Committee of European Banking Supervisors

Review Panel

Mapping of supervisory objectives and powers, including early intervention measures and sanctioning powers

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Executive Summary

1. In March 2008, the European Commission invited CEBS to provide assistance in conducting a survey on supervisory powers and objectives, including the actual use of sanctioning powers, as a follow-up to the December 2007 ECOFIN Council conclusions. A similar request was sent to CEIOPS and CESR. In September 2008, CEBS received a complementary call for assistance from the Commission urging CEBS to perform a stock-taking exercise on early intervention measures, including an analysis of possible triggers and of the conditions under which these measures can be taken.

2. This report builds on the answers to questionnaires which were filled out by members by end September 2008. The 27 completed questionnaires are available on the CEBS website.

3. The report is divided into three main sections:

   - Part I provides a factual presentation of the objectives assigned to banking supervisors within the European Union;
   - Part II presents the outcome of the stock-taking exercise on supervisory powers, with a special focus on early intervention measures;
   - Part III is dedicated to a stock-take and analysis of the actual use of sanctioning powers.

4. On early intervention powers the Review Panel has adopted the broad approach proposed by the Commission, therefore covering substantially different remits ranging from corrective measures imposed by supervisors to restore compliance and soundness to interventions on ailing banks and resolution procedures.

5. A preliminary analysis of the circumstances under which these early intervention powers may be exercised, including an analysis of triggers or indicators, is presented in Part II-B.

6. It should be noted that as the focus is on powers available at supervisory authorities, certain intervention tools have been left out of the scope of this survey. This is the case for instance of ring-fencing or recapitalisation, which may mainly be granted to other public authorities (central bank, ministry of finance...).

7. The survey on the objectives given to CEBS members highlight three major objectives common to all: i) ensuring compliance by the supervised institutions with banking regulation, ii) ensuring supervisory cooperation and iii) maintaining financial stability. Two other objectives are common to the vast majority of members: protecting banks' clients from bad business practices and the prevention of financial crime, including anti-money laundering and counter-terrorist financing. These objectives may be either explicitly mentioned in national legal provisions or may be derived from duties and responsibilities explicitly entrusted to supervisory authorities in national legal provisions. In general, insofar as the fundamental prudential objectives of supervisors are concerned, there is de facto a very high degree of commonality, even though the actual legal formulation may differ.

8. As for powers available to supervisors, the responses provided to questions relating to licensing, information gathering and inspections as well as on rule making show a high level of convergence. However, common powers do not necessarily imply common practices and this is visible for instance in the modalities for carrying out on-site inspections.

9. Regarding corrective measures, early intervention and crisis management, the degree of uniformity appears to decrease as one moves from the typical supervisory action towards basically solvent institutions to the interventions on weak or ailing banks.

10. Answers relating to corrective measures, aimed at restoring compliance and soundness in normal circumstances, provide a rather reassuring picture, with supervisors appearing well equipped. To mention just a few examples, all supervisors have the power to limit or impose conditions on the business of an institution, to require an institution to cease certain practices, to impose (with a few exceptions) stricter prudential requirements or require an adjustment in the risk profile. In addition, it should be mentioned that regulatory frameworks usually provide supervisors with a "general power" to impose - or require an institution to take - any measure that is deemed appropriate to restore compliance with legal requirements.

11. It is fair to state that the toolkits available to supervisors may present differences. For instance, only fifteen members can exercise supervisory forbearance. However, it is not obvious how much these differences matter in practice. Further work would be needed to conduct a thorough impact assessment of those differences.

12. As for tools to deal with ailing institutions, the responses received highlight substantial differences in the measures available as well as in the conditions under which these measures can be taken. This is likely to increase problems of coordination of supervisory action in cases of ailing cross border institutions.

13. All supervisors have the power to temporarily suspend the exercise of all or part of an institution's activities. Similarly, all supervisors have the power to withdraw a licence, except for three countries in which this power belongs to another authority. All the supervisors have de facto the power to at least indirectly trigger the local deposit guarantee scheme (DGS), by taking decisions creating the conditions through which the Scheme is triggered, e.g. through a withdrawal of a banking licence.

14. However, powers towards the persons who effectively direct the business appear rather fragmented. While a majority of supervisors can suspend or replace directors and managers and can appoint an administrator, there are significant variations in the conditions and process for such measures and in the powers of administrators.

15. There are even wider differences in the measures aimed at shareholders. For instance only one out of three supervisors have the power to require the transfer of shares or share certificates held by a specific shareholder or a change in ownership.

16. As for extreme measures, a majority of supervisors reported at least to play a role in an insolvency proceeding (reorganisation or winding-up), although this role may vary significantly. The allocation of responsibilities may differ depending whether reorganisation or winding-up is considered, since winding-up usually belongs to the judicial authorities, although in many cases upon proposal by or prior consultation of the supervisors. Several supervisors also reported specific powers towards the persons or bodies entrusted with special decision making powers at ailing institutions, either through their designation or various form of control or necessary approval of their acts. Very few supervisors have the powers to directly arrange a takeover, reorganise or liquidate an institution.

17. As for possible triggering events or criteria conditioning supervisory action, one needs to consider that no automatic triggers exist and, consequently, early intervention measures are activated by ongoing prudential supervision. Three supervisors have reported quantitative thresholds below which supervisory action is required. However, the identified thresholds are so low that supervisory action would have been taken long before the situation of an individual institution deteriorates to such a level. Prudential supervision is based on quantitative and qualitative analysis of the situation of a credit institution in order to determine its individual risk profile and to identify and solve potential problems at an early stage. Supervisory

authorities have developed a set of indicators, which they use as a sort of "early warning system". Supervisory action/measures will be based on further in-depth analysis in order take the whole situation of the supervised institution into account. It also involves supervisory judgment with the view of taking the most appropriate action(s) to correct the situation. This flexibility is for the supervisory authorities a "conditio sine qua non" of the exercise of their supervisory tasks as it allows a holistic approach to risk-assessment and on-going dialogue within SREP.

18. On the actual use of sanctioning powers, a major impediment to any comparative analysis lies in the absence of a common legal definition of "sanction". Some authorities seem to have a broad approach to the concept of sanctions, while others distinguish administrative measures from sanctions. In addition as sanctions referred to by members are generally meant to be commensurate in particular to the severity of the breach of law or regulation and/or to the concerned institution (e.g. size of own funds), comparison across countries and across institutions proves difficult. Similarly, it is difficult to draw conclusions from the substantial differences in maximum amounts of pecuniary sanctions or in frequency of meetings of the sanctioning body, since sanctions cannot be seen in isolation, as they are only one, and not the most important, means of inducing compliance with rules and prudential objectives. The substantial difference in policies or practices related to publication of sanctions, with only four authorities publishing all sanctions as a general rule, may also deserve further consideration with a view to ensure a level playing field across Member States.

Summary Table of the Stock Take on Supervisory Objectives and Powers among EU National Supervisors

Q No	QUESTIONS Does your authority have been granted the objective :	YES		NO		NOT FULLY		TOTAL	
		No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries
1	Maintaining financial stability ?	22	81%	1	4%	4	15%	27	100%
2	Ensuring compliance with banking regulation?	27	100%	0	0%	0	0%	27	100%
3	Enforcing competition rules?	2	7%	25	93%	0	0%	27	100%
4	Protecting banks' clients from misconduct and/or bad business practices?	23	85%	0	0%	4	15%	27	100%
5	Preventing financial crime including anti-money laundering/combating financing of terrorism (AML/CFT)?	25	93%	2	7%	0	0%	27	100%
6	Promoting access to banking services (e.g., access by small and medium size business, low income individuals, etc)?	4	15%	23	85%	0	0%	27	100%
7	Promoting supervisory cooperation in the EU?	27	100%	0	0%	0	0%	27	100%
8	Promoting convergence of supervisory practices in the EU?	5	19%	22	81%	0	0%	27	100%

For Questions on Actual Use of sanctioning powers, which are of a more qualitative nature, please refer to Part III of the report

Q No	QUESTIONS Does your authority have the power :	YES		NO		NOT FULLY		TOTAL	
		No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries
1 - "Core" prudential supervisory activities									
a.	**Taking-up of business / licensing of credit institutions**								
28	To enforce that entities do not provide banking services in your jurisdiction without authorisation / due notification?	15	56%	8	30%	4	15%	27	100%
29	To grant initial authorisations?	23	85%	3	11%	1	4%	27	100%
30	To grant subsequent authorisations (new branches, new businesses…) ?	24	89%	2	7%	1	4%	27	100%
31	To verify if the persons who effectively direct the business are fit and proper?	25	93%	1	4%	1	4%	27	100%

Q No	QUESTIONS Does your authority have the power :	YES		NO		NOT FULLY		TOTAL	
		No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries
b.	**Ongoing activity, including crisis management**								
32	To submit supervised institutions to (regular or special) on-site inspection?	27	100%	0	0%	0	0%	27	100%
33	To submit entities performing outsourced functions for supervised institutions to on-site inspection?	22	81%	2	7%	3	11%	27	100%
34	To require supervised institutions to provide information, document and data on a regular basis?	27	100%	0	0%	0	0%	27	100%
35	To require supervised institutions to provide any information on demand (e.g. in times of crisis)?	27	100%	0	0%	0	0%	27	100%
36	To require supervised institutions to provide any information within a defined time period (e.g. in times of crisis)?	27	100%	0	0%	0	0%	27	100%
37	To require that entities performing outsourced functions for supervised entities provide any information (including special reporting during times of difficulty) on demand ?	18	67%	2	7%	7	26%	27	100%
38	To require that entities performing outsourced functions for supervised entities provide any information (including special reporting during times of difficulty) within a defined time period?	18	67%	2	7%	7	26%	27	100%
39	To require an institution to meet supervisory requirements that are stricter than the legal requirements (capital, liquidity or other : please specify in the last column)?	27	100%	0	0%	0	0%	27	100%
40	To require an institution to enhance governance, internal controls and risk management systems?	27	100%	0	0%	0	0%	27	100%
41	To apply a specific provisioning/write-off policy?	24	89%	2	7%	1	4%	27	100%
42	To restrict, limit or place conditions on the business conducted by the institution?	26	96%	1	4%	0	0%	27	100%
43	To require the closure of existing branches/offices?	24	89%	2	7%	1	4%	27	100%
44	To require an institution to downsize its operations (e.g. through selling assets)?	25	93%	0	0%	2	7%	27	100%
44 bis	To require an institution to adjust the risk profile of its business (e.g. switching to lower risk weighted assets)?	26	96%	1	4%	0	0%	27	100%
45	To require an institution to negotiate new agreements with viable but weak debtors?	5	19%	19	70%	3	11%	27	100%
46	To require an institution to take possession of loan collateral or other assets of debtors?	9	33%	15	56%	3	11%	27	100%
47	To require an institution to reduce or restructure unprofitable activities?	20	74%	4	15%	3	11%	27	100%
48	To require an institution to cease practices, such as those which are harming the institution, e.g. irregularities and violation of laws or regulations governing the bank's activity?	27	100%	0	0%	0	0%	27	100%
49	To limit intra-group asset transfers and transactions ?	24	89%	3	11%	0	0%	27	100%
50	To limit asset transfers and transactions outside the group?	22	81%	3	11%	2	7%	27	100%
51	To require a supervised institution to submit a recovery plan?	24	89%	2	7%	1	4%	27	100%
52	To exercise supervisory forbearance (i.e. to waive supervisory requirements)?	16	59%	7	26%	4	15%	27	100%

Q No	QUESTIONS Does your authority have the power :	YES		NO		NOT FULLY		TOTAL	
		No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries
2 - Rule making									
53	To lay down legally binding general rules or principles ?	21	78%	3	11%	3	11%	27	100%
54	To lay down non legally binding general rules or principles?	25	93%	2	7%	0	0%	27	100%
55	To lay down interpretative guidance or best practices?	26	96%	0	0%	1	4%	27	100%
3 - Other remits that might fall under the scope of banking supervisors: the example of Anti-Money Laundering and Counter Financing Terrorism (AML/CFT)									
57	To license or register currency exchange offices?	17	63%	9	33%	1	4%	27	100%
58	To enforce that entities do not provide cuurency exchange services in your jurisdiction without authorisation/due registration?	14	52%	11	41%	2	7%	27	100%
59	To license or register money transmission or remittance offices?	19	70%	7	26%	1	4%	27	100%
60	To enforce that entities do not provide money transmission or remittance services in your jurisdiction without authorisation/due registration?	15	56%	8	30%	4	15%	27	100%
61	To refuse licensing or registration (e.g. if you are not satisfied that the persons who effectively direct or will direct the business of such entities are fit and proper persons)?	19	70%	8	30%	0	0%	27	100%
62	To refuse licensing or registration (e.g. if you are not satisfied that the beneficial owner of such entities are fit and proper persons)?	18	67%	9	33%	0	0%	27	100%
63	To monitor compliance with Directives 2005/60/EC and 2006/70/EC? (Please indicate in the last column how this is handled for the institutions or persons mentioned in Questions 59 and 61, which might be only licensed/registered but not supervised as such)	19	70%	5	19%	3	11%	27	100%
64	To compel the institutions and persons mentioned in Questions 59 and 61 and any supervised institution to provide any information, data or document relevant for AML/CFT?	19	70%	5	19%	3	11%	27	100%
65	To conduct on-site inspections at institutions and persons mentioned in Questions 59 and 61 and at any supervised institution for AML-CFT purposes?	19	70%	5	19%	3	11%	27	100%
66	To carry out AML/CFT supervision also on a consolidated basis for institutions and persons mentioned in Questions 59 and 61 and any supervised institution?	20	74%	4	15%	3	11%	27	100%
67	To cooperate and exchange AML-CFT related information on institutions and persons mentioned in Questions 59 and 61 and on any supervised institution with other authorities tasked with AML/CFT in your jurisdiction?	17	63%	4	15%	6	22%	27	100%
68	To cooperate and exchange information with foreign authorities tasked with ALM/CTF?	16	59%	4	15%	7	26%	27	100%

