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## 3L3 DELEGATION TASK FORCE

### DELEGATION OF RESPONSIBILITIES

#### I. Introduction- Background information

1. The Ecofin Council has on several occasions urged the L3 Committees to examine the issue of delegation of tasks/competences<sup>1</sup> between the competent authorities and to assist the European Commission in the review of the financial services Directives with a view to include provisions on the voluntary delegation of tasks and in the analysis of the options for voluntary delegation of supervisory competences. Moreover, the 3L3 Committees have conducted sectoral work in the area of delegation and similar areas.

2. Following the Ecofin's requests, the 3L3 Committees have agreed on the creation of a specific task force on delegation which -according to its mandate- would examine and analyse the legal/technical aspects of the delegation of tasks and of the delegation of competences<sup>2</sup>

3. In June 2008, the European Commission addressed a letter<sup>3</sup> to the Chairs of the 3L3 Committees asking for a report to be prepared on the delegation of tasks and responsibilities with particular focus on the establishment of key common principles for delegation of tasks and responsibilities and the identification of possible EU and national legal and practical obstacles to delegation. The 3L3 task force has deliberated its advice on the delegation of tasks at the end of September 2008<sup>4</sup>. Following that, the Chairs of the 3L3 Committees have requested the task force to pursue its work on delegation of responsibilities<sup>5</sup>.

4. In response to this decision, the 3L3 Committees conducted a fact finding/mapping exercise on the delegation of responsibilities in the different Member States and more specifically on a) the current national legal and regulatory frameworks on the delegation of responsibilities, b) possible legal obstacles and practical problems to such delegation and c) possible areas of delegation of responsibilities. The responses to this exercise served as the basis of the task force's discussions.

5. Moreover, at its meeting on 15<sup>th</sup> November 2008, the G20 stressed the need for reinforcement of the international cooperation under the form of establishment of the supervisory colleges for cross-border cases, the cooperation and communication, exchange and collection of information and convergence<sup>6</sup>.

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<sup>1</sup> Extract of the Ecofin Council conclusions of 4 December 2007 : "*The Council STRESSES the need for efficient and effective supervision of cross-border groups and to that end:*

– *INVITES the Commission to review financial services Directives, where still necessary, to include provisions to enable the use of the voluntary delegation of tasks. In addition, the Commission, as well as the Level 3 Committees, are INVITED to analyse the options for the voluntary delegation of supervisory competences;*

*The Commission and the level 3 committees by the end of 2008 to review financial services Directives to include provisions to enable the use of the voluntary delegation of tasks and analyse the options for voluntary delegation of supervisory competences*".

<sup>2</sup> Mandate of the Delegation task Force, Ref. 08-...

<sup>3</sup> EC letter of the 5<sup>th</sup> of June 2008 (DG Markt/BPC/Ip(2008)6108

<sup>4</sup> Ref. 08-744

<sup>5</sup> Summary of conclusions of the 32<sup>nd</sup> meeting of CESR, *equivalent decisions of CEBS and CEIOPS and ....3L3 Chairs decisions*).Reference to 3L3 Chairs meetings and 3L3 work programmes for 2008 and 2009

<sup>6</sup> Declaration-Summit on Financial Markets and the World Economy, November 15, 2008



## II. Analysis

### 1. Terminology issues-The notion of the “Delegation of responsibilities”

6. The task force discussed whether this type of delegation should be referred to as delegation of responsibilities, of decisions or of competences or by any other appropriate term. After due consideration, it came to the conclusion that “delegation of responsibilities” is the most appropriate term.

7. “Delegation of responsibilities” reflects the ideas of the supervisors entrusting the supervision of a certain supervisory matter or of an entity, e.g. a subsidiary or of a transaction to another supervisor. This type of delegation includes not only the final supervisory decision – the approval or rejection of certain matters, if any decision is needed – but all, often complex preparatory activities preceding the final determination as well as the follow-up of the final determination. It better expresses the continuous/ongoing nature of most possible delegation activities, and includes the fact that the responsibility for a certain determination has, at least for the period agreed, been transferred to another supervisor. It also includes the issues of supervisory liability, to be discussed infra.

8. Some EU Directives in the financial services’ field contain references to delegation in one form or another (for the specific provisions, please refer to Annex I). From the excerpts one can determine that directives contain different terminologies, and usually it is not clear whether these provisions refer to **the delegation of responsibilities or the delegation of tasks** (for the distinction between delegation of responsibilities and delegation of tasks, please see below under section 2.) The Directives indeed do not distinguish between the two forms of delegation: they are neutral. Moreover, it is not clear from the wording of these provisions whether they also refer to/ encompass the **cross-border** delegation of responsibilities or tasks or only the delegation that can take place at the national level from the competent authority to another authority of the same Member State or from the competent authority to a third entity within the same Member State.

9. However, this document does not deal per se with the differences in wording of the current Directives, but gives an overview of the pros and cons of delegation of responsibilities and possible issues that need to be tackled.

10. The notion of delegation of responsibilities refers to cases whereby one supervisor (the “delegatee”), on the basis of legal texts permitting such delegation and a delegation agreement decides upon a certain supervisory matter in its own name in lieu of another supervisor (the “delegator”), who would initially be the competent supervisor on the basis of the applicable legal and regulatory framework.

11. As a consequence, the delegator would be bound by the decision of the delegatee, and will not be entitled to challenge this decision or intervene in the decision-making process. In case of persistent disagreement, the delegation agreement would first have to be terminated, after which the delegator will recover its responsibility. The delegator could only “re-gain” its power to issue decisions on the issues or areas that were delegated and impose new decisions for the future, after notice of termination of the agreement has been given.

12. By virtue of the delegation of responsibilities, the delegatee would be fully entitled to take the decision. This leads to the question according to which legal system the delegation will have to be construed: one should distinguish here between the effect among the supervisors involved in the delegation, and the effect to third parties (firm subject to the delegated supervision, creditors, clients/investors other stakeholders etc.). Among the supervisors, the applicable rules would have to be detailed in the delegation agreements, but as far as the relation with third parties is concerned, the most reasonable solution is that, the decision will be subject to the law of the delegatee, will be reviewable before the delegatee’s judicial bodies, might trigger liability according to the rules applicable to the delegatee (see further under sections 6 on liability and 7 on accountability) and be enforced according to the rules of the delegatee. These basic rules should expressly be determined in the EU Directives that will provide the legal basis for the delegation of responsibilities. Moreover, it should be clear that the decision of the delegatee will be binding in the jurisdiction of the delegator for the delegated cases. The EU law should also clearly provide for the possibility of the competent authorities to enter into a delegation agreement.



13. Delegation of responsibilities may take different forms. One could distinguish between different grades, which may, sometimes, occur within the same subject matter:

- a- A simple form is the one in which delegation relates to a single/one-off determination: e.g. delegation of the decision about whether a manager is “fit and proper” may be cited as a possible example<sup>7</sup>, delegation of the approval of a prospectus for public offer of securities in accordance with Art. 13 of the Prospectus Directive, etc.
- b- Ongoing supervision would result in a follow-up either of a single initial decision (e.g. does the person continue to be “fit and proper”?) or of more complex decisions (e.g. approval of internal rating based model, supervision of the financial statements of listed companies etc.) and
- c- Ongoing supervision on an entire entity: all aspects of the supervision of a foreign branch are delegated by the home supervisor to the host supervisor, or referring to art. 131 of CRD, all group related powers are delegated to the home supervisor.

14. Further analysis is likely to reveal more shades and in fact, a continuous scale of forms of delegation that could be involved in one single delegation matter. The complexity of the relationship, and hence of the resulting legal and other problems should not be underestimated.

