation on behalf of the requesting authority, there is the possibility that the investigation is not carried out the way the requesting

authority would have done it. **NL**: several member states only allow requests for information to be filed through the national supervisor. There have also been instances where other supervisors have requested information from firms in the Netherlands without copying the AFM. The AFM considers copying the national supervisor to be essential, as it is the most efficient way of requesting information and serves to highlight the importance of the request to the firm.

Appendix

Relevant text of Article 16.4. of MAD *"The competent authorities may refuse to act on a request for an investigation to be conducted as provided for in the first subparagraph, or on a request for its personnel to be accompanied by personnel of the competent authority of another Member State as provided for in the second subparagraph, where such an investigation might adversely affect the sovereignty, security or public policy of the State addressed, or where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the State addressed or where a final judgment has already been delivered in relation to such persons for the same actions in the State addressed. In such case, they shall notify the requesting competent authority accordingly, providing information, as detailed as possible, on those proceedings or judgment."*

Section J. Additional items in lists of insiders – Article 5 paragraph 2 and 4 of implementing directive 2004/72/EC

800. This section relates to the implementing directive 2004/72/EC and the option whereby Member States can impose items in lists of insiders in addition to those laid down under Article 5(2), and the option of imposing additional years to the minimum number of years that the lists of insiders are to be kept, as laid down under article 5(4).

Items in lists of insiders

801. Implementing directive 2004/72/EC states in Article 5.2 that lists of insiders shall state at least: (a) the identity of any person having access to inside information; (b) the reason why any such person is on the list; (c) the date at which the list of insiders was created and updated. In most Member States these are the only items required to be included in lists of insiders. However eight Member States **(BE, DE, EL, NO, PL, LT, LV** and **SK)** require additional items. In one Member State **(LU)** there is strictly speaking no additional information to be included in the insiders' lists. The competent authority has issued implementation rules of the law on market abuse where it clarifies the details of the information that has to be included in lists of insiders.

802. Most of these Member States **(BE, DE, EL, LT, NO, PL)** require the lists of insiders to state the date at which such persons acquired or lost the access to inside information. Five Member States **(DE, EL, LV, LU** and **PL)** report of requirements of more than first name and family name as identification of the persons on the lists. Three Member States **(DE, LU** and **PL)** require home address to be included. Date and place of birth is also requires in on Member State **(DE)** and another Member State **(PL)** have included ID card number as mandatory item on the lists**.** One Member State **(EL)** requires information from the Investor Ledger (Investor Account) and transactions clearing code for derivative instruments for identification purposes. One Member State **(LT)** requires information concerning the issuer the person is associated with (name, ISIN code) and the reason why any person is excluded from the list. In another Member State **(DE)** there is also an obligation of the lists to include a clearly highlighted headline "Insider List" and include the identity of the person obliged (or any person commissioned and authorized) to maintain the insider list. All these additional items have been included as they are deemed relevant and necessary information to facilitate future market abuse investigations. **LV** requires inclusion data allowing the identification of holders of inside information (for resident natural persons: their name, surname, personal identity number; for non-resident natural persons: their name, surname, date of birth, the number and date of issue of a document certifying their identity, the institution issuing the document; for legal persons: their firm name, legal address, registration number and place of registration);

803. One Member State **(PL)** require the inclusion of a note concerning the fact that the person was informed about penal and administrative sanctions connected with unlawful disclosure and usage of the inside information. This is in order to make the person on the lists of insiders aware of his obligations and prevent from possible misconduct.

804. All Member States but two **(PT** and **UK)** are satisfied with the practical application of items in the lists and consider them effective in its application. Neither of the legislations of the two Member States which are not satisfied requires additional items in the list. Both Member States have reported that when requesting lists they have a need of more detailed information than those items required in the lists. Therefore they use the alternative powers to require information for the purposes of an investigation. One of the Member States **(PT)** lacks details such as dates of meetings, people present, and subjects debated. They also finds the information in lists of insiders frequently to be too broad (too many people) and not specific enough. The other Member State **(UK)** has a need of detailed information such as home addresses and personal telephone numbers.

805. The Member state **(UK)** has reported: "The list compiled by issuers requires the inclusion of only those "persons acting on their behalf or for their account". However, when conducting a preliminary market abuse enquiry, a competent authority needs to review a wider list showing all those individuals who could have had access to the inside information. Whilst we do not think that it would be proportionate to extend the obligation to maintain this additional detail as a matter of course, we think it is important that the competent authority is able to obtain this detail on individual cases as required. The current framework does not provide the necessary powers. The Authority's experience is that advisers not subject to financial regulation such as law firms or public relations firms engaged by the issuer have sometimes refused to provide this additional information unless a formal enforcement investigation has been launched by the Authority (in which case we can compel the firm to provide the information). At an early stage of an enquiry it may not be proportionate or an effective use of resources to launch such an investigation. Advisors to the issuer may in turn employ firms to undertake specific tasks that might not be directly charged to the issuer. Our interpretation of the Directive text: "Member States shall require that issuers, or persons acting on their behalf or for their account, draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information" is that there is no requirement for these firms to be included on the insider lists maintained by the issuer. The Authority's experience in requesting insider lists from regulated advisors frequently shows them as unwilling to coordinate the inclusion of firms employed by them. "

806. None of the twenty nine Member States have any plans to make any changes in the requirements of items in lists of insiders.