Q No	QUESTIONS Does your authority have the power :	YES		NO		NOT FULLY		TOTAL	
		No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries	No. Answers	% Total countries
4 - Administrative measures and sanctions, including in the AML/CFT field									
69	To issue a public warning or reprimand against a bank?	19	70%	6	22%	1	4%	26	96%
70	To withdraw all or part of the license?	23	85%	2	7%	2	7%	27	100%
71	To suspend the exercise of all or part of an institution's activities, or prohibit these activities altogether?	27	100%	0	0%	0	0%	27	100%
72	To oppose to the nomination of a board member or managing director?	24	89%	2	7%	1	4%	27	100%
73	To replace or require a bank to replace a director or manager, or all of its directors or managers?	22	81%	1	4%	4	15%	27	100%
74	To appoint a person or body who has general or specific powers to authorize acts or take decisions? (please specify under which circumstances and which types of acts/decisions fall under these powers, eg transfer/sell assets...)	20	74%	4	15%	3	11%	27	100%
75	To limit compensation (including management fees and bonuses) to directors and senior executive officers?	8	30%	18	67%	1	4%	27	100%
76	To suspend the voting rights attached to shares held by a specific shareholder or by all shareholders?	23	85%	2	7%	2	7%	27	100%
77	To require the transfer of the shares or share certificates held by a specific shareholder?	11	41%	11	41%	5	19%	27	100%
78	To require a change in ownership?	10	37%	10	37%	7	26%	27	100%
79	To prohibit or limit the distribution of profits or other payments to shareholders?	22	81%	2	7%	3	11%	27	100%
80	To require commitments/actions from shareholder to support the institution if needed with cash (equity)?	11	41%	9	33%	7	26%	27	100%
81	To prohibit or limit principal or interest payments on subordinated debt?	18	67%	8	30%	1	4%	27	100%
82	To require the conversion of subordinated debt into preferential or new equity?	8	30%	15	56%	4	15%	27	100%
83	To limit, prohibit or require prior supervisory approval for any major capital expenditure, material commitment or contingent liability?	18	67%	6	22%	3	11%	27	100%
84	To set a deadline by which a bank has to comply with specific supervisory requirements, non-compliance with which may trigger a public disclosure, by the supervisor, of the facts involved?	16	59%	6	22%	4	15%	26	96%
85	To initiate an insolvency proceeding (either reorganisation or winding-up)?	17	63%	3	11%	7	26%	27	100%
86	To control or play a role in the reorganisation or winding-up? Please specify the extent of your powers in this respect.	19	70%	3	11%	5	19%	27	100%
87	To coordinate a rescue plan before insolvency is declared (e.g. by setting-up a bridge bank, creating a new bank, coordinating a private sector take-over,…)? Please specify the range of actions available.	17	63%	7	26%	3	11%	27	100%
88	To impose a moratorium (closing a bank for business without declaring insolvency)?	15	56%	9	33%	3	11%	27	100%
89	To refer a particular action by a bank to the judicial authorities?	24	89%	2	7%	1	4%	27	100%

Introduction

19. The December 2007 ECOFIN Council, when reviewing the functioning of the Lamfalussy process, invited the Commission, in cooperation with the 3L3 Committees to study the differences in supervisory powers and objectives entrusted to Member State supervisors and to conduct a cross-sectoral stocktaking exercise of the coherence, equivalence and actual use of sanctioning powers among Member States, including any variations between sanctioning regimes. The stocktaking exercise would in particular allow the various interested parties to ascertain whether sanctioning powers have equivalent effect across the EU. It was requested that both work streams should be completed by the end of 2008.

20. By a letter dated 31 March 2008 (please see Annex 1), the European Commission asked CEBS to provide assistance in this matter. The sectoral mapping exercise has been designed in order to serve the following purposes: i) providing an overview of common supervisory objectives and powers, including an analysis of the rationale for differences between Member States and assessing the adequacy of those powers in relation to the stated objectives; and ii) analysing any differences in the practical implementation of sanctioning powers, taking into account decision-making processes and publication/cooperation with other supervisory authorities.

21. Coordination was ensured with the sister Committees as letters from the European Commission calling for assistance were also sent to CEIOPS and CESR. Due to the parallel working, CEBS members have been asked to provide answers from a banking supervisory perspective exclusively, irrespective of the institutional setting of their domestic financial supervision. CEBS members were also asked to indicate for each supervisory power considered, whether they had sole responsibility in their respective Member States and whether this power was exercised directly or by delegation. When another (financial or not) authority is responsible, or shares responsibility with, the banking supervisor, or when a power is delegated to another authority, CEBS members have been asked to name the other authorities involved.

22. A questionnaire (please see annexes 3 and 4) has been prepared by CEBS's Review Panel with a view to capturing the objectives of (questions 1 to 8) and powers (questions 28 to 90) available to a supervisory authority irrespective of their sources (EU Directives, purely domestic measures, both binding and non-binding). Special emphasis has been put on the sanctioning powers and their actual use (questions 8 to 27). As many actions can be taken on the basis of general supervisory powers, the answers provided are outcome oriented. A positive answer ("Yes") can therefore cover cases where a supervisor has the power to do the action specified in the related question on the basis of a general power that can be applied to the specific case as well as cases where a supervisor has been entrusted with a dedicated power specifically targeting the action specified in the question. Cases where a supervisor has been granted conditional powers, i.e. powers which can only be exercised after prior consultation of another authority, are reflected in "Not Fully" answers.

23. In addition, under the current circumstances and further to another request from the Commission in September 2008 (please see Annex 2), a specific focus has been put on early intervention powers. CEBS has been asked to assist the Commission in providing an overview of "all pre-liquidation stabilisation measures" available to national supervisors for achieving timely solutions at a troubled institution as well as the conditions under which these measures can be used. The outcome of this evidence gathering will help design possible policy options in the Commission's White Paper on Early Intervention Tools for dealing with ailing banks, the main focus of which will be to assess whether there is a case for further convergence of crisis

management and resolution tools in the EU and whether the tools currently available can or should be supplemented by any additional tools.

24. It should be noted that there is no commonly accepted definition of early intervention measures and the reference for the stocktake has been the broad interpretation given by the Commission, which includes reorganisation measures.

25. This report builds on the questionnaires completed by CEBS members, which are published on CEBS's website[1]. When reading the report, one should bear in mind that additional powers may have been entrusted to some supervisors or may be under discussion as lessons are drawn from the current crisis.

26. It is divided into three main sections:

- Part I provides a factual presentation of the objectives assigned to banking supervisors within the European Union, based on the answers provided to questions 1 to 8;
- Part II presents the outcome of the stocktaking exercise on supervisory powers, based on the answers provided to questions 28 to 90. Special focus has been put on early intervention measures and the circumstances under which they may be exercised, including an analysis of triggers or indicators, with a view to highlighting commonalities to draw attention to the possible impact of significant differences in the case of an ailing cross-border institution and to identify areas for further work; and
- Part III is dedicated to a stocktake and analysis of the actual use of sanctioning powers (questions 9 to 27) with a view to verifying that banking supervisory authorities are entrusted with robust sanctioning powers that ensure effective implementation of the prudential requirements, and that their effective use provides a level playing field for supervised institutions throughout the EU.

27. It is worth noting that, in line with the ECOFIN conclusions, a legal perspective has been adopted in so far as the objective is to map the existing supervisory powers and objectives, as provided in national legislation, and not their effective or consistent implementation (with the partial exception of Part III). Therefore possible differences in supervisory practices will not generally be captured, even though some have been tentatively identified so as to nuance the outcome of the stocktaking exercise.

28. However, this exercise should not be understood to be a transposition check of Directives. The focus is restricted to supervisory powers and objectives, the sources of which may be found in national law, in particular for early intervention powers.

29. In addition, it is important to stress the inherent limits of this stocktaking exercise, which at this stage, without having conducted a thorough analysis of the conditions for exercising the powers (which would require further investigation) does not allow conclusions to be drawn but only the identification of areas where the disparity of powers and/or of objectives supporting those powers may warrant further work. Indeed the fact that the same powers are available to different supervisors does not necessarily ensure that their scope of application, the conditions for their exercise and/or the degree of reliance on those powers do not differ in practice. In addition, the fact that some supervisors lack certain powers may only relate to the allocation of powers within national institutions and does not necessarily imply that these powers are missing in some jurisdictions.

[1] The completed questionnaires are available at http://www.c-ebs.org/Review-Panel/Other-Surveys.aspx

30. The comparative analysis of the actual use of sanctioning powers is only tentative due to the absence of a common definition of "sanctions" between EU supervisors, coupled with the normal method of conducting banking supervision which relies mainly on preventive measures rather than sanctions to pursue its prudential objectives.

31. Lastly, this report was finalised before the current crisis unfolded, which may lead (and has already led) to changes in the powers available to banking supervisors.

32. The list of country codes used in this report is set out below with information on the "Supervisory landscape" or institutional setting for banking supervision in each Member State (National Central Bank, stand-alone integrated financial supervisor or stand-alone banking supervisor). Unless otherwise stated, the codes also refer to the banking supervisory authority in each country.

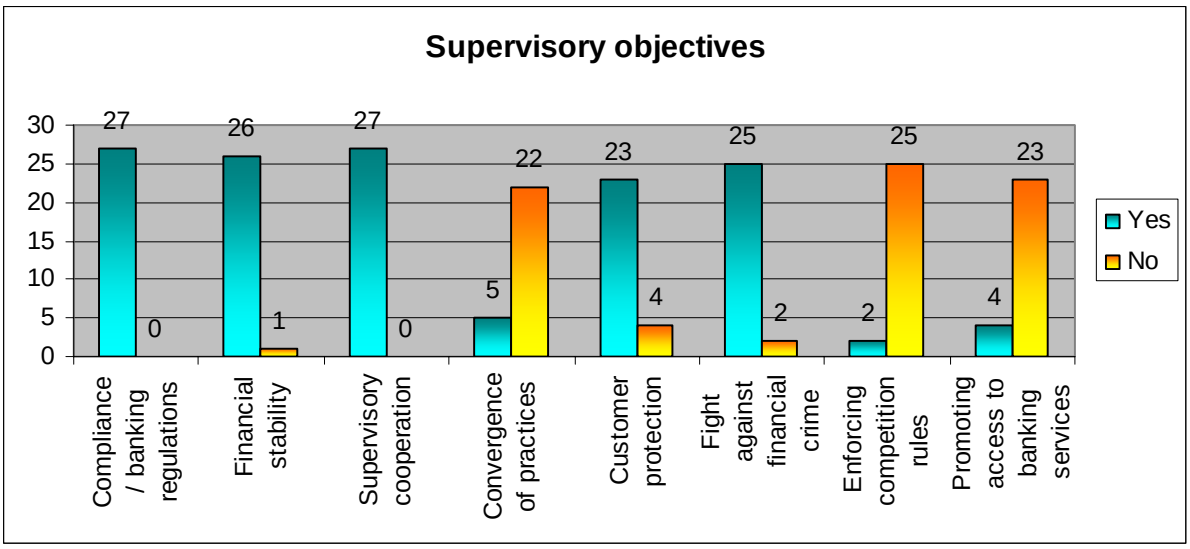
Country	Code	Institutional setting
Austria	AT	Stand-alone integrated financial supervisor
Belgium	BE	Stand-alone integrated financial supervisor
Bulgaria	BG	National Central Bank
Cyprus	CY	National Central Bank
Czech Republic	CZ	National Central Bank
Germany	DE	Stand-alone integrated financial supervisor
Denmark	DK	Stand-alone integrated financial supervisor
Estonia	EE	Stand-alone integrated financial supervisor
Spain	ES	National Central Bank
Finland	FI	Stand-alone integrated financial supervisor
France	FR	Stand-alone banking supervisor
Greece	GR	National Central Bank
Hungary	HU	Stand-alone integrated financial supervisor
Ireland	IE	Stand-alone integrated financial supervisor
Italy	IT	National Central Bank
Lithuania	LT	National Central Bank
Luxemburg	LU	Stand-alone integrated financial supervisor
Latvia	LV	Stand-alone integrated financial supervisor
Malta	MT	Stand-alone integrated financial supervisor
The Netherlands	NL	National Central Bank
Poland	PL	Stand-alone integrated financial supervisor
Portugal	PT	National Central Bank
Romania	RO	National Central Bank
Sweden	SE	Stand-alone integrated financial supervisor
Slovenia	SI	National Central Bank
Slovakia	SK	National Central Bank
United Kingdom	UK	Stand-alone integrated financial supervisor

I. Supervisory Objectives

33. This section presents the responses provided by CEBS members to questions 1 to 8 of the questionnaire (inclusive). Members were invited to describe what objectives are explicitly given to their authorities and were also asked to provide explanations including whether those objectives are legally binding. This part of the stocktaking exercise builds on a survey conducted by the IMF in November 2005 on Governance Practices of Financial Regulatory and Supervisory Agencies, as well as on the study of national mandates undertaken by the Financial Services Committee.

34. As a similar survey is being conducted by CEIOPS, CEBS members were asked to answer from a banking supervisory perspective only, irrespective of the national institutional setting for financial supervision.

35. It is difficult to differentiate between explicit or implicit objectives based on the answers received. In fact, some authorities do not have explicit objectives in their mandates but instead their objectives are derived from the duties established in their national legislation, and pursued by them in practice. Supervisory authorities answered positively when this is the case.



A. Common objectives

36. All authorities stated that they have the explicit objective of **ensuring compliance with banking regulation** [Q2].

37. All authorities also reported that they have responsibility for ensuring **supervisory cooperation** in the EU [Q7], whether explicitly or through legal provisions providing for close cooperation and exchange of information between supervisors. Moreover, participation in the Committee of European Banking Supervisors and, in particular, in the Groupe de Contact promotes supervisory cooperation within the EU. Several authorities reported having dedicated Memoranda of Understanding or similar arrangements with other EU banking supervisory authorities with a view to establishing the terms and conditions for that co-operation (for example in relation to the distribution of supervisory tasks, the designation of a supervision coordinator, the method of supervision, the terms and conditions governing the collection and exchange of information, etc).

38. All authorities, except **MT**, declared that they have the objective of **maintaining financial stability** [Q1]. This assignment is clear not only in countries where banking supervision is entrusted to central banks but in other countries supervisory authorities share this objective with other authorities (central banks, deposit guarantee schemes, Ministries of Finance or financial market authorities). From a practical point of view members have pointed out that when exercising their supervisory tasks they take into account the impact of the activities of the credit institutions concerned for the financial system.

B. Additional objectives common to many authorities

39. Almost all banking supervisory authorities have been given the objectives (solely or as a shared responsibility) of protecting banks' clients from misconduct and/or bad business practices and of preventing financial crime, including anti-money laundering/combating financing of terrorism (AML/CFT).

40. Although not all supervisors have an explicit mandate to **protect banks' clients from bad business practices** [Q4] (as in NL, RO, SI and SK this is entrusted to other authorities, such as a Government Body in the case of SI), they all contribute to some extent to this objective although the scope of the application of this power may differ. For example in AT and CZ, although there is no general competence to protect consumers/clients, the authorities monitor compliance with some consumer credit law provisions. This would include in the case of CZ the prohibition of unfair commercial practices, including misleading commercial practices and aggressive commercial practices; prohibition of consumer discrimination; provision of proper information about prices and setting; in addition, CZ is also entrusted with powers of supervision over financial services agreements which are concluded remotely. IE pointed out that banks are required to provide financial services to clients in accordance with the law which includes a basic competency framework (minimum standards for financial service providers, with particular emphasis on individuals dealing with consumers) and a Consumer Protection Code (a set of general principles supplemented by more detailed rules). In ES the authority oversees compliance with regulations protecting banking customers and a "Claims Service" for banking customers is attached to the supervisory authority. One of the UK authority's statutory objectives is the protection of consumers, and in pursuit of this objective the authority initiated its "Treating Customers Fairly" regime, whereby practices aimed at the fair treatment of customers must be embedded in firms' operations. The authority can impose sanctions upon firms for not treating customers fairly as this amounts to a breach of the FSA's regulatory regime.