## 2. Delegation of responsibilities versus delegation of tasks and mutual recognition.

15. For clarity purposes it is useful to compare delegation of responsibilities with other similar “techniques” such as the delegation of tasks and mutual recognition, the later being the standard instrument in present European law for the coordination of the supervisory action in cross-border supervisory matters.

16. The **delegation of responsibilities differs from the delegation of tasks**: although in both cases, the delegation may include the accomplishment of certain material or intellectual tasks, delegation of responsibilities results in a change in the allocation of decision making power. The decision of the delegator, competent on the basis of the applicable legal and regulatory framework, will be substituted or replaced by a decision of the delegatee. The decision of the delegatee would have the same legal value as the decision of the delegator, both vis-à-vis the supervised entity and vis-à-vis other third parties, such as courts, investors and other supervisors (for more analysis on the differences between the delegation of tasks and the delegation of responsibilities, please see the 3L3 paper on the Delegation of Tasks<sup>8</sup>).

17. Under the mutual recognition regime, the decisions of the home supervisor extend to all the EEA markets where a supervised entity is present (e.g. supervision of branches) or where the transaction is executed (e.g. public offering of securities). Normally the supervisors of the other jurisdictions concerned have no right to intervene in the matter (“European passport”), or have limited rights in certain supervisory areas (e.g. supervision for branches under MiFID). Home state decisions are executable in other jurisdictions, and are only reviewable according to home state procedures. Liability would be governed by the home state. Supervisory sanctioning would be subject to the home state rules, while the host state is not entitled to impose measures for misconduct within its jurisdiction, except in cases in which the home state repeatedly refuses to take action (e.g. “precautionary measures” under the securities’ law Directives).

18. The main difference between mutual recognition and delegation of responsibilities lies in the character (mandatory versus voluntary) and the basis (law, contractual relationship) of the two “techniques”. Mutual recognition is a mandatory process regulated by the EU law, competences and responsibilities are transferred to one authority (mostly the home supervisor) directly by virtue of EU law. The delegation of responsibilities, as described here, is a voluntary process whereby the transfer of responsibilities between two competent authorities takes place by virtue of the (existing, such as the Prospectus Directive or future) EU law implemented by a voluntary agreement drawn up in accordance with the rules laid down in the EU law. Therefore, while in the case of mutual recognition all aspects of the transfer of responsibility

<sup>7</sup> See separate work stream 3L3

<sup>8</sup> See above footnote 4



(including the areas, the applicable law which is the law of the home Member State) are regulated directly by EU law, in the case of the delegation of responsibilities the most important issues would be regulated directly by EU law and other, less important issues, would be agreed between competent authorities.

19. More specifically, the right and the power to delegate and to accept delegation should be firmly rooted in EU law, and after transposition, in national law. The relevant provisions should expressly state that the competent authorities have the right to delegate and explicitly detail the general conditions under which delegation can take place. The delegation framework would be complemented by a voluntary agreement between the concerned supervisors, whereby certain specific matters will be decided by the competent authorities that will be parties to this agreement. The EU legal framework should provide the legal basis/foundation and will regulate the most important/crucial issues such as the applicable law vis-à-vis third parties. This would avoid having to refer to one of the national legal systems as the applicable law, a difficult exercise as it would refer to rules of public law. The same approach should apply to the designation of the competent court, the liability of the authorities or the responsible authority for the enforcement and sanctioning decisions. Sanctioning of the supervised individuals or entities will be the competence of the delegatee, with a corrective mechanism in cases in which the delegatee repeatedly refuses to take action which would have to be based on the EU law, and could be further detailed in the delegation agreement.

20. On the contrary, for reasons of flexibility, the specific field(s) of delegation, the conditions, reporting rules and several other more detailed aspects will have to be determined in the agreement, and should not follow from the EU directive and its implementation into national law (for an indicative content of the delegation agreement see below under par. 50).

21. The effects of the delegation would be similar to those of mutual recognition: decisions by the delegatee would be recognised as legitimate decisions in all states and they would be reviewable according to the delegatee's legal procedures, including the application of the rules on liability.

22. Another difference between delegation of responsibility and mutual recognition relates to the **duration** i.e. indefinite and irrevocable competence in the case of mutual recognition and limitation in time or possibility of revocation in the case of voluntary delegation<sup>9</sup>.

### 3. Why delegation of responsibilities among financial supervisors could be useful

23. The political support for delegation of responsibilities seems essentially to be due to considerations of efficiency and effectiveness in structuring the future European supervisory system. The task force discussed the possible added value of the delegation of responsibilities as opposed to the similar techniques of mutual recognition and of the delegation of tasks, which might achieve comparable results.

24. As the integration of the European financial markets progresses, the advantage of the delegation of responsibilities as compared to mutual recognition is that such delegation would allow, without imposing strict and less adaptable mutual recognition instruments, to **allocate supervisory competence to the supervisor that is best placed to take cognizance of the subject matter**. This includes the fact that, from a very practical point of view, the supervised entity and the supervisor will be speaking the same language

25. This more flexible technique is especially useful in cases where both home and host supervisors have the same competences, avoiding therefore overlaps in supervisory work, or where in a group context two supervisors have competence over the same group of supervised entities (e.g. under MiFID where the home supervisor has competence over the parent company and partly over branches though the host supervisor has competence partly over the branches as well). In this case, certain matters can be better approached from a group perspective by the home supervisor or vice-versa where closer scrutiny by the host supervisor would be preferable. In these cases **economies of scale or of scope** will be realised.

26. **Better coherence of decisions** may also be achieved. Decisions with group wide effects would be more coherent if taken by one supervisor, although this might lead to different treatment of other supervised entities in the same Member State. For example, the determination of the fit and proper character of

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<sup>9</sup> Eddy Wymeersch, "Delegation as an instrument for financial supervision", December , 12 2006, Social Science Research Network (SSRN)





managers is today undertaken by each of the subsidiaries' supervisors. As these managers often change positions within the group, there might be a case for having the subject dealt with by one supervisor, the decision being recognised in all jurisdictions where the group is active.

27. In other cases, the advantage will essentially be to render the existing **system more flexible**, and hence **better adapted to the needs of the markets**. In case of approval of a prospectus, the prospectus directive provides that the home state of the issuer may agree with another supervisor, usually the state where the regulated market is located and where the securities will be traded, to transfer his power to the latter<sup>10</sup>

28. Another advantage of the delegation of responsibilities consists in the **better and more optimal use of the technical expertise** and the know-how of a supervisor. For example, delegation of the scrutiny and approval of a prospectus for the public offer may take place whereby one supervisor who is less experienced in dealing with certain more "complex" securities delegates to a supervisor that has the relevant expertise. In cases in which mutual recognition would lead to a too radical solution, delegation might allow the supervisor to find solutions that lead to the above advantages and are optimally adapted to the specific needs of the case to be dealt with.

29. In comparison to delegation of tasks, the delegation of responsibilities will lead to the **elimination of redundancies** in the supervisory work (as the delegator will not be obliged to "ratify"/ to "seal" the decision of the delegate. Provided these matters are clearly dealt with in the relevant EU Directives, greater clarity as to the applicable legal regime and with respect to the designation of the competent courts will also be achieved.

30. Moreover, delegation of responsibilities provides **a response to the agency problem** arising out of the delegation of tasks in the sense that a supervisor having the responsibility for certain matters is more likely to be more diligent fearing reputation damage and even liability.

#### 4. Legal and practical issues

31. Although Member States have transposed the directive provisions on delegation, including the case in which the Directive mandated to introduce delegation of responsibilities<sup>11</sup>, in practice this type of delegation of responsibilities occurs rather rarely. The task force has identified a number of reasons why competent authorities remain hesitant to delegate decision making powers. These are also the points on which a future directive will have to clarify the legal position.