807. Two Member States **(FR** and **LU)** have taken enforcement actions regarding lists of insiders. In one of these Member States **(FR)** it has been noticed that insiders list had been established upon the request of the investigators, instead of being set up a priori. Furthermore, these lists of insiders are not always consistent: their scope is either too limited or too extensive. The competent authority has sent letters to the concerned companies on several occasions to remind them of the applicable rules. The competent authority in the other Member State **(LU)** has issued some injunctions in order to obtain complete insider lists with meaningful information, when poorly drafted lists were submitted which for example only contained names and surnames without any other requested details.

Time requirement for keeping lists of insiders

808. Article 5.4 of the Implementing directive 2004/72/EC states that lists of insiders shall be kept for at least five years after being drawn up or updated. Two Member States **(DE and LV)** have opted to implement a specified time of more than five years. In both cases the reason is the harmonization with other national law. One Member State **(DE)** has chosen a 6 year period to synchronize with the provisions of their national Commercial Code. The other Member State **(LV)** have implemented a 10 year period for lists of insiders to be kept, because the national limitation period for criminal liability on insider trading is 10 years. The rest of the Member States require the lists of insiders to be kept for five years or as the Directive states "at least five years".

809. All twenty nine Member States are satisfied with their practical application of the time requirement of keeping lists of insiders and find the rule effective in its application. One Member State **(IS)** has reported of problems with the time requirement of the keeping of lists of insiders. The competent authority has had to fine many issuers for not sending the lists on a six months basis. This problem is also affecting the 5 year rule. The Member State do not have any plans to change the time period for which lists of insiders have to be kept, but the competent authority has recently started to observe more closely that an issuer makes the lists and sends them on a regular basis.

810. Enforcement actions have been reported by two Member States **(IS** and **EE)**. The competent authority in one of the Member States has had to fine or make settlements with a few bonds

issuers who have neglected to make lists of insiders from the beginning of their issue. In the other Member State the competent authority has issued a precept to an issuer requiring it to include all insiders and date/time, when the persons gained access to inside information.

J1: Does your legislation require lists of insiders to state other items in addition to the identity of any person having access to inside information, the reason why any such person is on the list and the date at which the list of insiders was created and updated?

811. Eight Member States **(BE, DE, EL, LT, LV, NO, PL, SK)** replied that their legislation requires lists of insiders to state additional items to the those stated in the Implementing directive 2004/72/EC, whereas twenty one Member States **(AT, BG, CY, CZ, DK, EE, ES, FI, FR, HU, IE, IS, IT, LU, MT, NL, PT, RO, SE, SI, UK)** do not require any additional items.

J2: If yes, which are the items?

812. Most of the additional items have been included as they are deemed relevant and necessary information to facilitate future market abuse investigations. For example, some Member States (**BE, DE, EL, LT, NO, PL)** require the lists of insiders to state the date at which such persons acquired or lost the access to inside information. Four Member States **(DE, EL, LU** and **PL)** report of requirements of more than first name and family name as identification of the persons on the lists. Also, in one instance the additions are made to make the persons on the lists of insiders aware of their obligations and prevent from possible misconduct.

813. **BE**: Criterion b has been given some more detail, notably the date on which the persons on the insider list gained access to the inside information also has to be mentioned.

814. **DE**: Items are: 1.A clearly highlighted headline "Insider List" is required; 2.The identity of the person obliged to maintain the insider list; 3.The identity of the any person commissioned and authorized to maintain the insider list; 4.In addition to the identity of any person on the insider list by listing first name and family name, it is obligatory to state, date and place of birth as well as the private address; 5. The date at which any person was provided with an access to the insider information in question and, if applicable, the date at which this access was cancelled.

815. **EL**: The date at which such persons acquired or lost the said access to inside information; b) The Investor Ledger (Investor Account) with the Dematerialised Securities System and the transactions clearing code for derivative instruments traded on the Derivatives Market of the Athens Exchange.

816. **LT**: The reason why any such person is on the list and the date of the arising of the basis to include/exclude the person into /from the list the date at which the list of insiders was created and updated, information concerning issuer the person is associated (name, ISIN code).