41. All authorities, except MT and ES, have an explicit mandate to **prevent financial crime** [Q5], despite the fact that enforcement powers may be given to or shared with other authorities (such as Ministries of Finance or judicial authorities). For AML, an FIU is established in all Member States. All supervisory authorities, except ES, are the competent authorities for monitoring money laundering and anti- terrorist financing compliance by all persons subject to their supervision. All supervisors are required to promptly report to the relevant judicial authorities, and supply them with all the necessary information, situations where they become aware of a crime or offence being committed in the course of their supervised firms' professional activities. PL mentioned that the compliance of currency exchange offices is overseen by the National Bank of Poland. In IE the Financial Regulator currently has supervisory powers to prevent the use of the financial system for financial crime, and these preventative measures are supplemented by the necessary and proportionate use of administrative sanctioning procedures. Existing supervisory powers can also be used in tandem with sanctioning powers to ensure that adequate AML-CTF infrastructures and procedures are implemented in regulated firms.

42. Some supervisory authorities share the objective of preventing financial crime (EE, LT, SE, SK and SI). In EE the Estonian Financial Intelligence Unit is an independent structural unit of the Central Criminal Police, its role being to analyse and verify information concerning suspicions of money laundering or terrorist financing. The authority takes measures to preserve property when necessary and immediately forwards materials to the competent authorities upon detection of elements of a criminal offence. In SE, the Finance Police, a unit under the National Criminal Investigation Department, is among other tasks responsible for handling money laundering and terrorist financing issues. Depending on the nature of the matter, the suspected crime/transaction is referred to the Economic Crimes Bureau, prosecutor or the National Security Service. Banks and other institutions are required to report suspicious transactions to the Finance Police. Finansinspektionen (the SE financial supervisory authority) supervises the fulfilment by financial institutions of their obligations under the regulations governing measures against money laundering and for this purpose Finansinspektionen may carry out inspections on site. Finansinspektionen is also required to report to the Financial Police suspicious transactions which the authority is made aware of.

43. As for countries where such an objective has not been given to the supervisory authority, in MT the Financial Intelligence Analysis Unit is the authority empowered to oversee financial crime and to issue rules in this area. In ES the Bank of Spain assists the Spanish FIU – which is also the AML supervisor – by appointing its director and providing it with human & material resources. Both authorities have signed an MoU for cooperation and information sharing, which includes the commitment of the Bank of Spain to review compliance with AML procedures within the scope of normal or joint on-site inspections of credit institutions.

C. Other objectives common to a few authorities

44. Five supervisory authorities (FI, LU, SI, SK and UK) indicated that they have been mandated to promote **convergence of supervisory practices** [Q7]. LU, FI and SI reported they have recently amended their domestic law in this respect. PT mentioned that they do not have an express legal mandate but that it is nevertheless recognised as an essential objective of the authority. Moreover, implementation of CEBS Guidelines or Recommendations contributes to convergence of practices.

45. Only LT and LV are responsible for **enforcing competition rules** [Q3]. All other supervisors report that other authorities have been assigned this role, usually a specific Ministry/Competition Authority. However, competition is an issue to which they pay attention within their general objective of promoting the smooth functioning of the financial system (ES) or they have a statutory mandate to report on the extent to which competition exists among the providers of financial services (IE).

46. In LT the Law on Banks creates equal competitive and non-discriminatory conditions for banks' operations and therefore promotes competition between banks, both within the country and within the wider EU market. Some countries (such as IT) have reported some responsibilities in this area.

47. Only four authorities (IE, FR[2], PL and UK,) stated that they are responsible for **promoting access to banking services** [Q6] (e.g. access by small and medium-sized businesses, low-income individuals, etc). In IE the Consumer Director has a direct role in promoting the interests of consumers of relevant financial services.

48. Some supervisory authorities (BG, DE, FI, PT and LT) have implicit objectives to promote access to banking services. In FI such responsibilities are shared with the

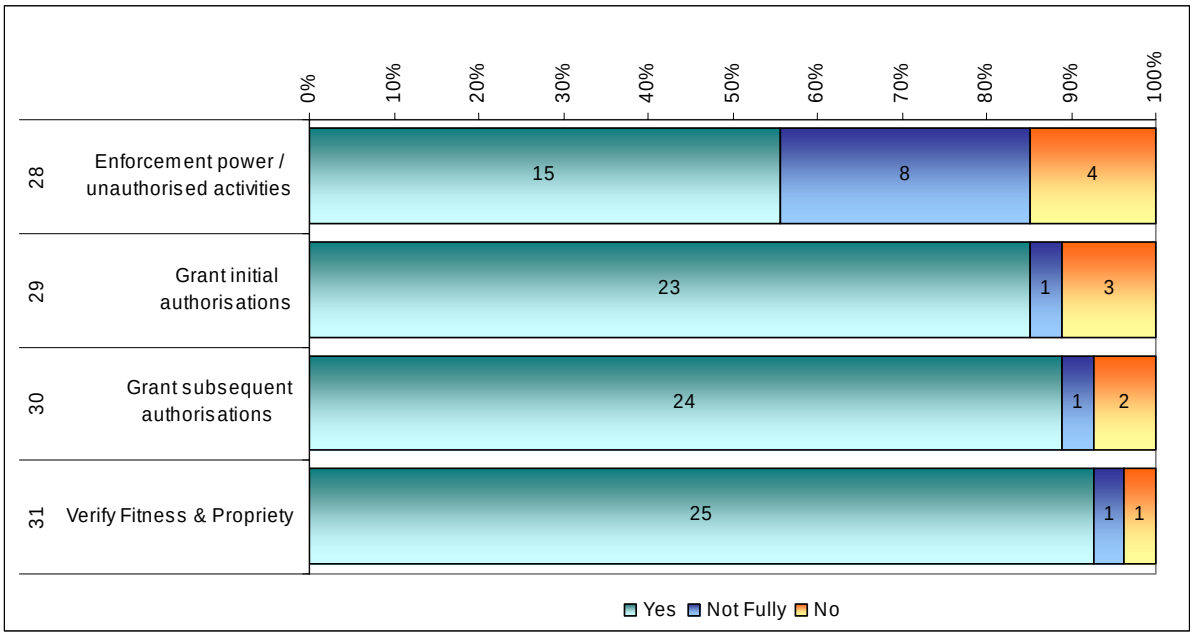
[2] As of 1 January 2009.

Ombudsman's office. For DE one objective is to counteract undesirable developments in the banking and financial services sector, and promoting access to banking services is one aspect of the processing of complaints. In LT the supervisory authority has within its competence participation in relevant governmental programmes (for example, the small and medium business programmes, programmes on housing for residents, etc.).

II. Overview of Supervisory Powers: commonalities & differences

A. Licensing, rule-making and information gathering

1/ Licensing, i.e. questions 28 to 31



49. The review shows that **unauthorised banking activity** [Q28] is a criminal offence in all EU Member States. All national supervisors are committed to preventing this abuse in order to protect the general public and, in particular, are required to provide information to the enforcement authorities. National authorities typically issue public warnings and through a dedicated CEBS network (Enforcement Contact List) ensure smooth flows of information are in place among supervisors concerning entities alleged to be carrying out banking and other financial activities without authorisation. They also actively collaborate with the domestic enforcement authorities (Public Prosecutors, Courts and Police).

50. In addition, fifteen authorities (AT, BG, DE, DK, FI, GR, HU, IE, LV, NL, PL, PT, SE, SI and UK) reported direct enforcement powers, such as imposing fines, issuing orders to close down businesses or seizing premises. In SE for instance the supervisory authority may order a company to close down the business and impose a fine. If this order is not obeyed, the authority may ask the court to liquidate the company.

51. Four authorities (CZ, ES, IT, FR) reported involvement either through general powers to impose pecuniary sanctions or require closure of unauthorized activities (ES) or specific responsibilities. In the latter case, they may relate to the abuse of bank names (i.e. inappropriate use of the term "bank" or other expressions suggesting the existence of a banking licence) such as in CZ and IT. In FR, if a company is unlawfully engaged in banking activities, the Banking Commission may appoint a liquidator, to whom full powers relating to the administration, management and representation of the legal entity are transferred.

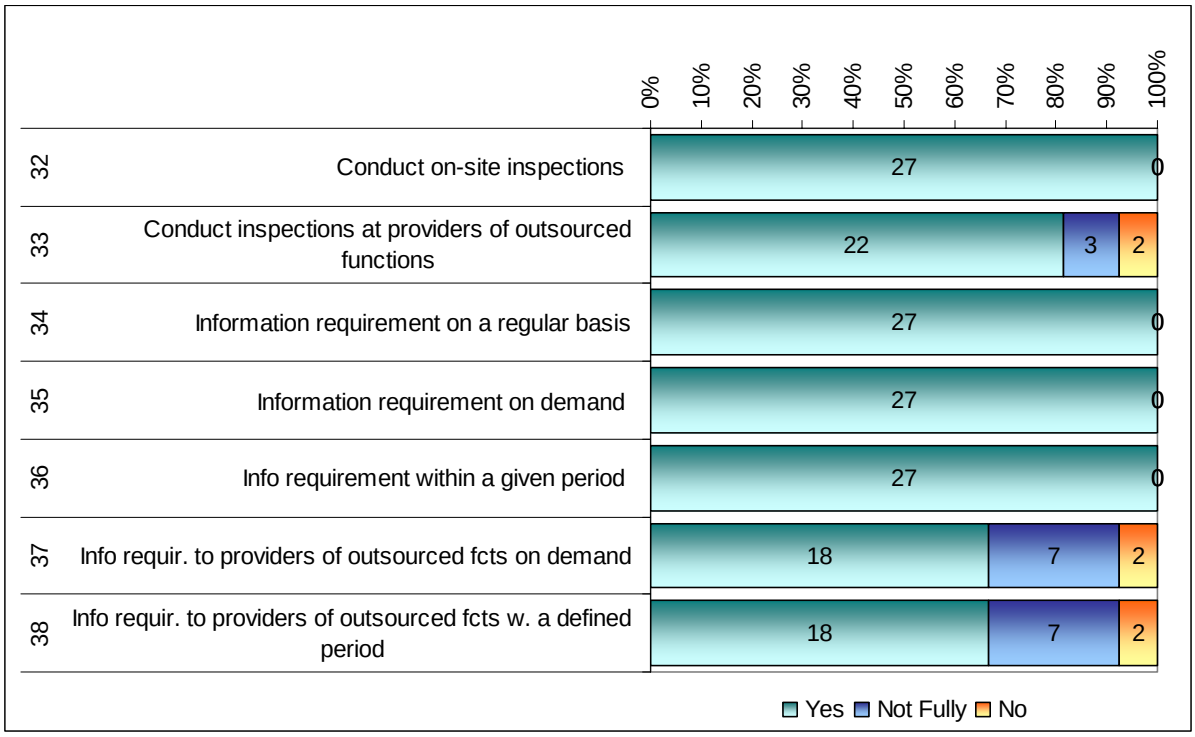
52. [Q29] With regard to **licensing**, a large majority of the authorities surveyed stated that they have the power to grant initial authorisation to banks and that this power is exercised directly. Three authorities reported that they have not been granted licensing powers as they are vested in Governmental authorities (Minister of Finance

in the case of ES; Minister of Treasury and Budget in the case of LU) or in a dedicated licensing authority (in the case of FR). One supervisor (PT) declared that it has restricted competence as authorisation of non-EU banks is entrusted to the Minister of Finance.

53. [Q30] Similarly a large number of positive answers have been received to the question whether the national supervisory authority has the power to grant **subsequent authorisations**. Many members specified that this power relates to variations to the original scope of the authorised activities and some members also referred to mergers and acquisitions of holdings. As to branching, the most common situation is the opening of branches within the national territory and within EU, which is subject to communication requirements. However, national authorities may oppose a bank's projects where they are inconsistent with maintaining that bank's overall health. One supervisor (LU) has limited competence since several types of subsequent authorisation (changes to the objects, the opening or setting up of new establishments) are exercised by the Minister of Treasury and Budget, upon prior advice by the supervisor. The French member specified that the competent authority for subsequent authorisations is the licensing authority. Finally, one member (ES) stated that in its country a banking licence has universal application, meaning that the taking up of new activities does not require any further authorisation.

54. [Q31] All supervisors but one (FR) replied that they have the power to **verify that the persons who effectively direct the business are fit and proper** when assessing applications for authorisation to conduct banking activity. FR stated that such verification is carried out by the licensing authority as a part of the licensing process but it should be noted that close cooperation between both authorities is ensured, in particular through Chairmanship. HU reported a partial power as reputation per se would not be part of the supervisory check.

2/ Information gathering and inspections, i.e. questions 32 to 38



55. [Q32] All the EU banking supervisors stated that they are entrusted with the **power to submit supervised credit institutions to on-site inspections**. Several

authorities have made reference to delegation of tasks. For instance, in one case (AT) on-site inspections have to be conducted by the Central Bank according to the Austrian Banking Act, while another member (DE) specified that the supervisory authority and the Central Bank share this responsibility. In other cases reference to the delegation of tasks is made with regard to supervision of cross border groups or in relation to the possibility of appointing external experts or auditors. However, the degree of reliance on inspections may vary significantly, reflecting different supervisory cultures and resource constraints3.

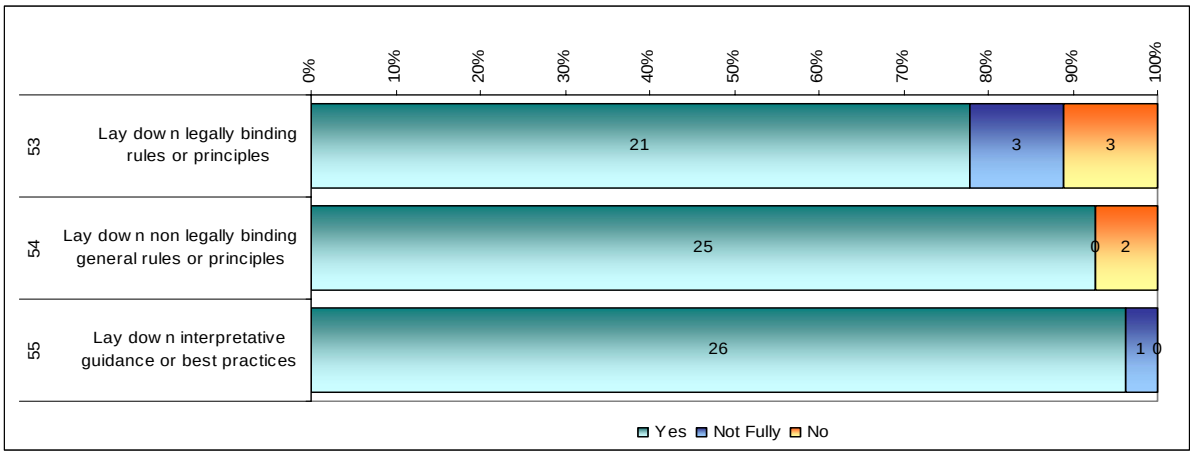
56. [Q33] All supervisors have the **power to inspect entities performing outsourced functions**, either directly or indirectly, but for LV and RO. In this latter case permission to inspect a service provider may be obtained by way of a specific provision of the outsourcing services agreement. One authority (AT) stated that it may inspect outsourcing entities only where they are part of a group subject to consolidated supervision; other members specified that inspections of outsourcing entities are subject to conditions: for instance the entity should have significant importance; or that inspections may be carried out in time of difficulties and with the bank's cooperation (SK).