32. Frequently mentioned are **the absence of clarity with regard to the legal basis and the modalities of the use of this instrument**. There is hesitation on the use of delegation at the national level, as this instrument is often unknown in the national legal order, where it may even raise constitutional questions. Issues are even more complex in cross border cases, as this type of delegation results in the transfer of sovereignty and administrative powers to another Member State. There have been few examples of explicit delegation of responsibilities in the Directives and there is little experience with this matter. Article 13 of the Prospectus Directive has, however, expressly allowed the power to approve a prospectus to be "transferred to another Member State" by mutual agreement. This power has been used in a certain number of cases, especially in cases where the delegatee's market was more directly concerned than the market of the delegator<sup>12</sup>.

33. The present Directives mention the possibility to delegate, without clearly defining the differences between delegation of tasks and delegation of responsibilities. Moreover, as the Directives do not contain the modalities along which delegation could be organised, national legislators have generally refrained from introducing useful rules guiding the action of national supervisors. A clear legal basis and the development of detailed guidance for organising delegation are therefore deemed indispensable, also as delegation may affect the position of the supervised entities. It might be useful to consider whether more detailed rules governing delegation could be devised by level 2 measures, supplemented by level 3 practical guidance.

<sup>10</sup> See for precise formulation, Annex I, under A2

<sup>11</sup> e.g. Art 13, par. 5 of the Prospectus Directive (see Annex I, under A2)

<sup>12</sup> "CESR's Report on the supervisory functioning of the Prospectus Directive and Regulation", June 2007, CESR/ 07-225, p. 13 and 14



34. A second reason why delegation is not frequently used is **the absence of clarity as to its legal consequences**. As long as the position of supervisors on issues such as liability, enforcement, sanctioning and accountability is not clarified, one cannot expect them taking the risk for being confronted with the unexpected consequences of decisions to delegate. These points will be further detailed in this report, with some indications as to possible solutions. In any case, the Directives, and the national laws implementing them, should contain clear rules about the legal consequences of delegation.

35. A third factor standing in the way of the use of delegation concerns the **differences in applicable rules**. Supervisors are unwilling to submit to the delegatee's jurisdiction if they fear that the latter will apply different and possibly weaker or unsatisfactory rules. The same argument may be raised about liability issues (see below under para.58 to 60)

36. A similar factor making difficult the delegation consists of the **differences in supervisory procedures and practices** followed in the different Member States. Therefore the task force underlines the importance of a sufficient degree of harmonisation of the substantive criteria, supplemented by convergence work by the Level 3 Committees so that delegation would not be used for the purposes of "forum shopping". The task force welcomed in that respect the ongoing work in the field of application of the "fit and proper" test for shareholders as this likely to result in sufficient supervisory comfort and may lead to delegation of responsibilities e.g. within groups of companies.

37. A fourth main factor is the **diversity of supervisory powers and of enforcement instruments**. These elements have been amply documented in several fact findings exercises undertaken by CESR, CEBS and by CEIOPS. In the absence of more harmonised rules in the supervisory and sanctioning powers' area clarity should at least exist about the system that will be designated to govern these issues.

38. Another factor is that delegation of responsibilities may result in the **different treatment of the same types of supervised entities in the same Member State**. For example, if the supervision of an entire group is delegated to the home supervisor, the rules and practices to be applied to the subsidiaries of the group will be those of the home (instead of the host) supervisor. Therefore, these subsidiaries will be treated differently from the other entities established in the same (host) Member State. However, a similar effect already exists on the basis of mutual recognition and it has been accepted as consequence of the internal market.

39. In cases of cross border delegation, there may be **procedural questions** as well, such as serving notice or imposing sanctions on a foreign person or entity, or launching investigations in another jurisdiction, the rights of the supervised individuals or entities and the recourse they have against the decision of the delegatee.

40. Other matters of a more technical nature should also be mentioned. The **use of different languages** may in some cases be a point of attention: although among supervisors the language of communication is established either by mutual agreement or by tradition, the question becomes much more complex when one deals with documents to be used in court proceedings. Translations will then have to be prepared. Another aspect of the same issue is the language to be used in the communication with the supervised individuals and entities. Members of the Committees indicated in their responses the possibility of regulating this issue at the EU level along the lines of the solution provided in the Prospectus and the Transparency Directives i.e. with the acceptance of a "language commonly used in the sphere of international finance" as a default option. Another possibility could be to allow the supervisors involved to agree on the language of communication e.g. taking into account the language used by the supervised entity.

41. Other practical issues to be taken into consideration are: the priorities imposed to the authorities, the availability of resources, cost sharing (see below under para 50) and the risk appetite of the authorities concerned. Depending on the national legislation, potential delegators will need to make a risk based decision on whether or not to engage in delegation of responsibilities to other supervisors .That is, they may identify advantages from doing so but, to the extent that there are uncertainties and differences of approach, there will also be risks.

42. For all the reasons mentioned above, rules might have to be provided for at the EU level, aimed at



achieving a high level of harmonisation that would obviate the need for additional national provisions.

43. Even if the delegation of responsibilities is permitted by law and could be considered as being in conformity with good supervisory practice, the delegator will also take into account, the practical issues mentioned above, its public accountability in its home state (“political” liability) especially when matters go wrong and investors lose money. All these factors could be mitigated if there were more harmonisation in the applicable rules and more convergence in the applicable practices.

## 5. Delegation agreements

44. Provided adequate solutions can be found for finding responses to the issues mentioned above, it is useful to reflect on the ways delegation of responsibilities could be made to work.

45. The task force underlines the importance of the voluntary character of delegation of responsibilities, and this for both parties. The authorities concerned should evaluate whether they want to enter into this agreement taking into account the proportionality between advantages and challenges.

46. As up to now there is little experience<sup>13</sup> with delegation, it would be premature to urge supervisors to enter into delegation agreement if there is not sufficient insight into the possible consequences of delegation arrangements. The experience shows that once negotiations for the signing of a specific agreement are undertaken among supervisors the real issues show up. Moreover, as delegation will affect responsibility, one would be ill advised to impose responsibility against the delegatee’s will, thereby possibly discharging the delegator. Delegation should be in the interest of both parties and of the supervised entities as well.

47. Depending on the possible future EU provisions on delegation, the delegation agreement could take several forms such as:

- *Multilateral* (e.g. with all the CESR authorities as signatories) or bilateral agreements (e.g. between two CESR authorities) or a combination of multilateral and bilateral agreements whereby the multilateral agreement sets the general framework and is complemented by bilateral agreements.
- *Sectoral* (e.g. between CESR authorities) or cross-sectoral (i.e. between a CESR authority and a CEBS or CEIOPS authority)
- From the *Home to the Host* competent authority or vice-versa regarding branches or both subsidiaries and branches
- On a *case by case* basis (e.g. for the supervision of a particular financial group, for a particular transaction or decision) or general approach (e.g. for all the EU supervised entities in case of a multilateral agreement or for all the entities that are supervised by two authorities that have signed a bilateral agreement)
- For a *particular subject* (e.g. fit and proper) or for a series of decisions or for the follow up on previous decisions (review of fit and proper on a periodic basis, or upon discovery of certain facts)

48. Questions will arise as to the legal nature of the delegation agreement: as it relates to the powers of public bodies, it will be governed by public law. In many jurisdictions, public law agreements are either not known, or not very clearly determined. The matters governed by the agreements are however closer to private law agreements. In order to avoid theoretical discussion, it is advisable that the European instruments (e.g. a future Directive) introducing delegation rules abstain from qualifying the agreement and introduce a detailed, sui generis framework, which could be challenged before the national jurisdictions and ultimately before the ECJ. The task force is of the view that the more comprehensive and detailed framework is created, the less important will be the law applicable in the agreement between the delegator and the delegatee.