817. **LU**: Strictly speaking, there is no additional information to be included in the insiders' lists but the Circular CSSF 07/280 of 5 February 2007 on implementation rules of the law of 9 May 2006 on market abuse, as amended clarifies the details of the information that has to be included. More precisely it specifies that i) the identity of any person having access to inside information (name, first name and residence: for practical reasons, the addresses of the issuer's employees may be set up and updated on a separate list, held by another department of the issuer (for instance Human Resources department), but shall mandatorily be indicated on the unique and exhaustive list to be transmitted to the CSSF upon request), ii) the reason why any such person is on the list (e.g. function and / or position with the employer) and iii) the date at which the list was created and updated.

818. **NO**: Insiders lists shall state: (cf. STA section 3-5 (2)) -the identity of persons with access to inside information, -the date and time the persons were given access to such information, -the

functions of the persons, -the reasons why the persons are on the list -the date of entries and changes to the list.

819. **PL**: Items on the insider list: - Name, surname, ID card number, present address; -Reasons why such person is on the list and connection with the issuer (legal); - When the person was granted access to the particular inside information (date); - Note concerning the fact that the person was informed about penal and administrative sanctions connected with unlawful disclosure and usage of the inside information; - Day of the creation of the list and updates.

820. **SK**: The position of any such person - the reason why any person is excluded from the list.

J3: If your legislation requires additional items in lists of insiders, please describe the reasons for this.

821. **BE**: This was considered as a useful clarification of the MAD-requirement to mention the reason for being on the insider list.

822. **DE**: 1. A clearly highlighted headline "Insider List" is required. Easy identification for BaFin of the submitted document; 2.The identity of the person obliged to maintain the insider list. Identification of the issuer to which the inside list relates; 3.The identity of the any person commissioned and authorised to maintain the insider list. Identification of the contact person in case of questions; 4. In addition to the identity of any person on the insider list by listing first name and family name, it is obligatory to state, date and place of birth as well as the private address. Identification of any persons on the insider list only by name would be insufficient, so that additional information for distinct identification is necessary; 5.The date at which any person was provided with an access to the insider information in question and, if applicable, the date at which this access was cancelled.Determination of the time period in which any person named on the insider list had access to inside information.

823. **EL**: The additional items were considered necessary to facilitate future investigations.

824. **LT**: Additional items are required in order to create effective queries looking for possible insider dealing cases using IT tool for the market supervision.

825. **LU**: As already mentioned in our answer to question J2 (word document it is no 2) the Luxembourg legislation does not require additional information but clarifies the information that is required. This specification is included in order to assure that the insiders' list contain meaningful and complete information.

826. **NO**: Pursuant to Norwegian law it is required to include the date and time the persons were given access to such information and the functions of the persons, to the list, as this is relevant information to the authorities when conducting an investigation.

827. **PL**: Polish law demands the issuer to inform the person on the responsibility in order to make the person aware of his obligations and prevent from possible misconduct.

828. **SK**: It is a result of transposition of MAD into our legislation, chosen by Slovak legislator (Ministry of Finance of the Slovak Republic). We are not aware of any such reason.

J4: Are you satisfied with the practical application of requiring/not requiring additional items in the lists of insiders?

829. Twenty six Member States **(BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LU, LT, LV, MT, NL, NO, PL, RO, SE, SI, SK)** are satisfied with the practical application of requiring/ not requiring additional items in the lists of insiders, whereas **PT** and **UK** are not satisfied with their practical application of not requiring additional items. **AT** has replied to the question as n/a.

J5: Is this option considered effective in its application?

830. Twenty six Member States **(BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LU, LT, LV, MT, NL, NO, PL, RO, SE, SI, SK)** consider their option of requiring/ not requiring additional items in the lists of insiders effective in its application, whereas **PT** and **UK** do not find their option effective in its application. **AT** has replied to the question as n/a.

831. **UK**: The list compiled by issuers requires the inclusion of only those "persons acting on their behalf or for their account". However, when conducting a preliminary market abuse enquiry, a competent authority needs to review a wider list showing all those individuals who could have had access to the inside information. Whilst we do not think that it would be proportionate to extend the obligation to maintain this additional detail as a matter of course, we think it is important that the competent authority is able to obtain this detail on individual cases as required. The current framework does not provide the necessary powers. FSA's experience is that advisers not subject to financial regulation such as law firms or public relations firms engaged by the issuer have sometimes refused to provide this additional information unless a formal enforcement investigation has been launched by the FSA (in which case we can compel the firm to provide the information). At an early stage of an enquiry it may not be proportionate or an effective use of resources to launch such an investigation.

832. Advisors to the issuer may in turn employ firms to undertake specific tasks that might not be directly charged to the issuer. Our interpretation of the Directive text: "Member States shall require that issuers, or persons acting on their behalf or for their account, draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information" is that there is no requirement for these firms to be included on the insider lists maintained by the issuer. FSA's experience in requesting insider lists from regulated advisors frequently shows them as unwilling to coordinate the inclusion of firms employed by them.