57. [Q34] [Q35] [Q36] In the field of information requirements, the survey shows that all the supervisory authorities have wide powers to require banks to submit the information necessary to carry out supervisory functions through off-site analysis. This power includes the possibility of (i) requiring information, data and documents on a regular basis (reporting), and (ii) asking for additional information on an ad-hoc basis and/or within a specified time period. On the basis of the clarifications provided by the respondents it is possible to infer that supervisory authorities often have the power to set information requirements or reporting frameworks by way of secondary legislation. One authority specified that the power to require information from banks is shared with the Central Bank (DE).

58. [Q37] [Q38] With regard to the **power to require information from entities performing outsourced functions on demand and/or within a specified time limit**, the landscape is more diversified. Slightly less than 20 authorities have these powers, although many supervisors specified that information from outsourcing entities may be obtained from the supervised institutions (or with their cooperation) or on the basis of a specific provision of the outsourcing service agreement. That is also the situation portrayed by the supervisors who answered "not fully" to questions no. 37 and 38 (such as DK) and by two authorities that provided a negative answer (RO and SK).

[3] The 3L3 Committees agreed to conduct a joint analysis of inspection practices in their Medium-Term Work Program, which is available on CEBS's website at http://www.c-ebs.org/Cross-sector-cooperation.aspx (to be uploaded!!)

3/ Rule making i.e. questions 53 to 56



59. The survey shows that the large majority of the EU supervisors have powers in the field of prudential regulation. In general, authorities are empowered to issue both mandatory (secondary legislation) and non-mandatory rules and principles; they may also provide advice to regulated entities by way of general interpretative guidelines. For those supervisory authorities that have the capacity to issue binding secondary legislation, they can only do so as far as this is provided for in law (primary legislation). AT stated that it has the legal power to issue secondary legislation in some areas (although the Federal Ministry of Finance has to approve the use of certain national discretions).

60. Three authorities (EE, FR and HU) reported not to have the power to issue binding rules or principles. In EE the national supervisor stated that mandatory regulations in the field of prudential supervision are issued by the Central Bank but it participates in the drafting of regulations and is entitled to issue explanatory guidelines. FR stated that they do not have a general power to issue regulations, since this power is in the hands of other authorities (the Minister of Finance, assisted by the Advisory Committee on Financial Legislation and Regulation) but it may issue interpretative guidelines and adopt implementing measures. HU indicated that it can not lay down mandatory rules and principles, which lies with the Ministry of Finance and the Central Bank.

61. In addition, in three countries (BE, DE and IT) opted for the "Not Fully" answer. In BE and IT the texts prepared by the supervisors have to be turned into other public institutions's decisions: for Belgium the CBFA Regulations have to be approved by Royal Decree; in Italy the Banca d'Italia regulations must be compliant with the general principles and criteria stated by the Interministerial Committee for Credit and Savings, which adopts its resolutions on the basis of proposals formulated by the Banca d'Italia. In DE the supervisor has to consult the Central Bank.

62. Finally some supervisors indicated that they have regulatory powers that go beyond prudential regulation, such as setting accounting standards applicable to credit institutions (ES), Anti Money Laundering, price stabilisation, financial promotion or control of information (UK).

D/ Conclusion

The elements provided by the RP survey allow the drawing of some general conclusions. With few exceptions EU supervisory authorities report having comparable licensing powers that encompass the granting of an initial licence, a number of subsequent authorisations and the power to assess that the persons who effectively direct the business are fit and proper to do so.

All national supervisors are involved to varying degrees in preventing unauthorised banking and protecting the interests of the general public.

Similar conclusions can be applied with regard to the powers to require information from supervised credit institutions and to subject them to on-site inspections.

The survey shows a more varied situation concerning the powers of entities performing outsourced functions. However, the cases reviewed demonstrate that the majority of EU supervisors are able to obtain information from such entities including through on-site examinations.

Finally, with very few exceptions, EU supervisors are entrusted with a wide range of regulatory (rule-making) powers; they may adopt mandatory provisions and issue general interpretative guidelines in order to assist the industry to comply with supervisory requirements.

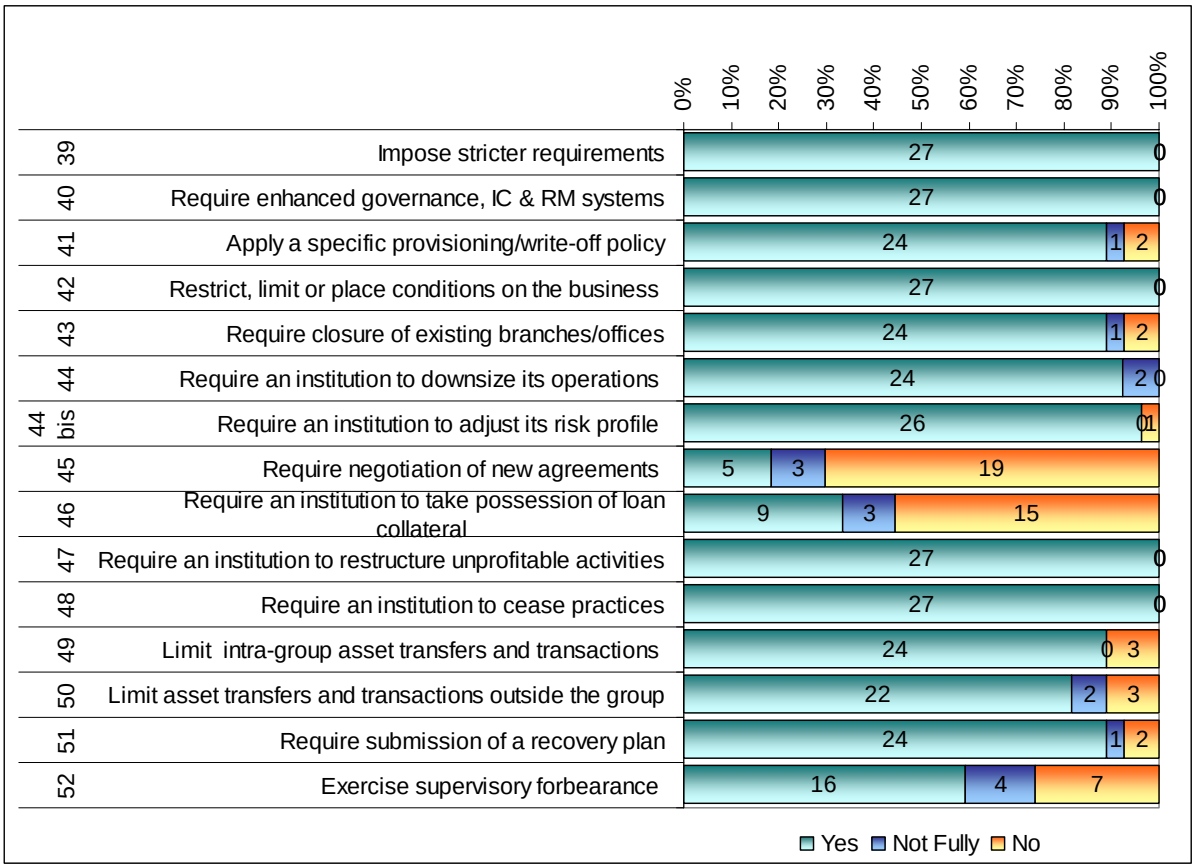
B. Corrective measures, early intervention & crisis management, sanctioning powers

1/ Range of measures available, i.e. questions 39 to 52 & 69 to 90

63. The range of corrective measures available to the supervisory authorities is broad and can be divided into different categories, including (i) measures aimed at restoring compliance, capital adequacy and soundness of an institution, (ii) sanctioning powers that operate through public notices, (iii) intervention and sanctioning powers, (iv) measures directed at the management body of the institution, (v) measures directed at the shareholders, (vi) capital-related measures, (vii) measures related to pre-insolvency situations and insolvency proceedings, and (viii) powers to trigger deposit guarantee schemes.

64. It should be noted that there is no clear-cut definition of intervention measures/tools. This section focuses on an analysis of the tools available to the supervisory authorities, based on the answers to the questionnaire and the additional information provided by the respondents. Hence, it does not include certain intervention tools, such as ring-fencing measures, recapitalisation or other bank resolution tools, which may mainly be granted to other public authorities (central bank, ministry of finance...).

(i) Measures aimed at restoring compliance and soundness (questions 39 to 52)



65. All authorities have the **general power to ensure compliance with the laws and regulations governing a bank's activities**. The power to require an institution to cease practices which are harming the institution, e.g. irregularities and violations of laws or regulations governing the bank's activity [Q48], constitutes a core competence of all supervisory authorities.

66. The exercise of the power to require compliance may be accompanied by an express **request to submit a recovery plan** for the approval of the supervisory authority [Q51]. Most authorities have this power. In CZ, the supervisory authority does not explicitly have such a power but it may require the institution to remedy the situation within a specified period by bringing its strategies into compliance with the legal requirements. The recovery plan contains all the measures the institution will implement in order to restore compliance with its legal obligations. The injunction to present a recovery plan will often go together with a time limit to rectify the situation (see also "sanctioning powers that operate through public notices" below).

67. The **power of forbearance** [Q52] is also linked to the general power to ensure compliance with the banking laws and regulations. Fifteen authorities reported that they have a general power to exercise supervisory forbearance, i.e. to temporarily waive specific prudential requirements for a bank in exceptional conditions. However, the scope of prudential requirements that can be waived differs. In some countries, such as RO, supervisory forbearance is restricted to the Large Exposures limits. In the UK, the authority has the power to waive or modify rules that do not implement EU Directives. Any firm can apply to have a rule waived or modified and the UK authority assesses each application individually. Rules may be waived or modified if the authority deems that compliance would be unduly burdensome or would not achieve the purpose for which the rules were made, and that any waiver or modification would not cause undue risk to the persons whose interests the rules were intended to protect. A list of the waived and modified rules is publicly available on the register of authorised firms.

68. Furthermore, since forbearance constitutes a temporary exception to the application of a legal requirement, such a power will in some jurisdictions be limited to targeted cases expressly provided for in the legislation. In other countries, such as ES, the same effect can be achieved in exceptional circumstances in the context of the supervisory approval of plans to return to a normal situation, which turns out to be an implicit temporary waiver.

69. All authorities have the **power to impose stricter requirements than the legal requirements** [Q39], as provided for in Art. 136 of the CRD. This power is discretionary, except in AT, where the supervisory authority must impose additional requirements when there has been a clear breach of the Banking Act and the situation has not been remedied by other measures.

70. The grounds for requiring an institution to meet stricter requirements are based on inadequate risk management (in terms of coverage or organisation, linked to any type of risk: solvency risk, liquidity risk, credit risk, risk concentration etc.), organisational deficiencies or other identified irregularities.

71. Supervisory authorities will usually impose additional capital requirements (capital add-ons) in order to cover the identified risks. In IT measures affecting capital shall be required where other measures would not have an effect within an acceptable period of time. But some authorities (e.g. CY, GR and UK) may also impose stricter requirements relating to the liquidity position, the quality of assets, large exposures etc. in accordance with the relevant provisions of their domestic legal framework.

72. All authorities have the **power to require an institution to enhance its governance, internal controls and risk management systems** [Q40]. All authorities, except SK, have the power to **apply a specific provisioning or write-off policy for the purpose** of own funds requirements [Q41]. SI indicated that in specific cases the authority may impose appropriate provisions, although it may not legally require the write-off of claims. AT answered "Not Fully" to Q41 stating that the authority has the power to enforce compliance with the law, including binding accounting rules, but that if accounting law allows for discretion, a special provisioning policy cannot be prescribed.

73. Within the measures aimed at restoring compliance and soundness, a number imply placing limits or restrictions on the activities of individual banks. As a general principle supervisory authorities do not interfere in an institution's strategy and the way it runs its business. However, in severe conditions general supervisory powers are reported to be used to restrict or place conditions on the activities of an ailing institution, without however touching upon existing commercial contracts. Further consideration could be given to the conditions for activating these general powers.

74. All authorities have the power to **restrict, limit or place conditions on the business conducted by an institution** [Q42]. For example, SI reported that it has the legal right to prohibit a bank from granting loans or providing banking services to persons with inadequate credit ratings or to prohibit a bank from concluding transactions with individual shareholders, members of the Board or undertakings that have close links with the bank, or to prohibit or restrict the expansion of a bank's branch network. As for the conditions under which restrictions on the conduct of the business can be exercised, in some jurisdictions (e.g. AT, BG, DE and LT), they can be taken when a breach of the legal provisions occurs, or when the situation of the institution is jeopardized.

75. All authorities have the power to **require an institution to downsize its operations** [Q44]**.** One of the possible means of doing so is through selling assets. DK and SI answered "Not Fully" as they do not have the power to require an institution to sell assets but only to require downsizing through restriction of the lending policy.

76. All authorities, except SK, have the power to **require an institution to adjust the risk profile of its business, e.g. switching to lower risk weighted assets** [Q44 bis].

77. Even if the legal framework does not explicitly allow the **power to require an institution to reduce or restructure unprofitable activities** [Q47], all supervisory authorities have a general power that they can use to require an institution to restrict or limit the exercise of its unprofitable activities if they put the future of the institution in jeopardy.

78. As for the power to **require the closure of existing branches and/or offices** [Q43] all authorities acting as home supervisors, except DK and SI, reported having this power, irrespective of the location of those branches. In DK, the supervisory authority only has this power with regard to the institution as a whole and not vis-à-vis its branches or offices. SI reported that although it can oppose the expansion of a bank's branch network, it cannot require the closure of existing branches/offices. As host supervisors, in compliance with Article 30.1 of Directive 2006/48/EC, authorities have the power to stop business at local branches, the headquarters of which is located in another country. When the headquarters are located in another EEA country prior consultation with the home supervisor is required. This consultation might prove difficult in practice during a crisis as recent cases of branches of Icelandic banks have shown.

79. No supervisory authority has an explicit and specific **power to require an institution to negotiate new agreements with viable but weak debtors** [Q45]. Supervisors cannot interfere with the institution's business and commercial contracts but, in crisis situations, may limit or prohibit supervised institutions from undertaking new commitments in general.