49. Delegation rules will only be effective if they concern parties that have powers that are equivalent at least in outcome: only in sufficiently harmonised fields can delegation effectively intervene and prospective signatories will investigate whether there is sufficient and necessary equivalence for the delegation. This does not prevent national legislations to extend delegation to other fields as is already the case in some

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<sup>13</sup> See above footnote No 12



jurisdictions today on the basis of a general authorisation to delegate, in which case delegation could be put to work even if the other jurisdiction involved has only specific delegation powers. For example, if one EEA Member State has general powers to delegate in the securities field and another EEA Member State may only have limited ones, delegation from the one Member State to the other can take place. CESR has already conducted mapping exercises on the supervisory and sanctioning powers of its members arising out of the Market Abuse Directive, the Prospectus Directive, the MiFID and the Transparency Directive. CEBS has conducted similar exercises on the supervisory powers of the CEBS members arising out of the Banking Directives, the 3<sup>rd</sup> Money Laundering Directive and the Financial Conglomerates Directive. CEIOPS has conducted a survey on supervisory powers undertaken by Pillar II WG in the context of ECON. These exercises provide important information of the assessment of the equivalence of powers.

50. The delegation agreement might be regulated in its essential elements at the EU level. In any case the following subjects would usefully be dealt with in the agreement:

1. Defining the field of delegation (areas/ subjects);
  2. Use of language (between the competent authorities concerned and between the delegate and the supervised entities);
  3. Clear procedure on initiating delegation negotiations;
  4. Reporting obligations and discharge;
  5. Identification of the law applicable to the relation between the delegator and the delegate;
  6. Conflict resolution provisions – Role of Committees – Mediation;
  7. Legal disputes: court to be designated in agreement of parties, in accordance with the EU directive provisions;
  8. Appeal procedure: general regime for administrative decisions according to the European Directive;
  9. Confidentiality: While the EU Directives contain confidentiality provisions covering the exchange of information among EU supervisors, some supervisory authorities may want to specify in written form the conditions under which members of other supervisory authorities working for such supervisory authorities in the context of any arrangement of delegation of responsibilities, will have access to confidential information of the institutions under its supervision;
  10. Time limitation/duration;
  11. General Information to the market;
  12. Information to the supervised entity;
  13. Information to the other relevant supervisors and to the 3L3 Committees;
  14. Costs: Competent authorities will not receive remuneration for the execution of tasks in the context of the delegation. However, competent authorities may agree that the delegating authority will cover the costs of the delegatee arising out of the execution of the delegated tasks and
  15. Accountability
- Etc.

51. This list is provisional and should be rendered adaptable by level 2 measures.

## 6. Liability issues

52. In any discussion on delegation, liability issues are on everybody's mind. One should distinguish liability among supervisors on the basis of the delegation agreement, and liability of any of the parties to the agreement towards third parties (the supervised entities, creditors, other market participants, etc). The latter one is the most important one, as only the former – but not the latter - can be dealt with in the agreement. Therefore it is important to inform the supervised entities concerning the delegation agreement in advance.

53. As a matter of principle, the transfer of supervisory responsibility involves also transfer of liability i.e. the authority that is responsible would also be liable. Therefore, the task force arrived at the opinion that possible future EU provisions on delegation should specify that if decisions are delegated, the civil responsibility for the implementation of that decision should be on the delegatee. The delegatee is the party that is in charge of the subject matter and therefore best placed to take measures to avoid responsibility.





Moreover, from the angle of the incentives, putting responsibility on the delegatee would motivate him to deploy all necessary measures to achieve the best result. Conversely, putting responsibility on the delegator is not logical: once the power to take decisions has been delegated, he cannot intervene anymore (see above under 2 on definition of delegation of responsibilities) and therefore has no incentive for maximising the performance of the delegation.

54. However, this change in the allocation of responsibility could involve a different degree of protection for depositors, investors and clients in case, for example, the law of the delegatee provides for limitations in the level of liability or a different burden of proof. Moreover, it would be more difficult for the supervised persons to protect their rights when violated by the delegatee as they will have to defend their rights in a different jurisdiction under a foreign law and before foreign courts.

55. The same solution has been applied in a case of mutual recognition, where an Italian Tribunal has referred to Belgian liability rules for establishing the liability for allegedly misleading information in a prospectus that had been approved by the Belgian supervisor, and used in Italy under the mutual recognition regime<sup>14</sup>.

56. Regarding the possible responsibility arrangements between the delegator and the delegatee, the delegatee can of course be held liable to the delegator for inadequate performance of his contractual obligations under the delegation agreement. This can be dealt with in the agreement, e.g. providing for clauses defining the contractual duties or limiting the liability or terminating the arrangement without notice in important cases.

57. The liability of the delegator should be limited to its intervention in the delegation, and depending on the intensity of its intervention in the implementation of the agreement. If the agreement does not provide for monitoring the delegation, the delegator's liability will be limited to the exercise of its power to delegate and the conclusion of the delegation agreement. If such monitoring is provided, the delegator could be held liable, under its own regime of liability, for not performing adequately this task, which is its own duty under the agreement. How these liabilities will be further articulated is a matter for the national law of the delegator.

58. Another question that arises in the field of liability relates to the standard of liability adopted. General liability standards are diverse in the different European jurisdictions. With respect to the liability of financial supervisors, specific provisions apply. An increasing number of Member States have determined the standard of care that is expected from the supervisors to be limited to gross negligence or wilful misconduct. Indirectly the same result is achieved under the general regime of liability for acts of public servants.

59. Other states follow the general standard for liability for mere negligence. Some would even accept strict liability on the proof of damage and causation<sup>15</sup>. It is unclear whether this difference will influence the Member States' willingness to delegate: stricter states might not like to delegate to more lenient ones, as this may create liability for them.

60. The task force has conducted a mapping exercise on different regimes of civil supervisory liability that exist in the EEA states. The responses to this exercise are presented in the form of a table attached as Annex II.

61. The possibility to cover a supervisor's liability by insurance has been admitted in several Member States. However, this is not the case in other Member States, on the basis that this liability is a public law one and hence not subject to coverage by contractual arrangements. Moreover, in some states, as the supervisor has not - significant - assets of his own, the liability is ultimately that of the state. In other jurisdictions, the liability is that of the supervisor, i.e. the central bank, with or without state backing.

<sup>14</sup> Trib.Ord.Rome (civ), 30 January 2007, Colombo e.o. v. CBFA and Consob, RG 26939-2003, not yet published.

<sup>15</sup> The Spanish legislation establishes a strict standard of liability for administrative authorities (applicable to supervisors) based on the existence of a damage suffered by third parties and caused by the omissions or actions of said authorities.



These differences may also constitute a handicap in the conclusion of delegation agreements, as supervisors would be unwilling to offer less guarantees to their stakeholders.

62. Whether insurance is likely to offer a solution to these differences in liability systems is an issue subject to debate within the task force. Some consider that if insurance is allowed, the premium should be recovered on the supervised entity<sup>16</sup>. However, delegation should not lead to increase the burden on the supervised entities, and lead to increasing the fees due for supervision. Moreover, some members pointed out that if supervised entities have to cover the costs of delegation, this should result to their possibility to be consulted or at least informed on the proposed delegation agreement. Others think that if a fee may be charged between delegator and delegatee, the insurance premium could be part of that fee.

63. However, it would seem that the matter of liability is less dramatic than it would seem at first glance: if both supervisors are subject to the same liability standard, the problem of disparity disappears. It is the same if the supervisor with the weaker standard delegates to the stricter. Only in the opposite case, could depositors in the stricter state complain. Insurance or a top-up obligation might help to solve this problem. The relative interest of the parties involved will therefore decide whether delegation would still be worthwhile.

64. It is undeniable that delegation will not be used by supervisors if no satisfactory solution for the liability question is achieved at the European level. In the first stage, it will not be likely that supervisors will be willing to delegate important responsibilities, and will prefer to limit themselves to areas creating less risk. But as mutual trust builds up, more issues would qualify for delegation.