J6: Have you encountered any problems with requiring/not requiring additional items in the lists of insiders?

833. Two Member State **(PT, UK)** have encountered problem with not requiring additional items in the lists of insiders, whereas twenty seven Member States **(AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LU, LT, LV, MT, NL, NO, PL, RO, SE, SI, SK**) have not encountered problem with requiring/not requiring additional items in the lists of insiders.

J7: If yes please provide us with a description of the problems encountered.

834. **PT**: The information in insider's list is frequently, on the one hand, too broad (too many people) and, on the other hand, not specific enough (dates of meetings in which people were present, etc). Therefore, using the general powers to require information for the purposes of an investigation, CMVM usually asks the issuer (or other entity with connection with the concrete event, eg a bidder) to provide a document with that kind of details: dates of meetings, people present, and subjects debated).

835. **UK**: When requesting insider lists we find that we are in need of detailed information such as home addresses and personal telephone numbers. For this reason we request information from regulated firms using alternative powers.

J8: Are there any plans to change the present requirements of items in the lists of insiders?

836. None of the 29 Member States have any plans to change their present requirement of items in the lists of insiders.

J10: Have you had enforcement action undertaken by your Authority or court cases on the issue of (additional) items to be included in lists of insiders?

837. Two Member States **(FR, LU)** have had enforcement actions undertaken on the issue of (additional) items to be included in lists of insiders. Twenty-seven Member States **(AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IS, IT, LT, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK)** reported of having had no enforcement actions on this issue.

J11: If yes please describe the most relevant examples.

838. **FR**: The AMF has recently carried out several investigations where it has been noticed that insiders list had been established on the request of the investigators, instead of being set up a priori, as provided for by the AMF General Regulation. Furthermore, these lists of insiders are not always consistent: their scope is either too limited or too extensive. The AMF has sent letters to the concerned companies on several occasions to remind them of the applicable rules.

839. **LU**: The CSSF has issued some injunctions in order to obtain complete insider lists with meaningful information, when poorly drafted lists were submitted which for example only contained names and surnames without any other requested details.

J12: For how long does your legislation require that lists of insiders are kept after being drawn up or updated?

840. Two Member States **(DE, LV)** replied that their legislation require lists of insiders to be kept for more than five years, while twenty-seven Member States **(AT, BE, BG, CY, CZ, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LT, LU, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK)** requires the lists to be kept for five years or at least five years.

J13: If more than five years, how many please?

841. **DE** requires six years. **LV** requires 10 years.

J14: If your legislation requires lists of insiders to be kept for more than five years, please describe the reason why your legislation has chosen this option.

842. **DE**: The six years period was chosen to synchronize this provision with the according provisions of the German Commercial Code (HGB).

843. **LU**: It is a literal transposition of the directive.

844. **LV**: Because the limitation period for criminal liability on insider trading is 10 years

J15: Are you satisfied with the practical application of the requirement to keep lists of insiders for five years/more than five years?

845. All Member States are satisfied with their practical application of the requirement to keep lists of insiders.

846. **Do you consider this rule effective in its application?**

847. All Member States consider their rule to be effective in its practical application.

J17: Have you encountered any problems with the time requirement to keep lists of insiders?

848. Only one Member State **(IS)** reports of having encountered any problem with the time requirement to keep lists of insiders.

J18: If yes please provide us with a description of the problems encountered.

849. **IS**: The Authority has had to fine many issuers for not sending the lists on a six months basis. A few issuers, bonds issuers, have even neglected to do so until the intervention of the Authority. This problem is of course also affecting the 5 year rule.

J19: If you have encountered any problems, are there any plans to change the time that lists of insiders have to be kept?

850. **IS**: There is no plan to change the time but the Authority has recently started to observe more closely that an issuer makes the lists and sends them on a regular basis.

J20: Have you had enforcement action undertaken by your Authority or court cases on the keeping of the lists of insiders?

851. Four Member States **(EE, IS, LV, NL)** have had enforcement action taken on the keeping of lists of insiders, whereas twenty five Member States **(AT, BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LU, LT, MT, NO, PL, PT, RO, SE, SI, SK, UK)** have not had any enforcement actions taken on this issue.

J21: If yes, please describe the most relevant examples.

852. **EE**: The EFSA has issued a precept to an issuer requiring it to include all insiders and date/time, when the persons gained access to inside information.

853. **IS**: See answer to J18. The Authority has had to fine or make settlements with a few issuers, bonds issuers, who have neglected to make such lists from the beginning of their issue.

854. **LV**: The sanctions were applied to issuers in cases when the list of insiders was not promptly updated.

855. **NL**: In one case, the insider list of a company involved in a takeover bid was not complete. This helped prove that price sensitive information had not been kept confidential.