80. Only a minority of authorities (AT, BE, DE, DK, HU, LU, MT, NL, PL and UK) directly have the **power to require an institution to take possession of loan collateral or other assets of debtors** [Q46]. In AT this power is limited to cases within the framework of Art 70 para. 2 of the Banking Act (if the security of assets of a credit institution is jeopardized). In BG, any arrangements (or requirements) which stipulate that the creditor shall become the owner of the property if the debtor does

not perform its obligations, as well as any other arrangement which stipulates the manner for satisfying the creditor other than those provided for by the law (i.e. sale of collateral), shall be invalid, according to Art. 152 of the Bulgarian Law on Obligations and Agreements. Moreover, other authorities (GR and LT) do not explicitly have the power to require an institution to take possession of loan collateral or other assets of debtors, but they will use their general prudential authority to this end.

81. The **limitation of asset transfers and transactions** within [Q49] and outside of a group [Q50] is rarely expressly provided for in the legal framework as a measure relating to the operation of the business. However, such measures can be imposed by most authorities on the basis of their general supervisory powers. Only EE, FI, IE ruled out this possibility in their answers to Q49; FI, RO and SI answered negatively to Q50. It should also be noted that in AT and BG those measures will typically be imposed by a special administrator appointed by the supervisory authority. The conditions for the exercise of these powers (for capital-related reasons, liquidity-related reasons etc.) may deserve further scrutiny, especially in a cross-border context and in a crisis situation.

Summary

In respect of measures covered in Directive 2006/48/EC, some supervisory authorities still lack some of these powers, as is shown by the following table. Full convergence needs to be achieved.

To apply a specific provisioning/write-off policy[4]?	1	SK
To require the closure of existing branches/offices?	2	DK, SI
To require an institution to adjust the risk profile of its business (e.g. switching to lower risk weighted assets)?	1	SI

In addition, we observe discrepancies in (i) the discretionary or compulsory use of the power to impose stricter requirements than the legal requirements, and (ii) the type of additional requirement that may be imposed. These two issues may deserve further scrutiny.

With regard to other measures aimed at restoring compliance and soundness, all supervisory authorities have the power to require an institution to cease practices which are harming the institution and breach the laws or regulations governing banking activity. Most authorities have the power to limit intra-group transfers and transactions as well as transfers or transactions outside the group. Most authorities also have the power to require an institution to submit a recovery plan. A majority of the supervisory authorities have the power to require an institution to reduce or restructure unprofitable activities.

On the other hand, a majority of supervisory authorities do not have the power to require an institution either to negotiate new agreements with viable but weak debtors or to take possession of loan collateral or other assets of debtors.

It should be noted that the existing legal frameworks do not usually provide an exhaustive list of specific measures but rather a set of powers (e.g. those listed in Art. 136 of the CRD and some others) including a "general power" on the basis of which the supervisory authority may require an institution to take any appropriate measures or may impose any measure that it deems appropriate to restore compliance with the legal requirements. Supervisory authorities need to rely upon such "general powers" to

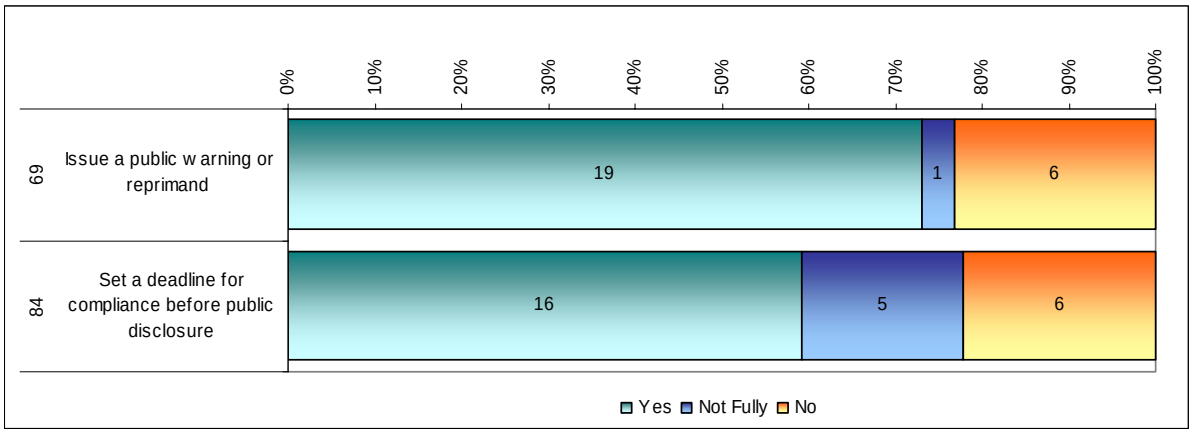
4 For the purpose of own funds requirements

exercise their tasks with the necessary flexibility.

Finally, although a large majority of the supervisory authorities may exercise general or targeted supervisory forbearance, a significant minority (6) of the supervisory authorities (AT, CZ, EE, LV, MT and SI) do not have such a flexible power. Further convergence may be needed in this respect.

(ii) Sanctioning powers that operate through public notices (questions 69 & 84)

82. The powers under review in this subsection are the power to issue a public warning or reprimand (i.e. question 69) and the power to disclose failure by an institution to comply with specific supervisory requirements (i.e. question 84).



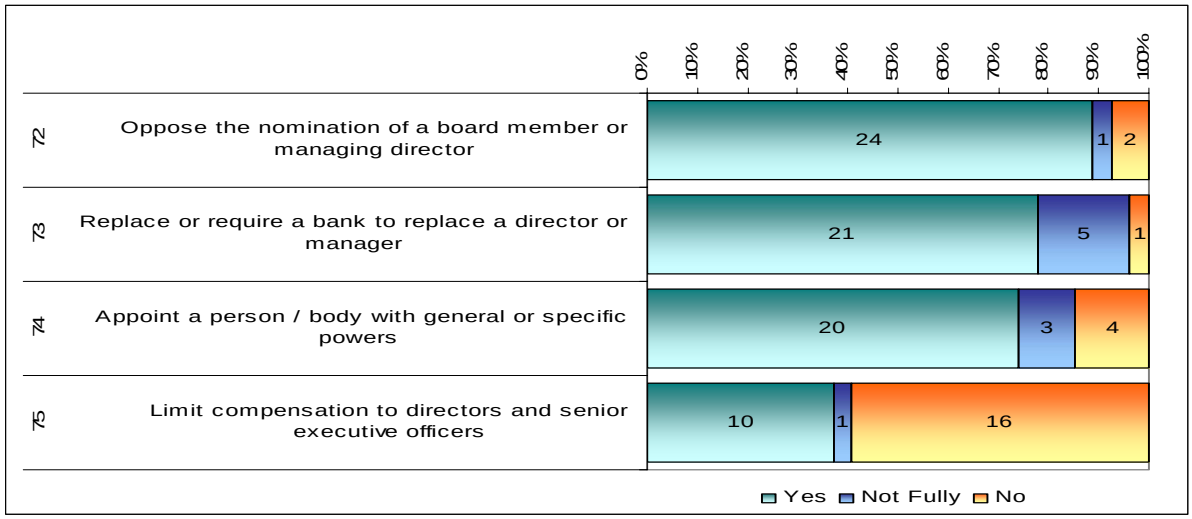
83. The power to set a deadline by which the institution concerned has to comply with the requirements imposed by the supervisory authority is a basic power of the supervisory authorities and is often applied together with the power to issue an injunction to take corrective actions. However, it does not necessarily go along with the publication of a reprimand in the case of non-compliance [Q84]. Publication is an additional and discretionary sanction that may be taken by the supervisory authority (as far as it is entrusted with such a power). In sixteen countries (AT, BE, DK, EE, ES, FI, FR, HU, LT, LU, MT, NL, PL, RO, SE and UK), the supervisory authorities have the **power to set a deadline by which a bank has to comply with specific supervisory requirements, non-compliance with which may trigger public disclosure** by the supervisor of the facts involved. In BG, CZ, GR, IT and SI, the authorities have the power to issue date-specific requirements, but non-compliance will not result in public disclosure, or at least, not necessarily (HU). In IE, there are specific circumstances in which public disclosure is permitted. In SK, public disclosure of non-compliance is dependent upon the requirement in question being breached. CY and PT do not have the power to take such action.

84. The power to **issue a public warning or reprimand** against a supervised institution [Q69] may be limited to sanctions imposed on an institution or to certain measures (e.g. in CZ or SK to forced administration and withdrawal of the licence) but may also apply to other measures imposed on an institution by the supervisory authority. Six authorities (DE, GR, IT, PT, RO and SI) do not possess this power. DE, GR, PT, RO and SI have no legal provision permitting public disclosure of warnings or reprimands given to banking entities. CY may at its discretion publicise the imposition of a fine relating to AML. IT has no specific legal provision for issuing public warnings or reprimands as a means of sanction, but may issue statements to the public in order to safeguard them in specific situations. This power is usually discretionary but, in some cases, the disclosure of sanctions may be mandatory (e.g. in FR). In the exercise of this power, the need to inform/protect the public/investors, the nature and the seriousness of the breaches committed by the institution, as well as the

lawful and regular functioning of the financial markets may be decisive. Some authorities will name the institution concerned when deemed necessary (e.g. DK), other authorities are prohibited by law from doing so. Although in CZ the imposition of a conservatorship or the withdrawal of a licence is published, a strict policy of confidentiality operates and in other cases information cannot be released to the extent that individual banks or persons can be identified. Nevertheless, public warnings are possible in the area of capital markets' supervision in so far as the bank acts as broker. Authorities entrusted with this power usually have the choice of the means of publication (Official Gazette, Newspapers, the Internet, a Notice posted on the premises of the institution concerned, etc).

(iii) Measures directed at the management body of the institution (Questions 72 to 75)

85. Questions 72 to 75 of the questionnaire collectively deal with competent authorities' ability to make changes in a bank's management. Such measures may include changes in personnel, changes in persons able to make or authorise decisions, or changes in management remuneration. From the responses received, it appears that few of the competent authorities possess specific triggers for implementing measures at management level. Rather, any trigger would cause a range of measures to be taken by the competent authorities in order to stabilise a bank's position, of which those aimed at the bank's management form a part.



86. All authorities, except FR, have the **power to oppose the nomination of the persons who effectively direct the business**, based on the fit and proper requirements set in Directives 2006/48/EC [Q72]. In FR, the licensing authority holds the power to oppose the nomination of a board member or managing director. However, not all potential board members in every country would be subject to this power, as in DE (Not Fully answer), for example, there is no express power to oppose a nomination although in effect the authority has the power through its ability to dismiss a board member once they have been employed, which in practice leads to prior consultation in order to avoid unnecessary administrative steps from being taken. Because the fit and proper test is to a degree discretionary, depending upon particular sets of circumstances, different authorities may apply the fit and proper criteria in different ways. In IT the authority may intervene to require the dismissal of officers who fail to comply with the ongoing obligations of the fit and proper test. The criteria against which fitness and propriety of managers are weighed are established by secondary legislation (i.e. a ministerial decree) and are so restrictive that non-compliance is very unlikely, in practice.

87. In theory, all authorities except FR (as this power is entrusted to another French authority) should have the **power to replace or require a bank to replace a director or manager** [Q73], as such an act would be based upon the person not meeting the fit and proper test (as mentioned above) on an on-going basis. However, only twenty authorities responded that they have this power (including FR, as both the supervisory authority and the licensing authority have the power to require replacement of a director). According to the responses, the Member States not providing their authorities with this direct power are FI, HU, IT, NL, PL and SK. In FI, the authority has the power to prohibit a person (through the fit and proper test) but cannot sanction a replacement. In HU, there is no legal provision providing the power, although through exercising a general power the authority may advise or oblige the institution to hire managers with the appropriate skill levels. In IT, failure to comply with fit-and-proper criteria shall be declared by the board of directors, the supervisory board or the management board within thirty days of its learning of failure. In the event of inaction by the board of directors the Bank of Italy shall declare the disqualification. In NL, the authority can only invoke the power if the bank is unable to replace the board member itself.

88. The circumstances in which this power is triggered differ; for example, whilst the competent authority in ES can use the power when own funds, stability or liquidity of a bank are deemed to be in danger, in the UK, general discretionary powers are used to determine whether a replacement is necessary. Other Member States adopt similar approaches to the above examples. The competent authorities in BE and BG, for example, use general supervisory powers to decide whether a bank requires remedial action, where one of the sanctions available is the replacement of all or part of the decision-making body. DE takes a similar approach to that of ES, in requiring the existence of specific preconditions before the power to replace or require a replacement in management can be used.

89. Because of the disparity in the triggering mechanisms employed by the different competent authorities, it is evident that this power can be applied at differing stages of supervisory action against a bank, and the frequency with which such measures are applied will also vary between Member States.

90. Regarding the **power to appoint a person or body that has general or specific powers to authorise acts or to take decisions on behalf of a bank** [Q74], it is important to distinguish "business as usual" circumstances and times of difficulties for an institution.

91. In "business as usual" situations, for example in the case of a simple vacancy of Board members or managers (possibly following from the exercise of powers as in Q73), three authorities (DE, LU and PL) have the power to make an application to the relevant national court in order to appoint an administrator.

92. In times of difficulties for a bank (in cases of severe difficulties and near insolvencies, please see Q 85-86), twenty authorities have the ability to directly appoint a person or body possessing general or specific powers to authorise acts or take decisions on behalf of banks. For example, in ES, the National Bank has the power to appoint *interventores*, whose approval is required for signing any subsequent agreement made by the board of directors; in FI, the authority has the power to appoint a monitor of business activities with powers of approval. Two other authorities (DE, IE) have the power to petition the courts to appoint an administrator or examiner. The UK authority has powers to impose restrictions on the permission of a firm, which could include the appointment of a specific person or body. However in relation to the appointment of a director in a company this would depend on whether the articles of the company required shareholders to approve the appointment of a director. Finally, in DK, EE, LU and SE, the supervisors do not have the power to appoint a person with specific or general powers at an ailing institution. In LU, it is the courts who

have the power to appoint persons with decision-making powers. In SE, a change in the law is under consideration to allow for such a power.