## **7. Accountability**

65. The task force draws attention to the importance of clarity about the accountability of both supervisors involved in delegation agreements as both will have to justify their role in implementing the agreement. Public reporting, eventually indicating the names of the supervised entities involved might be too far going, but the fact of delegation of responsibilities should be made public.

## **III. Conclusion**

66. The usefulness of delegation of responsibilities is recognised by the task force (see above under II.3). However, to make it operational a certain number of important legal and practical issues (as analysed in 4 above) that impede the use of the delegation instrument have to be properly addressed.

67. Some of these issues should be addressed at EU level, and therefore, be introduced in all Member States. This EU legal instrument should not oblige any Member State to enter into delegation of responsibility agreements. However, some Member States consider that the legal and practical barriers analysed in the paper are quite important and may be very difficult to circumvent, also taking into account the legal constraints arising out of the national legislation, and as such view there is scope to further explore areas for delegation of tasks. Some other Member States are more willing and have already full scale provisions allowing delegation.

As to which areas could be fit for delegation of responsibility, it is very difficult to predict as experience has to be built up.

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<sup>16</sup> The system of financing supervision are relatively diverse, some being financed out of the state budget, other by a levy on supervised institutions, and still other out of the revenue of the central bank.



## ANNEX I

### EU FINANCIAL LAW PROVISIONS ON DELEGATION AND COMPARABLE ARRANGEMENTS

#### A. Securities' law

##### A.1 Market Abuse Directive 2003/6/EC

###### Article 13

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.

##### A.2 Prospectus Directive 2003/71/EC

###### Article 13

5. The competent authority of the home Member State **may transfer the approval of a prospectus to the competent authority of another Member State**, subject to the agreement of that authority. Furthermore, this transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within three working days from the date of the decision taken by the competent authority of the home Member State. The time limit referred to in paragraph 2 shall apply from that date. 6. This Directive shall not affect the competent authority's liability, which shall continue to be governed solely by national law."

###### Article 21

2. Member States **may allow their competent authority or authorities to delegate tasks**. Except for delegation of the publication on the Internet of approved prospectuses and the filing of prospectuses as mentioned in Article 14, any delegation of tasks relating to the obligations provided for in this Directive and in its implementing measures shall be reviewed, in accordance with Article 31 by 31 December 2008, and shall end on 31 December 2011. Any delegation of tasks to entities other than the authorities referred to in paragraph 1 shall be made in a specific manner stating the tasks to be undertaken and the conditions under which they are to be carried out.

These conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. In any case, the final responsibility for supervising compliance with this Directive and with its implementing measures and for approving the prospectus shall lie with the competent authority or authorities designated in accordance with paragraph 1.

Member States shall inform the Commission and the competent authorities of other Member States of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

###### Article 22

1. The obligation of professional secrecy shall apply to all persons who work or have worked for the competent authority and for entities to which competent authorities may have delegated certain tasks. Information covered by professional secrecy may not be disclosed to any other person or authority except in accordance with provisions laid down by law.



### A.3 MiFID 2004/39/EC

#### Article 17

In the case of investment firms which provide only investment advice, Member States **may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the regular monitoring of operational requirements**, in accordance with the conditions laid down in Article 48(2).

#### Article 48

The competent authorities referred to in paragraph 1 shall be public authorities, **without prejudice to the possibility of delegating tasks to other entities** where that is expressly provided for in Articles 5(5), 16(3), 17(2) and 23(4).

### A.4 Transparency Directive 2004/109/EC

#### Article 24

2. Member States **may allow their central competent authority to delegate tasks**. Except for the tasks referred to in paragraph 4(h), any delegation of tasks relating to the obligations provided for in this Directive and in its implementing measures shall be reviewed five years after the entry into force of this Directive and shall end eight years after the entry into force of this Directive. Any delegation of tasks shall be made in a specific manner stating the tasks to be undertaken and the conditions under which they are to be carried out.

3. Member States shall inform the Commission and competent authorities of other Member States of any arrangements entered into with regard to the delegation of tasks, including the precise conditions for regulating the delegations.

#### Article 25

1. The obligation of professional secrecy shall apply to all persons who work or who have worked for the competent authority and for entities to which competent authorities may have delegated certain tasks. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of the laws, regulations or administrative provisions of a Member State.

## B. Banking law

### Banking Directive 2006/48/EC

#### Article 126

1. Where credit institutions authorised in two or more Member States have as their parent the same parent financial holding company in a Member State or the same EU parent financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities of the credit institution authorised in the Member State in which the financial holding company was set up.

Where the parents of credit institutions authorised in two or more Member States comprise more than one financial holding company with head offices in different Member States and there is a credit institution in each of these States, supervision on a consolidated basis shall be exercised by the competent authority of the credit institution with the largest balance sheet total.

2. Where more than one credit institution authorised in the Community has as its parent the same financial holding company and none of these credit institutions has been authorised in the Member State in which the financial holding company was set up, supervision on a consolidated basis shall be exercised





by the competent authority that authorised the credit institution with the largest balance sheet total, which shall be considered, for the purposes of this Directive, as the credit institution controlled by an EU parent financial holding company.

3. In particular cases, the competent authorities may by common agreement waive the criteria referred to in paragraphs 1 and 2 if their application would be inappropriate, taking into account the credit institutions and the relative importance of their activities in different countries, and appoint a different competent authority to exercise supervision on a consolidated basis. In these cases, before taking their decision, the competent authorities shall give the EU parent credit institution, or EU parent financial holding company, or credit institution with the largest balance sheet total, as appropriate, an opportunity to state its opinion on that decision.

4. The competent authorities shall notify the Commission of any agreement falling within paragraph 3."

#### Article 131

In order to facilitate and establish effective supervision, the competent authority responsible for supervision on a consolidated basis and the other competent authorities shall have written coordination and cooperation arrangements in place.

Under these arrangements additional tasks may be entrusted to the competent authority responsible for supervision on a consolidated basis and procedures for the decision making process and for cooperation with other competent authorities, may be specified.

The competent authorities responsible for authorising the subsidiary of a parent undertaking which is a credit institution may, by bilateral agreement, delegate their responsibility for supervision to the competent authorities which authorised and supervise the parent undertaking so that they assume responsibility for supervising the subsidiary in accordance with this Directive. The Commission shall be kept informed of the existence and content of such agreements. It shall forward such information to the competent authorities of the other Member States and to the European Banking *Committee*.

### **C. Insurance law**

#### **Directive on the supplementary supervision of insurance undertakings in an insurance group**

##### Article 4

Where insurance undertakings authorised in two or more Member States have as their parent undertaking the same insurance holding company, reinsurance undertaking, non-member-country insurance undertaking or mixed-activity insurance holding company, the competent authorities of the Member States concerned may reach agreement as to which of them will be responsible for exercising supplementary supervision.

##### Article 6

Member States shall provide that their competent authorities responsible for exercising supplementary supervision shall have access to any information which would be relevant for the purpose of supervision of an insurance undertaking subject to such supplementary supervision. The competent authorities may address themselves directly to the relevant undertakings referred to in Article 3(2) to obtain the necessary information only if such information has been requested from the insurance undertaking and has not been supplied by it.

Where, in applying this Article, the competent authorities of one Member State wish in specific cases to verify important information concerning an undertaking situated in another Member State which is a related insurance undertaking, a subsidiary undertaking, a parent undertaking or a subsidiary of a parent undertaking of the insurance undertaking subject to supplementary supervision, they must ask the competent authorities of that other Member State to have that verification carried out. The authorities which receive such a request must act on it within the limits of their jurisdiction by carrying out the



verification themselves, by allowing the authorities making the request to carry it out or by allowing an auditor or expert to carry it out.