Appendix

Article 5 of Commission Directive 2004/72/EC

1. *For the purposes of applying the third subparagraph of Article 6(3) of Directive 2003/6/EC, Member States shall ensure that lists of insiders include all persons covered by that Article who have access to inside information relating, directly or indirectly, to the issuer, whether on a regular or occasional basis.*

2. *Lists of insiders shall state **at least**:*

(a) *the identity of any person having access to inside information;*
(b) *the reason why any such person is on the list;*
(c) *the date at which the list of insiders was created and updated.*

3. *Lists of insiders shall be promptly updated*

(a) *whenever there is a change in the reason why any person is already on the list;*
(b) *whenever any new person has to be added to the list;*
(c) *by mentioning whether and when any person already on the list has no longer access to inside information.*

4. *Member States shall ensure that lists of insiders will be kept for **at least** five years after being drawn up or updated.*

5. *Member States shall ensure that the persons required to draw up lists of insiders take the necessary measures to ensure that any person on such a list that has access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions attaching to the misuse or improper circulation of such information.*

Section K. Threshold – Article 6 paragraph 1 a) of Directive 2003/125/EC

856. This section is related to the MAD option whereby Member States – as for the disclosure, in recommendations, of cross-shareholdings that exist between the relevant person and the issuer (and *vice versa*) – may provide a lower shareholding threshold than the one provided in the Directive: exceeding 5% of the total issued share capital in the issuer / of the total issued share capital of the relevant person.

K1. Does your legislation require that recommendations disclose shareholdings between the relevant person or any related legal person and the issuer when the shareholdings held by the relevant person or any related legal person are equal or below 5% of the total issued share capital of the issuer?

857. Five Member States **(BG, IT, NL, PL and PT),** replied that their legislation requires that recommendations disclose shareholdings between the relevant person (or any related legal person) and the issuer when the shareholdings held by the relevant person (or any related legal person) are equal or below 5% of the total issued share capital of the issuer.

858. Twenty four Member States **(AT, BE, CY, CZ, DE, DK, EE, EL, ES, Fl, FR, HU, IE, IS, LT, LU, LV, MT, NO, RO, SE, SI, SK, UK)** provided a negative answer to the question since their legislation kept the threshold provided in the Directive (exceeding 5%).

K2. If yes, which are the relevant thresholds provided?

859. Three Member States (**BG, NL, PL)** set the relevant threshold at 5%, and two Member States, **(IT, PT)** set such threshold at 2%.

860. **BG**: We have kept the threshold stated in the Directive and also have included the holdings of exactly 5%.

861. **IT**: The relevant threshold is 2%

862. **NL**: The thresholds for major holdings apply, as well as any other material financial interests.

863. **PL**: the relevant threshold is 5%

864. **PT**: The relevant threshold is 2%, in accordance with the definition of "qualifying holdings" (regarding communication duties for listed companies in regulated markets). However, it could be the case where a lower holding has to be disclosed if it constitutes a "significant financial interest" that might impair the objectivity of the recommendation as foreseen in Directive 2003/125/EC.

K3. Does your legislation require that recommendations disclose shareholdings between the relevant person or any related legal person and the issuer when the shareholdings held by the issuer are equal or below 5% of the total issued share capital of the relevant person or any related legal person? (Yes – No)

K4. If yes, which are the relevant thresholds provided?

865. The answers to questions K3 and K4 are identical to the ones given to K1. and K2, with the exception of **NL**.

866. **NL**: The option as mentioned under question K3 has not been implemented in the Netherlands; there is no obligation for a recommendation to state holdings of an issuer in the relevant person. Only the option under 1 has been implemented (the relevant person's holdings in the issuer).

K5. Please describe the reasons why your legislation provides for the option used in relation to 1 and 3. (i.e. why your legislation provides for lower threshold than required in the Directive or sets the threshold possible under the Directive).

867. The reasons presented by the five Member States **(BG, IT, NL, PL, PT),** whose legislation provide a lower threshold than the required in the Directive are the following:

868. **BG**: By transposing the text from the Directive the legislator has adopted the required threshold of 5 % for disclosure of shareholdings. The chosen option is based on the necessity for disclosure only the major shareholdings when the person could be interested to a greater extent and respectively not so objective when drawing up and dissemination of recommendations.

869. **IT**: Italian legislation provides for lower threshold than required in the directive to harmonize such provisions with the Italian provisions on information about major holdings.

870. **NL**: Under current legislation, a five percent threshold applies. This threshold will be lowered to three percent for all major holdings.

871. **PL**: In the Polish jurisdiction protection of minor shareholders' law starts at the 5% threshold (please compare notification obligations) and therefore that is the threshold that was chosen.

872. **PT**: The relevant threshold is 2%, in accordance with the definition of "qualifying holdings" (regarding communication duties for listed companies in regulated markets). However, it could be the case where a lower holding has to be disclosed if it constitutes a "significant financial interest" that might impair the objectivity of the recommendation as foreseen in Directive 2003/125/EC.