93. Whilst this power includes the ability to appoint an administrator or a person akin to an administrator, or all or part of the management team directly, responses in many cases did not clarify which type of person they have the power to appoint. Furthermore, several factors will affect the nature of an authority's response, including:

a) The pre-conditions necessary for an authority to take such a measure

94. Some authorities use ongoing general discretionary powers as the basis for appointing persons with decision-making powers over a bank. Because discretionary powers are used, there are no specific criteria determining when such a measure is necessary; rather, supervisory judgement is the primary factor for initiating action. However, there are authorities such as PT and DE, where specific circumstances are required before a person with decision-making powers can be appointed. In PT, for example, only when a bank is at risk of suspending payments or is in financial distress is the authority able to act.

b) The process by which an authority may appoint such a person or body

95. There are two general ways in which competent authorities appoint persons with decision-making powers. The first method is unilateral, not requiring the approval of another body or institution, as is the case in IT or BE. The second method is one that requires prior approval, for example from the national courts, which is the system employed in DE and IE. These differing processes may affect the frequency with which such action is taken.

c) The type of person or body an authority may appoint

96. Competent authorities are able to appoint different types of person with decision-making powers over a bank's business. In AT for every credit institution with a balance sheet in excess of €1 billion a state commissioner (*Staatskommissär*[5]) must be invited by the credit institution to its general meetings and any other meetings of the members, to the meetings of the supervisory board and to executive meetings; the *Staatskommissär* has powers to raise objections on behalf of the competent authority. In a crisis situation, when the security of an institution's assets is jeopardized, the supervisory authority may also appoint government commissioners (*Regierungskommissär*) for a period of up to 18 months. The government commissioners have the power to veto certain transactions if the authority believes that there is a danger of the liabilities to creditors not being met.

97. Whilst this approach is unique amongst Member States, other authorities, such as IT, FR, LT, PL and SK, have the power to appoint administrators, whose primary role is to run the bank whilst stabilisation measures are implemented for its long-term survival. In BE, the UK and PT, the authorities also have the power to appoint members to the board of a bank, although in the case of the UK it is dependent upon shareholder ratification. Other types of person appointed by competent authorities are Conservators in BG and CZ, Interventores in ES, Commissioners in GR and HU, and a Curator in the case of NL.

d) The range of powers the appointed person or body may possess

[5] A Staatskommissär is a person who is appointed for every credit institution with a balance sheet total in excess of €1 billion and who has the right to veto a decision when he/ she thinks that the institution is not in compliance with a specific provision of the legal framework.

98. Persons appointed by competent authorities will have different powers, although the nature of each appointment will often determine the extent of the decision-making powers. For example, in FI, the appointed person only possesses powers of approval/veto over certain transactions. In BE, the appointed person has the power to veto all or part of the decisions taken by the management body and the power to submit any proposal to the decision-making body. In FR, IT and the UK, for instance, potentially full management and administrative powers are given to the appointed person(s).

99. Some competent authorities (BE, CY, EE, HU, LT, MT, PL, SE and SI) have an **ability to limit financial compensation to directors or senior executive officers** [Q75], which is generally achieved through general powers and only in cases of troubled institutions. In SE, the authority does not have any specific rules regarding limitations on compensation payments to management, but may oppose a compensation payment that would put at risk the liquidity and capital requirements of an institution In EE, the same outcome can be achieved through a general power authorising the supervisor to request restrictions on the operating expenses of an institution. In SI, the authority enforces compliance with the Banking Act under which a bank may not pay out profits either in the form of an interim dividend or final dividend, or in the form of a payment deriving from participation in profits by the management board, the supervisory board or employees, when the bank does not comply with the capital and liquidity requirements, or would no longer comply if the compensation payment were to occur or when the compensation payment might have a significant impact on the bank's profit and loss account.

100. Among those authorities who stated not to have the power, BG indicated that appointed conservators may suspend payments to directors. In IT, the authority can put any matter on the agenda of board meetings, but the decision remains with the bank.

Summary

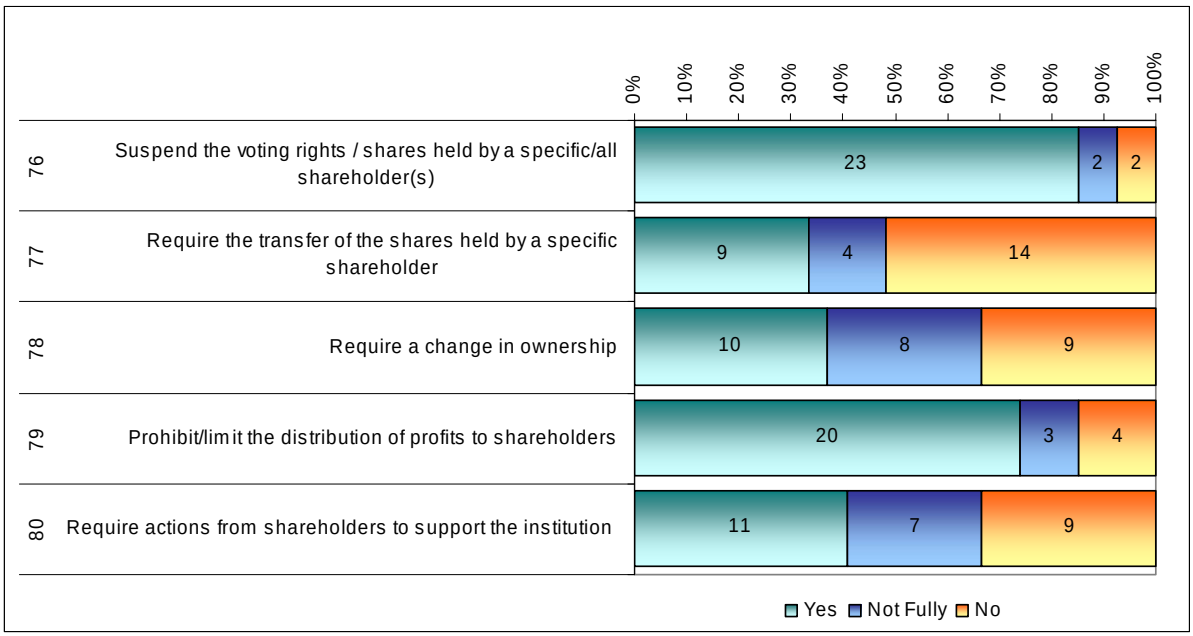
Persons holding management functions at banks are subject to the authorities' general supervisory powers, and in particular to on-going compliance with national fit and proper tests. However, following the responses it became clear that there are two distinct sets of circumstances in which supervisors have explicit powers to take action aimed at a bank's management. The first is during business as usual situations when the number of authorities with specific powers is limited. The second set of circumstances, where far more authorities can act, is when a bank appears to be in difficulty. Whilst authorities have powers to remove directors who are demonstrably unfit (under the fit and proper regime), they may not have a direct power to appoint replacements, as such action may be taken through or in conjunction with other bodies, and/or be dependent upon ratification by shareholders.

(iv) Measures directed at the shareholders (Questions 76 to 80)

101. This section covers five different powers directed at the shareholders: the power to suspend the voting rights attached to the shares held by a specific or all shareholders, the power to require the transfer of the shares or share certificates held by a specific shareholder, the power to require a change in ownership, the power to prohibit or limit the distribution of profits or other payments to shareholders, and the power to require commitments/actions from shareholders to support the institution if needed with cash/equity.

102. It is important to highlight that the supervisory powers potentially affecting shareholders' rights can only be exercised at severely distressed institutions and with

a view to achieving wider public policy objectives, such as maintaining financial stability or protecting depositors' interests. The exercise of these powers may raise legal issues, as shown in the Fortis case in October-November 2008, since Company Law Directives, in particular the Third Company Law Directive on mergers (78/855/EEC) and the Sixth Company Law Directive on divisions (82/892/EEC), also lay down specific requirements designed to protect shareholder rights with respect to mergers or divisions, such as the requirement to have mergers or divisions approved by a general meeting of the shareholders. Additional provisions may be found in national company law. The conditions under which supervisors can exercise these powers may differ and it may be useful to elaborate on the ways in which these powers can be activated and how they relate to the relevant European Directives and national provisions, as well as to the European Convention on Human Rights[6].



103. Before examining these five powers, it should be noted that the authorities also have the right of prior approval when a legal or a natural person intends to acquire shares in a supervised institution (or a qualifying participation of a minimum percentage of the shares - the exact percentage being specified in the legal framework). If the authorities have reasons to consider that the influence of the shareholder owning the shares is likely to be detrimental to the sound and prudent management of the institution, they will oppose the acquisition. In IT, qualifying holdings for which approval has not been obtained or has been revoked must be divested within the time limit set by the supervisory authority.

104. All authorities except FR and NL have the **power to suspend the voting rights attached to specific shareholders** [Q76]. However, in BE, BG, CY, CZ, DE, EE, IE, RO and SE the power extends only to shareholders with qualifying interests. In ES, depending upon the triggering event for such action, either the supervisory authority suspends the voting rights, or the Minister of Finance and Economy suspends the voting rights following a proposal by the authority. In IT, the power is exercisable only in certain circumstances where, for instance, authorisations have not been obtained for qualified holdings, or have been suspended or revoked or when mandatory communications have not been made. In FR, this power is exercised by a provisional administrator, who is appointed by the authority applying to the French Court of first instance.

[6] Shareholder rights are protected under the European Convention on Human Rights (ECHR Protocol 1 Art.1).

105. There are various grounds for suspending voting rights: (i) the influence of the shareholder owning the shares is likely to be detrimental to the sound and prudent management of the institution (this ground is common to all authorities); (ii) the intended acquisition has not been pre-notified to the supervisory authority; (iii) the participation has been acquired despite the opposition or without the approval of the supervisory authority; (iv) there is a risk of insolvency and the institution is placed under special supervision; (v) the acquisition would place the institution in a corporate structure that would prevent its effective supervision ; or (vi) the approval has been revoked.

106. Some authorities have full competence to exercise this power, although other authorities must involve the judicial authorities or the Ministry of Economy and Finance, who will order the suspension. The suspension will last until the circumstances that have warranted the adoption of the measures are no longer present or when the shares have been purchased by a third party of whom the supervisory authority approves. If the voting rights are exercised despite the suspension, the votes shall be deemed invalid (e.g. BE, ES).

107. All authorities with the exception of CZ, DK, LU, and NL have the **power to limit or prohibit the distribution of profits or other payments to shareholders** [Q79]. However, in CZ, the authority can demand that post-tax profits are used to supplement reserve funds. In LU, the authority may limit but not prohibit the distribution of profit to shareholders. In AT, this measure can only be taken within the framework of Art 70 para. 2 of the Banking Act, that is when the security of assets is in danger. It is worth noting that in some "national rescue plans" adopted in late 2008, such as in DK, banks benefiting from the plans are not allowed to pay out dividends or create new redemption programmes whilst the plans are in force.

108. As to the grounds for the prohibition on the distribution of all or part of the profits, the power can be used: (i) when an institution fails to comply with any of the legal requirements; (ii) when its liquidity position is impaired; (iii) when the institution threatens to become insolvent; (iv) when it is deemed necessary for safeguarding the interests of depositors or creditors; or (v) when an institution lacks sufficient equity, etc.

109. This measure aims to allow the institution to supplement its reserve funds or to increase its capital. By so doing, the authorities that do not explicitly have the power to require a capital increase will indirectly achieve the same objective (e.g. MT). In PL, when an institution undergoes a recovery program, the institution's earnings will be prioritised to cover previous losses and then to increase its capital. In ES, depending upon the seriousness of the situation, the authority will prohibit the distribution of profits or will oblige the institution to request its prior approval before distributing profits in connection with the recovery plan which also has to be approved by the authority. Regarding the process, this measure may be imposed by the authority itself or by the special administrator who has been appointed.

110. As to the powers to require a transfer of shares, a change of ownership or a capital injection from shareholders, only a minority of authorities hold such powers. Nine authorities (BG, DE, LU, MT, PL, RO, SE, SI and UK) have the **power to require the transfer of shares or share certificates held by a specific shareholder** [Q77]. In four more countries (BE, IT, RO and SI) this power can only be exercised over shareholders with qualifying holdings and when the authorization to obtain a qualifying holding has been withdrawn. In LT, the authority may apply to the court to force the sale of shareholdings. It is worth noting that there may be indirect ways to achieve the same result. For example, in AT, the supervisory authority may use its power to suspend the voting rights to indirectly encourage a transfer or a change in ownership.

111. Ten authorities (BE, BG, CY, DE, LU, MT, PL, RO, SE and UK) have the **power to require a change in ownership** [Q78]. As to the conditions for exercising this

power, an authority will have the possibility of requiring a transfer of shares or a change in ownership where the influence of the shareholder possessing the shares is likely to be detrimental to the sound and prudent management of the institution. Examples of the use of this power include a supervisory authority requiring a qualified shareholder to reduce its stake or a merger with another credit institution.

112. The authorities who do not have the power to require a transfer of shares or change in ownership may use the suspension of voting rights to indirectly bring about a transfer or a change in ownership (e.g. AT). Also, a change of control may take place indirectly through a capital increase required by the authority. In such a case, the authority may prohibit the existing shareholders from participating in the capital increase. In FR, the power can only be exercised by a provisional administrator appointed by the authority, following an application by the authority to the French Court of first instance. In IT, the authority can put any matter on the agenda of board meetings, but the decision remains with the bank. In LT, the authority may apply to the court to force the sale of shareholdings. In PT, the authority has the power to prohibit the voting of qualifying holdings in credit institutions.

113. Regarding the process, the authority may set a deadline by which the shareholder concerned must sell their holding (e.g. BE). The authorities that do not directly have the power to require a transfer of shares or a change in ownership will request the judicial authorities to order a transfer of shares or a change in ownership (e.g. FR, IE and LT), or some authorities may use a general supervisory power to order a general meeting be convened, set the agenda and propose the adoption of certain decisions, including a transfer of shares, a change of ownership by way of a merger, etc. (e.g. IT). In HU, the supervisory authority does not have such powers but it may recommend taking such measures.

114. Eleven authorities (AT, BE, BG, CY, GR, LT, LV, PT, RO, SK and UK) have the **power to require commitments and/or actions from shareholders to support an institution if needed with cash** (equity), although here again the conditions for exercising this power may differ [Q80]. In AT, only where the security of assets is in danger will such an action take place, and under such circumstances the maximum period for which this may be imposed is 18 months. Regarding the process, the authorities may require a letter of comfort from the shareholders in order to formalize their commitments.

115. Where the power to require commitments and/or actions from shareholders has not been entrusted to supervisors, similar effects might be obtained indirectly for all supervisors through "pillar II" powers, such as the power to require credit institutions to maintain a certain level of own funds on top of "pillar I" capital requirements.

116. Finally seven supervisors (EE, FR, HU, IT, MT, PL and SI) reported to have at their disposal different "soft tools" to exert influence over shareholders and/or create the conditions for shareholders action through moral suasion. In FR, the banking Act specifies that the Chairman of the authority may invite shareholders to provide financial support. In HU, IT or SI, the supervisory authority may require a general meeting to be convened and request a discussion of specific items.