### **Further guidance**

It has also to be highlighted that the Directive on the supplementary supervision of insurance undertakings in an insurance group led to the conclusion of CEIOPS' Helsinki Protocol in 2000 by all European insurance supervisors. That protocol explicates how to carry out the collaboration between the different authorities involved in the supervision of an insurance group. That document has been complemented in 2006 by "a statement on the role of the lead supervisors" and the tasks they may perform. The statement indicates:

"The lead supervisor will assume all of the tasks of the lead supervisor as defined in the Helsinki Protocol and the tasks of the key coordinator as set out in the Co-Co Guidelines. In summary these could be described as:

- to organize, to prepare and to chair the Co-Co meetings;
- to set out and to agree in co-operation with all supervisors in the group, a regulatory program in accordance with the attached Framework Document;
- the co-ordination of the gathering of information;
- the assessment of the intra-group transactions and positions and of the additional adjusted solvency calculations;
- the assessment of internal control and risk management;
- and the dissemination of any information or outcomes with the other Co-Co members."

### **D. Financial Conglomerates**

#### **Financial conglomerates Directive 2002/87/EC**

##### Article 11

1. The tasks to be carried out by the coordinator with regard to supplementary supervision shall include:

- (a) Coordination of the gathering and dissemination of relevant or essential information in going concern and emergency situations, including the dissemination of information which is of importance for a competent authority's supervisory task under sectoral rules;
- (b) Supervisory overview and assessment of the financial situation of a financial conglomerate;
- (c) Assessment of compliance with the rules on capital adequacy and of risk concentration and intra-group transactions as set out in Articles 6, 7 and 8;
- (d) Assessment of the financial conglomerate's structure, organisation and internal control system as set out in Article 9;
- (e) Planning and coordination of supervisory activities in going concern as well as in emergency situations, in cooperation with the relevant competent authorities involved;
- (f) Other tasks, measures and decisions assigned to the coordinator by this Directive or deriving from the application of this Directive.

In order to facilitate and establish supplementary supervision on a broad legal basis, the coordinator and the other relevant competent authorities, and where necessary other competent authorities concerned, shall have coordination arrangements in place. The coordination arrangements may entrust additional tasks to the coordinator and may specify the procedures for the decision-making process among the relevant competent authorities as referred to in

Articles 3, 4, 5(4), 6, 12(2), 16 and 18, and for cooperation with other competent authorities.



2. The coordinator should, when it needs information which has already been given to another competent authority in accordance with the sectoral rules, contact this authority whenever possible in order to prevent duplication of reporting to the various authorities involved in supervision.

3. Without prejudice to the possibility of delegating specific supervisory competences and responsibilities as provided for by Community legislation, the presence of a coordinator entrusted with specific tasks concerning the supplementary supervision of regulated entities in a financial conglomerate shall not affect the tasks and responsibilities of the competent authorities as provided for by the sectoral rules.

#### **E. 3<sup>rd</sup> Money Laundering Directive 2005/60/EC**

*Note: This directive is quite explicit that where one relies on a 3<sup>rd</sup> party it remains for that 3<sup>rd</sup> party to satisfy itself with Anti Money Laundering requirements. However there is a reference in Chapter V, Section 4 of this directive in respect to penalties, which refers to an authority able to take decisions on behalf of the legal person – see detail below*

#### **SECTION 4**

##### **Penalties**

##### **Article 39**

1. Member States shall ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.

2. Without prejudice to the right of Member States to impose criminal penalties, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions can be imposed against credit and financial institutions for infringements of the national provisions adopted pursuant to this Directive. Member States shall ensure that these measures or sanctions are effective, proportionate and dissuasive.

3. In the case of legal persons, Member States shall ensure that at least they can be held liable for infringements referred to in paragraph 1 which are committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person,

or

- (c) an authority to exercise control within the legal person.

4. In addition to the cases already provided for in paragraph 3, Member States shall ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 3 has made possible the commission of the infringements referred to in paragraph 1 for the benefit of a legal person by a person under its authority.



**ANNEX II**

**Comparative overview of the supervisory civil liability of banking, securities' and insurance supervisors in different EEA Member States**

Note: The civil supervisory liability is largely influenced by the tort law of the different EEA Member States

<u>Member State</u>	<u>Who is liable</u>	<u>Who is liable</u>	<u>Who is liable</u>	<u>Liability criteria</u>	<u>Liability criteria</u>	<u>Liability criteria</u>	<u>Source</u>
							(Please specify e.g. specific legislation, general principles of law, tort law, case law etc)
	<b>State/ CA</b> (Please specify state/ authority and name of the authority)	<b>Members of the Board</b> (Yes/ No)	<b>Other individuals</b> (e.g. directors, other employees)	<b>Negligence</b> (Yes/ No)	<b>Gross Negligence</b> (Yes/ No)	<b>Bad Faith</b> (Yes/ No)	
<b>Austria</b>							
Banking	State	Y (only by recourse)	Y (only by recourse)	Y (State only)	Y	Y	Constitution, Law (FMABG, AHG)
Sec./Ins.	State	Y (only by recourse)	Y (only by recourse)	Y (State only)	Y	Y	Constitution, Law (FMABG, AHG)
<b>Belgium</b>							
Bank./Sec/Ins	CBFA			N	Y	Y	Law
<b>Bulgaria</b>							
Banking	BNB	Y	Y	N	N	Y (related to actions with intend)	Art. 79(8) Law on Credit Institutions





Sec./Ins.	FSC	Y	Y	Y- for FSC N- for members of the Board and other employees	Y- for FSC N- for members of the Board and other employees	Y	For FSC, the law of the responsibility of the State and the Municipalities. For the members of the Board and the other employees of the FSC, Art 18, par. 9 of the Law on the FSC
<b>Cyprus</b>							
Banking	CBC	Y	Y-Employees	N	Y	Y	Banking Laws of 1997-2008
Securities	CYSEC	Y	Y-employees	N	N	Y If omission is proven to have been made intentionally and if there is a breach of confidentiality and observance of secrecy duty	Cyprus Securities and Exchange Commission (Establishment and Responsibilities) Law
Insurance	State			N	N	Y	Insurance Services and Other Related Issues laws 2007-2008



<b>Czech Republic</b>							
Bank./Sec./Ins.	State/ Czech National Bank	N <sup>17</sup>	N <sup>18</sup>	N <sup>19</sup>	N <sup>20</sup>	N <sup>21</sup>	The Act No. 82/1998 Coll, on liability for damages incurred in executing of public authority by a decision or by a wrong official channel
<b>Denmark</b>							
Bank./Sec./Ins	The Danish Financial Supervisory Authority (Finanstilsynet)	No Board	Y	Y	Y	Y	-Liability in tort
		No- Board	Y	Y	Y	N	- Law: Danish Law 3-19-2, employer's liability
<b>Estonia</b>							
Bank./Sec./Ins.	Liability in public law relationship (state liability, hereinafter "SL"): State & EFSA, probably jointly and severally.  Liability in private law relationship	Y, state and/or EFSA have a right of recourse against the management board members jointly and severally, with regard to	Generally N, but possible in rare cases of SL where administrative act/inaction is performed by respective employee.	Y – SL: state & EFSA, but N if it proves due care was taken.  Y – PL.  Unclear, but most probably N – member of	Y – SL & PL: state and EFSA.  Y – member of the management board.	Y – SL & PL: state & EFSA.  Y – member of the management board	Estonian Financial Supervision Authority Act, Law of Obligations Act, State Liability Act

<sup>17</sup> The state is liable for damages incurred by the unlawful decision of the Czech National Bank (CNB) or by wrong official procedures of the CNB. The state is entitled to recover compensations from the CNB in case of the blame of the CNB. In that case, CNB would be entitled to recover compensations from an employee in case of his blame, including member of the Board (the Act No. 262/2006 Coll. Labour Code). The maximum recourse of an employee is four-and-half of the average monthly salary. There is no maximum amount of the recourse in case of a deliberate act.