873. Out of the twenty four Member States who replied that their legislation has not opted to lower the threshold, nine Member States (**CZ, DE, EE, ES, MT, NO, RO, SI, SK)** described their reasons as following:

874. **CZ:** The limit is low enough; many persons own some parts of legal entities without to have any other connections to them.

875. **DE**: Reflecting the concept of materiality.

876. **EE**: The threshold provided by the Directive is considered effective.

877. **ES**: We decided to use the same threshold that the Directive because we consider that the 5% threshold is proportionate.

878. **MT**: The Authority deems the thresholds as set under the Directive to be suitable, and is currently not considering lowering these thresholds.

879. **NO**: The Norwegian legislation sets the same threshold as the Directive.

880. **RO**: The threshold of 5% is proportionate with the size and liquidity of the national market.

881. **SI**: The agency's by-law defines threshold above 5% of the total issued share capital of the issuer.

882. **SK**: It is a result of transposition of MAD into our legislation, chosen by Slovak legislator (Ministry of Finance of the Slovak Republic). We are not aware of any such reason.

K6. Are you satisfied with the practical application of the option you have chosen? (Yes – No)

883. Twenty-four Member States **(BE, CY, CZ, DE, DK, EE, EL, ES, Fl, FR, HU, IE, IS, LT, LU, LV, MT, NO, RO, SE, SI, SK, UK),** are satisfied with the practical application of the option to keep the threshold provided in the Directive.

884. Five Member States **(BG**, **IT, NL**, **PL, PT),** are satisfied with the practical application of the option to provide a threshold lower than the one provided in the Directive.

885. **AT** has answered "not applicable".

K7. Do you consider this option effective in its application? (Yes – No)

886. Twenty eight Member States **(BE, BG, CY, CZ, DE, DK, EE, EL, ES, Fl, FR, HU, IE, IS, IT, LT, LU, LV, MT, NL**, **NO**, **PL, PT, RO, SE, SI, SK, UK)** consider their option (see K6.) effective in its application.

887. **AT** has answered "not applicable".

888. While considering the option chosen effective, four Member States, (**BE**, **EL, IS, PT),** made a note as following:

889. **BE**: Belgium has not used the option to lower the thresholds for disclosures in the field of investments recommendations, and there are currently no plans to do so. In other words, it is satisfied with the current situation where the option to lower the thresholds has not been lifted.

890. **EL**: It should be noted that the HCMC considers that the threshold of 5% applies to all major shareholdings of the total issued share capital of the issuer that all the related legal persons hold together, as well as to all the major shareholdings of the issued capital of the relevant person and every related legal person that the issuer hold.

891. **IS**: There have been no cases so far where this has been seen to be neglected.

892. **PT**: CMVM considers the option made effective, although we also consider that the MAD regime regarding investment recommendations is less effective than actually needed for the purposes of protecting the Market against abuses. In fact, on one hand, the regime is restricted to transparency obligations and, to ensure market integrity, prohibitions to enter into transactions should also be foreseen. On the other hand, the transparency obligations do not cover disclosure of transactions made by the legal person responsible for the recommendation in the period when the recommendation has been disseminated and the market is driven by the impact of that dissemination. This disclosure would be essential for the investors to properly assess both the objectivity of the recommendation and the eventual interest of the firm responsible for the recommendation in its dissemination.

K8. Have you encountered any problems with the option you have chosen?

893. Twenty eight Member States **(AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FR, HU, IE, IS, IT, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK),** have not reported any problem.

894. One Member State (**FI**), has reported a problem with the option chosen.

K9. If yes, please provide us with a description of the problems encountered.

895. **FI**: There have been some uncertainty on how that 5 % threshold should be calculated at company level (e.g. by investment firm) - all the holdings of affiliate companies together or separately etc

K10. Are there any plans (thoughts) to change your option in order (i) to lower the threshold, if your legislation has opted to keep the Directive threshold, or (ii) to elevate the threshold, if your legislation has opted to provide lower threshold?

896. Twenty-eight Member States **(AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LT, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK, UK)** have not plans to change the option made.

897. In one Member State (**NL)**, there are plans to change the option, as following:

898. **NL**: The thresholds for Article 6 MAD refer to those set under the Transparency Directive. The Ministry of Finance will lower [to 3%] the thresholds for the notification of major holdings under the TD. This will automatically lower the thresholds set for Article 6 of MAD. There will be no separate adjustment to the Article 6 thresholds.

K11. Did you have any enforcement action undertaken by your Authority of court cases on this matter?

K12. If yes, please describe the most relevant examples.

899. None of the Member States has reported any enforcement action or court case related to the disclosure of cross-shareholdings in recommendations.