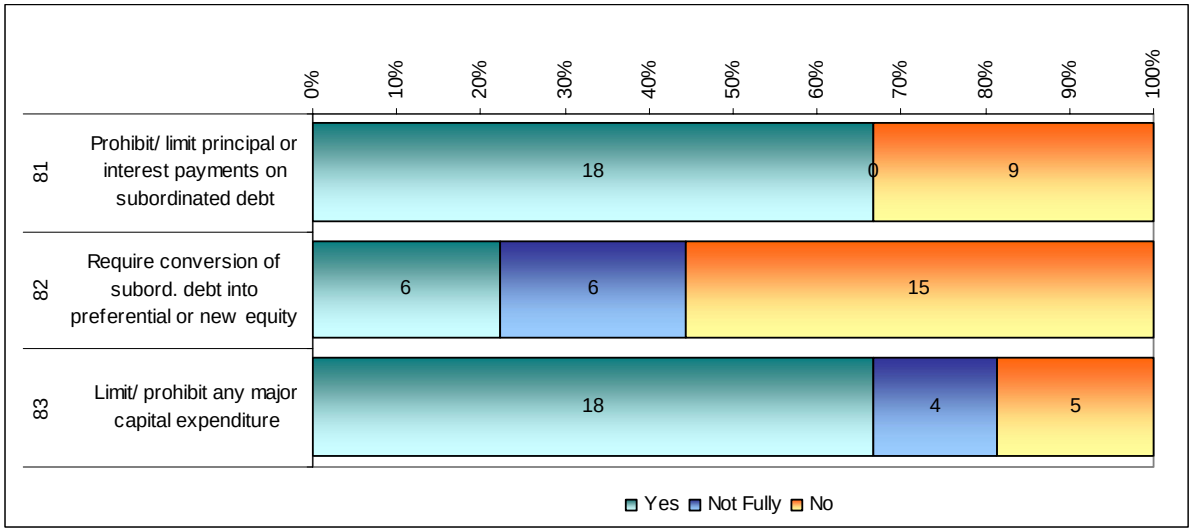
117. Moreover, it should be noted that in some jurisdictions, supervisory authorities have **further powers directed at the shareholders**. In BE, the supervisory authority has the power to order the sequestration of shares. Similarly, in DE, the authority may transfer the shares (and the exercise of the corresponding voting rights) to a trustee. The authority may also allow the trustee to sell the shares if the actual shareholder fails to find a purchaser within an adequate period of time. In UK, the supervisory authority may place restrictions on the shares. A restriction will prevent the transfer, the use of voting rights, the issue of further shares or the payment of dividends in respect of the "restricted shares".

Summary

From the above, it appears that there are very wide variations in the powers held by supervisory authorities vis-à-vis the shareholders. Even when authorities have far-reaching, and direct powers they are not really harmonised. Consideration should be given to further convergence in this respect, taking into account that, to a certain extent, authorities who do not have these powers may use other powers to achieve, indirectly, the intended objective.

(v) Capital-related measures (questions 81 to 83)

118. Questions 81 – 83 of the questionnaire concern competent authorities' ability to control certain aspects of a bank's capital expenditure and how a bank may deal with its subordinated debt.



119. Eighteen authorities (AT, BE, BG, CY, DE, DK, EE, FI, FR, HU, IE,IT, LT, LU, MT, PT, SE and UK) have the power to prohibit or limit principal or interest payments on subordinated debt [Q81]. The prior agreement of the authority is required in the case of early repayment of dated subordinated capital instruments or before any undated subordinated capital instruments can be repaid. This power may derive from a general power, such as in IT, where the authority has a general power that enables it to prohibit certain transactions or the distribution of profits and other elements of capital. It may take the form of a specific power, restricted in some countries to repayment of principal only, such as in FR. Other forms of restrictions can apply to the circumstances under which this power can be exercised: in AT for example, it is restricted to cases of severe difficulties as it belongs to a government commissioner who can prohibit credit institutions from transactions which may jeopardise their ability to meet their liabilities.

120. There are different bases on which this power may be used. In a few Member States, such as HU, quantitative methods of assessing capital adequacy are used as triggers. There are also Member States who employ a qualitative triggering system, in addition to quantitative methods, such as DE, if the business is not properly organised, where security for entrusted assets cannot be guaranteed, or where effective supervision cannot be ensured. Other countries such as BG, whilst employing a triggering system based on capital adequacy, may also use their general discretionary powers to take action, even in situations where the quantitative conditions may not have been satisfied.

121. Only a minority of authorities (BE, BG, DE, MT, NL and SE) have **the power to require the conversion of subordinated debt into preferential or new equity** [Q82]. In AT, the national legislation limits the use of this power to cases where there is a danger of credit institutions not fulfilling their obligations to creditors, and

in particular to the security of assets entrusted to the credit institution. In HU, this power can be exercised in the course of the recovery plan for a financial institution. In LT, there is no express legal provision permitting the authority to require the conversion of subordinated debt, although it is allowed if it is stipulated in the contract between the institution and the person providing the subordinated loan. In IT, the authority can put any matter on the agenda of board meetings, but any such decision remains with the bank. Based on the information provided, it appears that this power is generally limited to institutions in severe difficulties.

122. Eighteen authorities (AT, BE, BG, CY, DE, EE, FR, HU, IT, LT, LU, LV, MT, NL, PT, SE and UK) have the **power to limit, prohibit or require prior supervisory approval for any major capital expenditure, material commitment or contingent liability** [Q83]. Only two authorities provided an explanation of the basis upon which such action might be taken. In the case of DE, this measure may be implemented on either quantitative or qualitative grounds, namely if the bank lacks sufficient equity, the business is not properly organised, where security for entrusted assets cannot be guaranteed, or where effective supervision cannot be ensured. In LU, this measure may be used in order for the bank to comply with the provisions of the CRD.

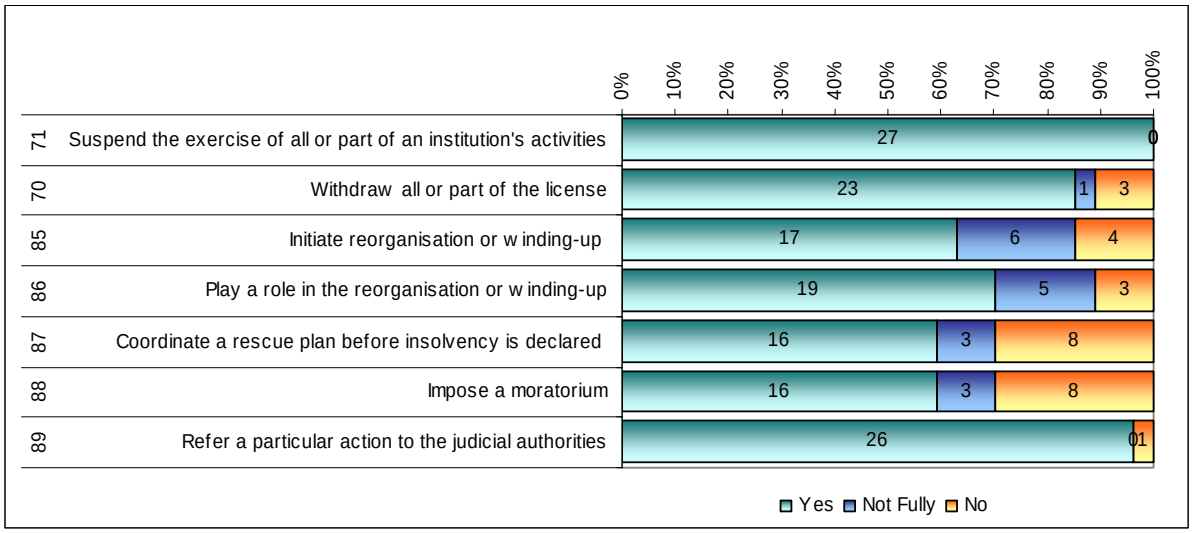
123. Other authorities have specific powers in relation to banks' capital expenditure. In GR, prior supervisory approval is required for major capital expenditure (for example prior to an acquisition); in SE the authority has this power when expenditure exceeds 25% of the credit institution's capital base; in SK, the power can only be used once an institution has gone into administration.

Summary

From the responses, it is evident that quantitative triggers feature more prominently in the capital-related powers of authorities than for other powers outlined in this report. Nevertheless, because qualitative triggers and discretionary powers may also be used, there may be variations in the ways in which authorities act. Only a minority of competent authorities have the power to require a bank to convert its subordinated debt into equity, whereas the majority of authorities have the power to limit or prohibit certain capital payments.

(vi) Measures related to pre-insolvency situations and insolvency proceedings (questions 70 to 71, 85 to 89)

124. In this section the powers to suspend the exercise of all or part of the activities of an institution, the power to withdraw all or part of the licence, to initiate an insolvency proceeding (re-organisation or winding-up) and to control or play a role in the re-organisation or winding-up of an institution are examined.



125. All authorities have the power to **suspend the exercise of all or part of an institution's activities, or to prohibit such activities altogether** [Q71]. This power is exercised indirectly in only a few cases. In AT for example, when the security of the assets of a credit institution is jeopardized, the supervisory authority can appoint an attorney or an external auditor who is entitled to prohibit credit institutions from certain transactions. The grounds for the suspension or the prohibition of the exercise of all or part of the activities may also vary. A suspension or a prohibition may take place when the institution does not comply with an injunction of the supervisory authority to take corrective action, when the security of the assets entrusted to the institution is jeopardized, when its effective supervision cannot be assured, or when the supervisor and institution have entered in a crisis resolution phase (e.g. ES). It may also go along with the appointment of a special administrator (e.g. FR).

126. All authorities have the power to **withdraw all or part of the licence** to operate [Q70] except in IT, LU and ES, where this power belongs to another authority. In IT the power to withdraw a banking licence belongs to the Minister of Economy and Finance who, acting on a proposal by the authority, orders by decree the compulsory administrative liquidation of the bank. In addition, the Banca d'Italia withdraws the banking license where a bank has been excluded from deposit guarantee schemes. In LU the Minister of Treasury and Budget has the power to withdraw the licence, either following a proposal from the CSSF or by his own decision. In ES, the power lies with the Council of Ministers, following a proposal from the Minister of Economy and Finance, which in turn is based upon a proposal from the supervisory authority.

127. The power to withdraw the licence is often described as the ultimate sanction. Several criteria or conditions may lead to the withdrawal of the licence: when legal requirements are continuously breached, when the conditions for the exercise of the activity are no longer met, when it appears that the initial authorization was based on fraudulent information, when the institution has not started its activities within a certain period of time after the authorization has been granted (e.g. six months or one year), or when the institution suspends its operations for a certain period of time (e.g. more than six months).

128. Sixteen authorities (BE, BG, CY, DE, ES, HU, IE, IT, LT, LU, MT, NL PL, PT, SK and UK) have reported to have the power to **coordinate a rescue plan** [Q87] before insolvency is declared (e.g. by coordinating a private sector takeover, setting up a bridge bank or creating a new bank). However, this figure should be handled with caution as not all the sixteen authorities have the capacity to implement all of the options given as examples in the questionnaire. It is worth noting that in a number of countries, the concepts of "bridge bank" or "setting up a new bank" for the purpose

of rescuing an ailing bank do not exist but similar effect can be achieved by restructuring the bank through a private sector takeover or merger. Coordination measures can consist of inviting and directing other bodies / stakeholders, such as Deposit guarantee Funds in a few countries (e.g. Spain) to aid in the reorganisation process or calling shareholder meetings to present proposals (e.g. in PT).

129. Of the authorities claiming the power to coordinate a rescue plan, most refer to their general powers of intervention. However, there is a distinction between authorities who possess direct powers of intervention (such as BG), and those who may be involved in a takeover but possess no powers to enforce it (such as the UK).

130. In BG, the supervisory authority (Bulgarian National Bank - BNB) may place a bank at risk of insolvency under "Special supervision", which will enable it to take a range of measures as necessary. For example, the BNB may order forced increase of the bank's capital and in this context formally invite the domestic Deposit Guarantee Fund (BDIF) or request financial institutions licensed by the BNB to support this initiative. In the former case, the BDIF has to decide whether the Fund's resources shall be used for capital infusion or for repayment of insured deposit amounts depending on which measure is the most cost-efficient. In case a private sector take-over is favoured, the design of the takeover plan belongs to the bank's conservator, designated by the BNB, while approval of the take-over rests with the BNB.

131. In the UK, special provisions allow the government to coordinate with the supervisory authority and the central bank in order to take a bank into public ownership or to reorganise the bank such that certain assets may be sold to private investors. These powers were used in nationalising Northern Rock in 2007 and in creating a bridge bank in the Bradford & Bingley case in 2008.

132. In three countries (CZ, FI and FR), the authorities reported to have no direct responsibilities in coordinating rescue plans. While FI reported that coordination mainly rests with the Minister of Finance, although the authority provides technical assistance, CZ and FR indicated that they were also involved through respectively the conservatorship or special administration regimes. For example, in FR, the authority can appoint a provisional administrator with general power to authorize acts and take decisions. Close coordination of actions with the Deposits Guarantee Fund and the Central Bank were also mentioned.

133. In AT, DK, EE, GR, LV, RO, SE and SI the powers do not exist. In SE, an amendment to introduce such power is currently under consideration.

134. Sixteen authorities (AT, BE, BG, CY, DE, DK, EE, GR, HU, IE, LT, LV, MT, PL, SE, UK) have reported to have the power to **impose a moratorium,** ranging from temporary suspension of payments to closure of a bank for business without declaring insolvency [Q88]. In some countries the general insolvency regime including the rules for establishing a moratorium does not apply to credit institutions for which specific provisions are in place.

135. Of the Member States possessing this power, some competent authorities do require specific circumstances in order to impose a moratorium. In DE, for example, if a bank cannot provide security for deposited assets or there is a situation in which the authority is prevented from effectively supervising the entity, a moratorium can be imposed with the sole purpose of preventing the initiation of insolvency proceedings. In IE, the authority has the power to impose a moratorium at its discretion if it is in the public interest to do so, but also if one of a set of prescribed circumstances exists.

136. Three supervisors (CZ, IT, PT) reported not to have full power to impose a moratorium, either because the initiative lies with another person or body although the decision requires prior authorisation from the supervisor (CZ, IT), or because a moratorium regime is not in place per se but the supervisor has the capacity to adopt with similar extraordinary measures (PT). In CZ a conservator may, with the prior

consent of the authority, suspend the rights of depositors. Similarly, in IT, suspension of payments of the bank's liabilities and restitution of financial instruments to customers may be suspended by provisional or special administrators; the measure is subject to the authorization by the supervisor, which may issue directions for its implementation. The suspension may be for a period of up to one month, which may be extended for two months. In PT, the supervisor may temporarily waive the timely fulfilment of contractual obligations and authorize temporary closure of premises where transactions with the public take place.

137. Of those countries where supervisors do not possess the power (ES, FI and FR), one (FI) reported that the power to take such a step rests with the Ministry of Finance.

138. All authorities have reported having the power to **initiate insolvency proceedings leading to the re-organisation or winding-up of an institution** [Q85] except BE, ES, FI and SE. In SE, there are no such powers under current law, but an amendment is under consideration. In addition, six supervisors (CY, DE, EE, FR, IT and MT) stated partial responsibilities only.