<sup>18</sup> See footnote 1

<sup>19</sup> See footnote 1

<sup>20</sup> See footnote 1

<sup>21</sup> See footnote 1



	(hereinafter “PL”): EFSA limited to its budget, all in excess by the Central Bank of Estonia.	administrative acts decided (and vast bulk of administrative acts are decided) by the management board. Joint and several liability, in case of gross negligence limited to 6 months’ salary.		the management board.			
<b>Finland</b>							
Bank./Sec./Ins.	Bank of Finland and State	Y	Y	N	Y	Y	Tort Liability Act Act of Financial Supervision Authority
<b>France</b>							
Banking							
Securities	AMF	N <sup>22</sup>	Y The AMF itself is not liable, notwithstanding possible liability of the staff <sup>23</sup>	Y	Y	Y	Administrative law (Responsibility for fault, negligence, imprudence, in addition Administrative law provides for a regime of responsibility for without fault, simple fault and Heavy fault).

<sup>22</sup> The members of the board of the AMF cannot be prosecuted for the *Bona Fide* discharge of their duties. Any civil or other legal prosecution against acts legitimately performed in the course of the duties of AMF board members shall be introduced against the AMF which is a legal entity. Moreover, it is worth noting that as a principle, the deliberating body of the AMF being the board and not its individual members, their responsibility should not be sought individually. Note that the Chair is a member of the Board.



Insurance	ACAM	N	N	N	Y	N	Case law of the Conseil d'Etat
<b>Germany</b>							
Banking	Supervisory Authority (liability towards supervised entities/addresses and not any third parties/customers)	N	N	N	Y (recourse against members of the board and other individuals)	Y (recourse against members of the board and other individuals)	German Civil Code and Constitutional Act
Sec/Ins	Supervisory Authority (liability towards supervised entities/addresses and not any third parties/customers)	N	N	N	Y (recourse against members of the board and other individuals)	Y (recourse against members of the board and other individuals)	German Civil Code and Constitutional Act
<b>Greece</b>							
Banking	Bank of Greece	N As a rule (see column 7)	N As a rule (see column 7)	N	N	Y	Law on Credit Institutions (3601/2007)
Securities	HCMC	Y	Y	-Y for HCMC -N for the members of the Board and the employees	-Y for HCMC -N for the members of the Board and the employees	-Y for HCMC -Y for the members of the Board and the employees in case of violation of confidentiality in MAD cases	-Tort law for HCMC -Specific legislation for the members of the Board

<sup>23</sup> The staff of the AMF (The Chair is not a member of the staff) cannot be prosecuted for the *Bona Fide* discharge of their duties. Any civil or legal prosecution against acts legitimately performed in the course of the duties of AMF staff shall be introduced against the AMF which is a legal entity. The decisions for which the civil responsibility of the AMF can be sought are taken by the board. Nevertheless, the board may delegate decisions powers to the Chair and to the General Secretary of the AMF. In that circumstance the responsibility of the delegate could be sought. In addition the Secretary general of the AMF is vested with administrative powers of its own (Opening of investigations





Insurance	PISC	Y <sup>24</sup>	Y <sup>25</sup>	N	N	Y <sup>26</sup>	-Administrative tort law -Jurisprudence -Sectoral legislation
<b>Hungary</b>							
Ban./Sec/Ins	HFSA	N	N	Y	Y	Y	Civil Code
<b>Iceland</b>							
Bank./Sec./Ins.							
<b>Ireland</b>							
Bank./Sec./Ins.	Irish Financial Services Regulatory Authority	Y	Y	N	N	Y	Case law in the area of tort (as modified by the Central Bank Act 1942)
<b>Italy</b>							
Banking	Banca d' Italia	Y	Y	N	Y	Y	Art.24, para 6-bis of the Law n.262 of 28 December 2005 (as modified by the Legislative Decree n.303 of 29 December 2006)
Securities	Consob and Banca d' Italia	Y	Y	N	Y	Y	Art.24, para 6-bis of the Law n.262 of 28 December 2005 (as modified by the Legislative Decree n.303 of 29 December 2006)
Insurance	ISVAP	Y	Y	N- for ISVAP N-for the members of the Board and other	Y- for ISVAP Y-for the members of the Board and other individuals	Y- for ISVAP Y-for the members of the Board and other	Art.24, para 6-bis of the Law n.262 of 28 December 2005 on the protection of savings (as

<sup>24</sup> Greek specific law relieves PISC Board Members and its personnel from all civil liability without excluding bad faith. However, jurisprudence analysis indicates that once a criminal case is proven in the courts, it will be unlikely that the ad hoc relieving provision of this law will be interpreted as keeping them immune, even when the bad faith will have been proven. That is why the answer is yes although a literal interpretation of the said regime would suggest no in all questions of the questionnaire.

<sup>25</sup> See footnote 8

<sup>26</sup> See footnote 8



				individuals		individuals	modified by the Legislative Decree n.303 of 29 December 2006)
<b>Latvia</b>							
Banking.	FCCM	Y	Y In case of violation of professional secrecy requirements, for any loss incurred by third parties as a result of any illegal restricted information	N	N	N	- Law on Remuneration of Losses caused by State Administration Institutions <sup>27</sup> ; - Law on the Financial and Capital Market Commission - Law on credit institutions
Sec./Ins	FCCM	Y	Y In case of violation of professional secrecy requirements, for any loss incurred by third parties as a result of any illegal restricted information	N	N	N	- Law on Remuneration of Losses caused by State Administration Institutions <sup>28</sup> ; - Law on the Financial and Capital Market Commission
<b>Liechtenstein*</b>							
Bank./Sec./Ins.							
<b>Lithuania</b>							

<sup>27</sup> The main criterion is an unlawful decision. Any person has the right to remuneration for material, personal and moral damage caused by the State Administration Institution's issuing of an illegal administrative act or its performance of illegal actions

<sup>28</sup> The main criterion is an unlawful decision. Any person has the right to remuneration for material, personal and moral damage caused by the State Administration Institution's issuing of an illegal administrative act or its performance of illegal actions



Banking	The Bank of Lithuania	Y	Staff of Credit Institutions Supervision Department	N	Y	Y	Civil Code of the Republic of Lithuania, law on the Bank of Lithuania
Securities	State	Y	Y	N	Y	Y	-Civil Code for the responsibility of the State; -Law on Civil Service for the responsibility of other employees; -Specific legislation for the members of the Commission
Insurance	State represented by the Insurance Supervisory Commission of the Republic of Lithuania <sup>29</sup>			Y	Y	Y	-Civil Code --Law on Public Administration -Law on Civil Service
<b>Luxembourg</b>							
Bank./Sec.	CSSF			N	Y	Y	Law of 23 December 1998 establishing a financial sector supervisory commission ("CSSF") as amended (Art. 20, par. 2)
Insurance	Commissariat aux Assurances	N	N	N	Y	Y	Law on insurance and reinsurance supervision
<b>Malta</b>							
Bank./Sec./Ins	MFSA	Y	Y	N	N	Y	Financial Services Authority Act (Art. 29)

<sup>29</sup> Insurance Supervisory Commission of the Republic of Lithuania has a right of regress towards a civil servant who has made damages. The right of regress to the damage compensated is limited to no more than nine average salaries of that civil servant