Annex

Article 6 paragraph 1 a) of Directive 2003/125/EC

"Member States shall require that any recommendation produced by an independent analyst, an investment firm, a credit institution, any related legal person, or any other relevant person whose main business is to produce recommendations, discloses clearly and prominently the following information on their interests and conflicts of interest:

(a) major shareholdings that exist between the relevant person or any related legal person on the one hand and the issuer on the other hand. These major shareholdings include at least the following instances:

— when shareholdings exceeding 5 % of the total issued share capital in the issuer are held by the relevant person or any related legal person, or

— when shareholdings exceeding 5 % of the total issued share capital of the relevant person or any related legal person are held by the issuer.

***Member States may provide for lower thresholds than the 5 %** threshold as provided for in these two instances;"*

Section L. Obligations in relation to fair presentation of recommendations – Article 4 paragraph 1 of the Implementing Directive 2003/125/EC

900. This section is related to the MAD option whereby Member States can impose obligations in relation to fair presentation of recommendations, in addition to those obligations laid down under Article 3 and Article 4(1) of the Directive 2003/125/EC.

901. Only two Member States (**DE, IS**) impose other obligations in relation to fair presentation in addition to those laid down in Article 3 and Article 4(1) of the Directive 2003/125/EC.

902. **DE** imposes that persons who prepare recommendations are obliged to do so with the requisite degree of expertise, care and conscientiousness. In **IS** the person needs to ensure that when an update of a recommendation takes place, the information of possible conflict of interests should also be updated.

903. **All** Member States except one (**PT**)are satisfied with the option they have chosen.

904. Two Member States (**DE, PT**) have encountered problems with the option they have chosen.

905. **DE** encountered some difficulties in defining how to prepare analysis of financial instruments with the requisite degree of expertise, care and conscientiousness. PT issued a set of non-compulsory obligations in relation to fair presentation of recommendations.

906. None of the Member States have plans to change the existing requirements.

L1: Does your legislation impose other obligations in relation to fair presentation of recommendations in addition to those laid down under Article 3 and Article 4(1) of the Directive 2003/125/EC?

907. Only two Member States (DE, IS) impose other obligations in relation to fair presentation in addition to those laid down in Article 3 and Article 4(1) of the Directive 2003/125/EC.

L2: If yes, please describe what additional obligations and provide reasons for this.

908. **DE**: The German Securities Trading Act (Wertpapierhandelsgesetz) imposes that persons who prepare recommendations are obliged to do so with the requisite degree of expertise, care and conscientiousness. Also companies other than investment firms which prepare or communicate financial analyses have to be organised in such a way that conflicts of interest remain as infrequent and insignificant as possible. In particular, they must maintain appropriate control mechanisms capable of countering any contravention of the statutory obligations.

909. **IS**: The relevant national regulation also states that the person needs to ensure that when an update of a recommendation takes place, the information of possible conflict of interests should also be updated. This applies even though the recommendation is in any other way unchanged, i.e. there has to be an announcement that the earlier recommendation on the same financial instrument or issuer can be found /accessed.

L3: Are you satisfied with the practical application of imposing (or not imposing) other obligations in relation to fair presentation of recommendations in addition to those laid down under Article 3 and Article 4(1) of the Directive 2003/125/EC?

910. **All** Member States except one (**PT**) are satisfied with the option they have chosen.

L4: Is this option considered effective in its application?

911. For **all** Member States except on (**PT**) this option is considered effective in its application.

L5: Have you encountered any problems with the option you have chosen?

912. Two Member States (**DE, PT**) have encountered problems with the option they have chosen.

L6: If yes, please provide a description of the problems encountered.

913. **DE**: Because of many different existing approaches of preparing analyses of financial instruments, it is sometimes difficult to clearly define how to do so with the requisite degree of expertise, care and conscientiousness. Too detailed obligations may conflict with the fundamental right of freedom of profession.

914. **PT**: When analysing investment recommendations that are based on a non-fundamental approach (e.g. technical analysis), some of the obligations set out in Article 3 and 4 have proved hard to apply (such as those related to price-targets and estimates). In addition to the obligations laid down in articles 3 and 4, CMVM disclosed a set of non-compulsory obligations / soft law in relation to fair presentation of recommendations (August 2008) in order to include: i) reference to the eventual previous knowledge and validation by the issuer of the assumptions considered; ii) appropriate risk warnings associated with the recommendation, such as future changes in the company's operating environment, changes in estimates, assumptions and/or valuation methodology; iii)disclosure at the end of each calendar quarter on investment firms and credit institutions website of the recommendation of the previous 12 months organised by issuer, including reference to the publication date, price target, recommendation, time horizon of the recommendation and name of the analyst responsible for each recommendation, as well as an analysis of the deviation of price-target versus market prices.

L7: Are there any plans (thoughts) to change the present requirements in relation to the fair presentation recommendations?

915. **No** Member States reported plans to change the present requirements.

Appendix

Article 4 paragraph 1 of the Directive 2003/125/EC

"Additional obligations in relation to fair presentation of recommendations

In addition to the obligations laid down in Article 3, where the relevant person is an independent analyst, an investment firm, a credit institution, any related legal person, any other relevant person whose main business is to produce recommendations, or a natural person working for them under a contract of employment or otherwise, Member States shall ensure that there is appropriate regulation in place to ensure that person to take reasonable care to ensure that at least:

(a) all substantially material sources are indicated, as appropriate, including the relevant issuer, together with the fact whether the recommendation has been disclosed to that issuer and amended following this disclosure before its dissemination;

(b) any basis of valuation or methodology used to evaluate a financial instrument or an issuer of a financial instrument, or to set a price target for a financial instrument, is adequately summarised;

(c) the meaning of any recommendation made, such as buy, sell or hold, which may include the time horizon of the investment to which the recommendation relates, is adequately explained and any appropriate risk warning, including a sensitivity analysis of the relevant assumptions, indicated;

(d) reference is made to the planned frequency, if any, of updates of the recommendation and to any major changes in the coverage policy previously announced;

(e) the date at which the recommendation was first released for distribution is indicated clearly and prominently, as well as the relevant date and time for any financial instrument price mentioned;

(f) where a recommendation differs from a recommendation concerning the same financial instrument or issuer, issued during the 12-month period immediately preceding its release, this change and the date of the earlier recommendation are indicated clearly and prominently."

Section M. Disclosure of other items – Article 5 Paragraph 2 of the Implementing Directive 2003/125/EC

916. This section is related to the option whereby Member States may request, where the relevant person is a legal person, the disclosure of other items in addition to those laid down under Article 5(2) of the Directive 2003/125/EC

917. Only one Member State (**NL**) requires that the information to be disclosed should include other items in addition to those laid down under Article 5(2) of Directive 2003/125/EC.

918. **All** Member States except one (**PT**) are satisfied with the option they have chosen.

919. Two Member States (**FI** and **PT**) have encountered problems with the application of the option they have chosen. In **FI** the problem relates to uncertainty regarding what such conflict of interest might be in practice. **PT** issued a set of non-compulsory obligations to ensure a fair disclosure of conflict of interest to the public is achieved.

920. None of the Member States have plans to change existing requirements.

M1: Where the relevant person is a legal person, does your legislation require the information to be disclosed in accordance with Article 5(1) of Directive 2003/125/EC to include other items in addition to those laid down under Article 5(2) of Directive 2003/125/EC?

921. Only one Member State (**NL)** requires that the information to be disclosed should include other items in addition to those laid down under Article 5(2) of Directive 2003/125/EC.

M2: If yes, please describe what additional items and provide the reasons.

922. **NL**: Any other material financial interest, acting as market maker or liquidity provider, being part to an agreement with the issuer related to publishing the investment advice, being party to any agreement with the issuer, having bought or placed newly issued shares in the last twelve months.

M3: If your legislation requires additional items to be included in the information to be disclosed under Article 5(1) of Directive 2003/125/EC, are you satisfied with the practical application of this option?

923. This question was only relevant to the Netherlands, who is satisfied with the option they have chosen.

M4: Do you consider this option effective in its application?

924. Only **PT** considered this option to be not effective in its application.

M5: Have you encountered any problems with the option you have chosen?

925. Two Member States (**FI and PT)** have encountered problems with the application of the option they have chosen.

M6: If yes, please provide a description of the problems encountered.

926. **FI**: There has been some uncertainty about what such conflicts of interest in practice would be

PT: Through the practical application of the regime, it became evident that the existing rules regarding disclosure of interest were not comprehensive and detailed enough for the purpose of ensuring a fair disclosure of conflicts to the public. Therefore, CMVM disclosed a set of non-compulsory obligations (soft law) requiring the disclosure of additional items relating to existing and/or potential conflicts of interest, namely: i) any syndicated agreement to assist in or place the securities of the issuer in which the author of the recommendation participated regardless of the nature of this participation; ii) any existing or past commercial relations between the issuer, the author of the recommendation and any related legal person.

M7: Are there any plans (thoughts) to change your option?

927. No Member States reported plans to change the present requirements.

Appendix

Article 5 Paragraph 2 of the Directive 2003/125/EC:

"General standard for disclosure of interests and conflicts of interest

1. […]

2. Where the relevant person is a legal person, the information to be disclosed in accordance with paragraph 1 shall at least include the following:

(a) any interests or conflicts of interest of the relevant person or of related legal persons that are accessible or reasonably expected to be accessible to the persons involved in the preparation of the recommendation;

(b) any interests or conflicts of interest of the relevant person or of related legal persons known to persons who, although not involved in the preparation of the recommendation, had or could reasonably be expected to have access to the recommendation prior to its dissemination to customers or the public."