							Please see footnote below <sup>30</sup>
<b>Netherlands</b>							
Banking	DNB/ AFM	N	N	N	Y	Y	6: 162 Civil code and case law
Sec./Ins.							
<b>Norway</b>							
Bank./Sec./Ins.	State	Y/N (depending on the circumstances)	Y/N (depending on the circumstances)	Y	Y	Y	Compensation Act (act no 26 og 13.6.1969 with amendments)
<b>Poland</b>							
Bank./Sec./Ins.	State Treasury	N	Y- State Treasury N- employee (only liable to the employer on the basis of the Labor Code)	Y- State Treasury N- employee (only liable to the employer on the basis of the Labor Code)	Y- State Treasury N- employee (only liable to the employer on the basis of the Labor Code)	Y- State Treasury N- employee (only liable to the employer on the basis of the Labor Code)	-Constitution (Art. 77.1) - Civil Code
<b>Portugal</b>							
Banking	Banco de Portugal	Y	Y	N	N	Y	Law
Securities	CMVM	Y	Y	Y-CMVM N-MoB N-O.I.	Y-CMVM N-MoB N-O.I.	Y-CMVM N-MoB N-O.I.	Law 67/2007, as amended by Law 31/2008
Insurance	Instituto de	Y	Y	-Y for ISP	Y	Y	Law

<sup>30</sup> MFSA note: The issue of civil liability does not easily lend itself to a Yes or No response. In accordance with the general provisions of the Maltese Civil Code regarding Torts and Quasi-Torts, a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus paterfamilias*. Therefore, at the first instance in terms of the general provisions of Maltese law, it could be the case that an officer and employee of the Authority are liable if in carrying out their duty if they have not acted with prudence, diligence and the attention. Nevertheless, pursuant to article 29 of the Malta Financial Services Authority Act (‘the Act’), the Authority, the Board of Governors, as well as the various Internal Committees/ Bodies established by the said Act and the officers and employees of the Authority, shall not be liable in damages for anything done or omitted to be done in the discharge or purported discharge of any function under this Act, *unless the act or omission is shown to have been done or omitted to be done, as the case may be, in bad faith*. We would highlight that article 29 of the Act as never been challenged in a Maltese Court.



	Seguros de Portugal (ISP)		All employees	-N for the members of the Board and other employees	Joint and several liability of ISP and members of the board and employees for their actions or omissions. ISP has a right of recovery for the paid compensation	Joint and several liability of ISP and members of the board and employees for their actions or omissions. ISP has a right of recovery for the paid compensation	
<b>Romania</b>							





Banking	NBR	Y	Y	Y	_** (see the last column)	Y	<p><b>**ARTICLE 25 paragraph 3 and 4 - Law No. 312 / 28.06.2004 on the Statute of the National Bank of Romania</b>, defines liability criteria as follows:</p> <p><b>(3)</b> The members of the National Bank of Romania's Board and the National Bank of Romania's employees charged with prudential supervision tasks shall not be subject to any civil or penal sanctions, as the case may be, if the Court finds that these persons fulfilled or failed to fulfil in good faith and with due care any action or fact related to the discharge, by law, of prudential supervision tasks.</p> <p><b>(4)</b> The costs associated with the judicial proceedings instituted against the persons under para. (3) hereof shall be borne by the National</p>
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							Bank of Romania
Securities	CNVM <sup>31</sup>	Y	Y	-Y for the members of the board and employees -N for CNVM	-Y for the members of the board and employees -N for CNVM	- Y for the members of the board and employees -N for CNVM	-Tort law -Specific legislation for the members of the Board
Insurance							
<b>Slovakia</b>							
Bank./Sec./Ins.	National Bank of Slovakia (NBS)	N	N	Y For NBS in the case when unlawful decision is made. Our legislation does not specify these liability criteria	Y For NBS in the case when unlawful decision is made. Our legislation does not specify these liability criteria	Y For NBS in the case when unlawful decision is made. Our legislation does not specify these liability criteria	- Act on Supervision of financial markets - Act on NBS - Act on liability for damage caused by discharge of public authority
<b>Slovenia</b>							
Banking	Banka Slovenije	Y BS is entitled to reimbursement from Board Members if they act in bad faith or gross negligence	N	-Y for BS -N for members of the Governing Board of BS	-Y for BS -Y for Members of the Governing Board of BS	-Y for Board -Y for Members of the Governing Board of BS	General rules on liability within the Code of Obligations apply (Official Gazette No 97/2007, p. 13125), applying mutatis mutandis also general rules for liability of the public

<sup>31</sup> CNVM experienced situations when judicial authorities decided to hold it liable with the supervisory civil liability following the issuance of individual acts. However, the CNVM Statute states that “CNVM is the only authority empowered to issue a competent opinion on opportunity matters, evaluations and quality analyses which represent the fundament of issuing its acts. In case of litigation, the individual acts issued by CNVM regarding the interpretation of the legal framework applicable to the regulated and supervised entities, can be challenged in appeal before the Court of Appeal of Bucharest -The Department of Administrative Disputed Matters. Until the court issues an irrevocable and indisputable judgement, the enforcement of the CNVM acts shall not be suspended” (Art. 7(7) of the CNVM Statute).



							authorities (i.e. state agencies etc.) and case law.
Securities							
Insurance	Insurance Supervision Agency (ISA)	Y	Y Director	-N (ISA) -Y (Members of the Board)	-N (ISA) -Y (Members of the Board)	-N (ISA) -Y (Members of the Board)	Insurance Act
<b>Spain</b>							
Banking	Banco de Espana (BdE)	N <sup>32</sup>	N <sup>33</sup>	N <sup>34</sup>	N <sup>35</sup>	N <sup>36</sup>	-Art. 106.2 of the Spanish Constitution - Title X of Law 30/1992 on the legal framework for the administrative authorities and the administrative proceeding.  - Royal Decree 429/1993, on the administrative proceeding regarding non-contractual liability of the administrative authorities.  - Articles 25 and 26 of BdE Internal Rules.
Securities	CNMV	Same regime as	Same regime as	Same regime as	Same regime as BdE	Same regime as	Same regime as BdE

<sup>32</sup> BdE must directly compensate individuals for any damage caused by its authorities and staff in the exercise of their legally bestowed duties and functions. Nevertheless, BdE must claim from its directors and employees any liability they may have incurred as a result of willful misconduct (“dolo”), negligence, or gross negligence.

<sup>33</sup> See footnote 15

<sup>34</sup> Spanish legislation establishes a general regime of non-contractual liability for administrative authorities (applicable to supervisors) based on a strict standard of liability where no willful misconduct, negligence or gross negligence need to be proved, being sufficient the evidence of the damage caused by the omissions or actions of the aforementioned authorities.

<sup>35</sup> See footnote 17

<sup>36</sup> See footnote 17



	(Public Administration)	BdE (see above)	BdE (see above)	BdE (see above)	(see above)	BdE (see above)	except for articles 25 and 26 of BdE Internal Rules, which are not applicable to CNMV
Insurance	DGSFP	Same regime as BdE (see above)	Same regime as BdE (see above)	Same regime as BdE (see above)	Same regime as BdE (see above)	Same regime as BdE (see above)	Same regime as BdE except for articles 25 and 26 of BdE Internal Rules, which are not applicable to DGSFP
<b>Sweden</b>							
Bank./Sec./Ins	Finansispektionen (FI)	N	N	Y- for FI	Y-for FI	Y-for FI	Liability on Damages Act
<b>UK</b>							
Bank./Sec./Ins.	FSA	Y <sup>37</sup>	Y <sup>38</sup> Any person acting as an officer, or member of staff of the FSA	N The FSA members of the Board or staff	N The FSA members of the Board or staff	Y The FSA members of the Board of staff	-Financial Services and Markets Act 2000 -The Human Rights Act 1998 and under the law of tort

\*Liechtenstein participates in this specific mapping exercise in its capacity as observer of CEBS and CEIOPS

<sup>37</sup> Liability will only arise on a finding of bad faith or a breach of the Human Rights Act 1998

<sup>38</sup> See footnote 20