139. A re-organisation procedure will only be initiated if it appears likely that the insolvency can be remedied. In such a case, the institution may continue its business activities. A receiver with extended powers to control the institution's activities might be appointed. A **Winding up** procedure will be initiated when the crisis is irreversible and the closure/termination of the institution is inevitable. In this case the business of the institution may be preserved by transferring all or part of assets and liabilities to another institution or a bridge bank. Reorganisation and winding up procedures may be initiated by administrative authorities, where a special resolution regime is in force for banks, or by judicial authority, where banks are subject to general bankruptcy rules. Authorities have different degrees of involvement in the judicial proceedings for banks.

140. Most authorities at least **play a role in the reorganisation or winding-up of an institution** [Q86] except EE, RO and SE. In EE for instance, the authority can only apply for a court judgment resulting in the compulsory dissolution of a firm. In SE, under the current law a credit institution cannot be dissolved following the initiative of the supervisor, but an amendment is currently under consideration.

141. In addition, five authorities (BE, CY, CZ, MT, PT) stated partial responsibilities only. In CY, the appointment of a receiver or liquidator is made by the court after consulting the authority. In CZ, the authority may propose a liquidator and has the capacity to appoint a conservator, whose decisions are made with the prior consent of the authority.

142. In the countries where supervisors initiate [Q85] or play a role [Q86] in the reorganization or winding-up of an ailing bank, this role may vary significantly. The allocation of responsibilities may differ depending whether reorganisation or winding-up is considered. While in MT the prudential authority has the power to wind up a credit institution, in most other countries the authorities would mainly be responsible for reorganisation. For example, supervisors (e.g. in BE, PT) or Ministries of Finance (e.g. in FI) can be in charge of reorganisation while winding-up usually belongs to the judicial authorities, although upon proposal by or prior consultation of the supervisors (e.g. in BE, FR) and in some countries with an obligation for the judicial authorities to inform the supervisors of any such decisions (e.g. in ES).

143. In general, supervisors reported to have at least an advisory role in the reorganisation or winding-up. For instance in CY, the authority can apply to the courts to convene a meeting of the bank's creditors and the courts will ratify any compromise or settlement proposal after hearing the views of the authority. Some supervisors reported specific powers towards the persons appointed with special powers at an ailing institution. Some supervisors have the power to appoint provisional administrators or liquidators (e.g. FR, GR, RO) or simply propose

receivers (e.g. CZ). Other supervisors will check and / or approve the decisions by those persons: in SK, an administrator must act with the approval of the authority in reorganising or winding-up the institution; in DE the supervisory authority may issue general orders to the liquidator; in HU, the supervisory authority will control and direct the re-organisation. In LU, the supervisory authority automatically acts as an administrator in the event of the initiation of a suspension of payments procedure until the District Court has delivered its judgment on the application and has nominated an administrator; it will approve and control the activities of the liquidator in case of a winding-up procedure. In PL, the supervisory authority enjoys wide powers to appoint a receiver, arrange a takeover, reorganise and liquidate an institution.

144. In countries where the supervisory authorities do not have the power to initiate and/or play a direct role in the proceedings, the judicial authorities (e.g. ES, FR) or Ministries of Finance (e.g. IT, FI) are generally responsible for it. In FI, FR and PT the National Deposit Guarantee Fund can be invited to participate in reorganisation plans, and in several countries, third parties appointed by the authorities (e.g. a conservator in CZ) will also have a role to play.

145. It is difficult to summarize the diversity of allocation and nature of responsibilities for reorganisation or winding-up of credit institutions and individual answers should be consulted for further information.

146. Last, all authorities have the power to **refer a particular action by a bank to the judicial authorities** [Q89] except FI. The scope of application of this power varies however as GR and SE reported that the power exists only in the field of AML and terrorist financing. In PT, the authority has the legal duty to report any knowledge or suspicions of any serious crime being committed (not only AML or terrorist financing)..

Summary

As regards the power to withdraw a banking licence, although variations can be observed in the exercise of this power, these variations are not significant and, therefore, do not give rise to major concerns.

Significant differences exist in the power to coordinate a rescue plan, because the competent authorities in the Member States appear to rely to a degree on general discretionary powers and their own judgment in deciding when it is necessary to take action. This is in part because the authorities may choose to utilise different powers from within their toolkit, and each authority will judge when it is most appropriate to use certain powers. Because of the variation in how, what and when authorities may decide to initiate reorganisation measures, it is not possible to draw general conclusions on triggering mechanisms other than to say it is ultimately dependent upon an authority's discretion. The tools available to deliver the reorganisation of a bank also differ. No prudential authority has the power to create a new or bridge bank, resulting in reorganisation measures being focussed on either internal options or through private sector takeovers.

Whilst the majority of Member States possess the power to impose a moratorium, the authorities have different bases and use different criteria in determining whether such a measure is appropriate. Because of the disparity of the triggering factors used, and the fact that discretion and judgment on the part of the competent authorities plays a significant role, there is the potential for the competent authorities to deal with similar situations in differing ways.

Whilst some of the authorities do not possess the power to impose reorganisation measures and/or a moratorium, such actions may nevertheless be possible in the Member State through a third party such as an appointed administrator, or alternatively

measures based upon general powers may have the same overall result as if the full direct power existed.

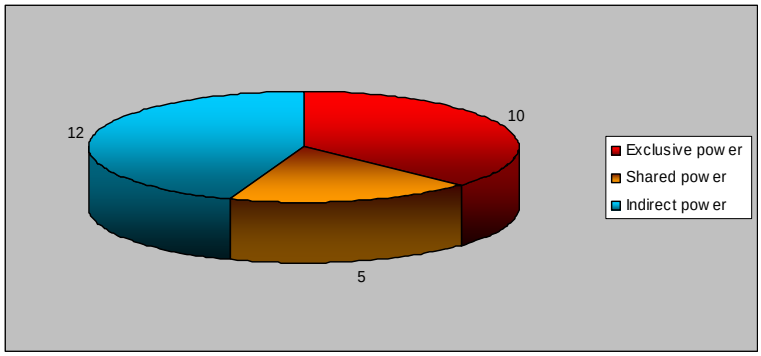
Due to the very nature of the power to refer matters to judicial authorities, there are few common triggers other than being in receipt of knowledge of criminal activity or suspecting that criminal activities are being undertaken. In some Member States, competent authorities are able to initiate non-criminal referrals to judicial authorities to achieve a binding court decision that does not result in a criminal penalty being recorded, such as a court order preventing a bank from undertaking a specific act or activity.

The role played by the supervisory authorities in insolvency proceedings is not harmonised and varies widely from one Member State to another. In some Member States, the supervisory authority is less involved in the procedure whereas in other countries it will control the process or be in charge of the process. These differences are linked to whether countries have specific insolvency laws applicable to credit institutions or a single insolvency regime applying to all firms. These two issues may deserve further consideration.

(vii) Other Administrative Measures (question 90)

147. Question 90 asked authorities to state whether they had the power to take any other administrative measures (excluding those under article 136(1) of the CRD). In this section the focus is on the power to trigger a domestic deposit guarantee scheme, while a few other powers are included for those authorities that have reported them.

Power to trigger the deposit guarantee scheme



148. In all countries the DGS is always triggered by a formal order or decision leading to the stopping of all payments by the institution concerned. By default, any supervisor has the power to trigger the DGS indirectly, by taking decisions creating the conditions through which the Scheme is triggered, e.g. through withdrawal of a banking licence. This is true also for DGS located in other Member States, where local branches have been established and which have voluntarily joined the local DGS for supplementary cover: in this case, the decision by the home supervisory authorities will also indirectly trigger the local schemes.

149. In ten countries (BG, CZ, DE, FI, FR, GR, HU, MT, NL and SI) the supervisory authority has the exclusive power to trigger the scheme. In other countries (AT, BE, CY, EE, ES and IE), the supervisory authority shares the power to directly trigger the scheme with other bodies, typically the courts which have the power to declare insolvency, in some cases at the request of the supervisory authority.

150. In two countries (IT and UK) the supervisory authorities, who have not been entrusted with the power to directly trigger the DGSs, reported other responsibilities towards the schemes. IT mentioned the necessary authorisation by the supervisor of

any decision by the DGSs: thus if the supervisor does not have the power to trigger the scheme, it could oppose its activation (unless mandatory by law, i.e. in the case of an administrative liquidation).

151. Aside form the question of activation of a DGS, some members reported special powers, such as the power to make rules regarding the operations of the compensation scheme (UK) or powers relating to the operations of the scheme. In this respect, aside from IT, in CZ after triggering the deposit guarantee scheme the Deposit Insurance Fund is obliged to determine, with the consent of the Ministry of Finance and the Authority, the date when the repayment of insured deposits will start. Therefore, this competence, unlike the decision to trigger the scheme, is a shared power. BE and LU reported that the supervisor shall determine any request by the scheme for an extension of the time-limit within which the amount due under the guarantee is to be paid to the depositors.

Summary

All authorities, to varying degrees, have a relationship with their national Deposit Guarantee Schemes. This relationship ranges from having the exclusive jurisdiction to trigger the scheme, to having the power to make the scheme rules but without having formal triggering powers. Although the mechanisms for the DGS being triggered vary, the conditions under which the schemes will be invoked, as reported by supervisors, are similar, for example following a bank's collapse or a withdrawal of permission.

Other Powers

152. Some members reported a few additional powers to those listed in the questionnaire. However, as the nature and specificity of those powers given to a particular supervisor cannot be ascertained, only two examples are mentioned below. For further information, please refer directly to the completed questionnaires.

153. The first relates to shareholders. If the competent authority is not notified of changes in bank's capital structure, it can impose fines on the persons acquiring/increasing/ decreasing a qualifying holding (GR) or request an annulment from the President of the Commerce Tribunal of certain related decisions taken by the shareholders (BE). In Austria, the authority may order the sequestration of shares not transferred within a defined period by a specific shareholder.

154. The second relates to the capacity to request the freezing and/or sequestration of assets (LU), which generally belongs to Governments/Ministries.

2/ Existence of triggers under which automatic corrective action is taken

155. Additionally to the questionnaire on supervisory and sanctioning powers, authorities have been requested to clarify whether their domestic legal framework specifies any triggers (including, but not limited to, quantitative thresholds for particular financial indicators) under which automatic corrective action should be taken by the supervisory authority. Authorities have also been asked to indicate which triggers exist and what action would follow from their activation, as well as to provide a brief description of the events if such triggers have actually been activated in the past.

156. Twenty authorities (AT, BE, BG, CY, CZ, DE, EE, ES, FR, GR, HU, IE, IT, LT, LU, LV, MT, NL, PT, SK and UK) have provided additional information regarding early intervention measures. The seven remaining authorities (DK, FI, PL, RO, SE and SI) have not provided information in this respect.

157. Apart from three countries (CZ, HU and SK), the domestic legal frameworks do not specify any triggers leading to automatic corrective action by the supervisory authorities. In some Member States, if certain quantitative thresholds are breached, the supervisory authority shall take action. In CZ, the supervisory authority shall impose one or more remedial measures if it becomes aware that an institution's capital is lower than two thirds of the minimum required. Examples of remedial measures imposed by the supervisory authority are: capital increase, acquisition of assets having a risk weighting of less than 100%, prohibition on acquiring any interest in another legal entity, and prohibition on granting a loan to a person having a special relationship with the institution. In HU, the supervisory authority shall take action if the own funds are less than 75%, or less than 50%, of the capital requirement[7]. The range of corrective measures available is broad. In SK, the legal framework specifies that the supervisory authority shall place a credit institution under forced administration if the own funds of the institution concerned fall below 50% of the minimum requirement.

158. Some countries (e.g. BG, CZ, SK) can withdraw a banking licence when capital falls below the minimum required or below a specified threshold of the minimum required (e.g. less than one third of the minimum capital requirement) or when own funds fall below a specified threshold of the own funds requirement (e.g. less than 25 percent). However, these very limited and specific cases should not be considered as a true early intervention measure. Indeed, in the first case, the identified thresholds are so low that one can believe that supervisory action would have been taken long before the situation of an individual institution deteriorated to such a level. In the other case the withdrawal of the licence should not be considered as an early intervention measure but rather as a sanction or an ultimate measure since it terminates the institution's activities.

Summary

Against this background, it can be concluded that there are no automatic triggers in practice. On the other hand, as we will see in the next section, quantitative, qualitative and supervisory indicators may be available but they do not lead to automatic action by the prudential authority which will always exercise its supervisory judgment and act in accordance with the principle of proportionality. In addition, if disclosed, the supervisory trigger points could pave the way to inappropriate behaviour by the institutions. All in all, it seems essential to have a holistic approach to risk assessment and establish on-going dialogue with the institutions within SREP.

3/ Criteria conditioning the action

159. From the above it can be taken that in the cases of CZ, HU and SK where thresholds leading to automatic action exist, the criteria conditioning the corrective action to be taken by the supervisory authority are strictly quantitative. Hence, these thresholds involve neither qualitative criteria nor supervisory judgment.

160. As to the margin for manoeuvre of the supervisory authority taking the corrective action, the cases identified show different options. In the case of SK, the supervisory authority does not have any margin for manoeuvre in its action: as soon as the quantitative trigger has been met forced administration will be applied. On the other hand, in the cases of CZ and HU, the quantitative trigger does impose a requirement upon the supervisory authority to act, but the supervisory authority keeps a margin

[7] Like other authorities, the Hungarian authority also has an obligation to take action on the basis of non-quantitative triggering events, such as insolvency, provision of unauthorised banking activities, etc…

of manoeuvre as to which corrective action(s) it shall impose on the institution concerned. However, as has been highlighted above, one cannot consider these thresholds as "triggers leading to automatic actions", since the supervisory authorities would be expected to have reacted well before an institution reaches such low levels of capital/own funds requirements.

161. Hence, it can be concluded that no automatic triggers exist and, consequently, early intervention measures are activated through on-going prudential supervision. Prudential supervision is based on both quantitative and qualitative analysis8 of the situation of a credit institution in order to determine its individual risk profile and to identify and solve any (potential) problems at an early stage.

162. Most supervisory authorities have developed a Risk Assessment System, which is intended to alert them to a (potential) problem arising9.

163. Once a (potential) problem has been identified, based on their supervisory judgment, authorities will take the appropriate measure(s). Supervisory judgment leading to the adoption of supervisory measures is exercised in accordance with the principle of proportionality. According to this principle, corrective measures must be proportionate to the risks/problems/breaches that have been detected. In other words, the severity of the measures taken will depend on the seriousness of the identified risks/problems/breaches. This principle also entails a gradual escalation of the measures in line with the seriousness and persistence of the situation.

164. In the first instance, the supervisory authorities will contact the management of the institution in order to discuss the measures the institution plans to take in order to remedy the situation. At this stage the authorities may recommend that the institution takes certain actions. Moreover, an on-site inspection may take place and a report drafted containing written recommendations. The supervisory authorities will closely monitor the implementation of these.

165. If the management of the institution concerned does not take the necessary actions to remedy the situation, most of the supervisory authorities, using a written order or injunction, may impose a time limit by which the institution must have remedied the situation (see below for further developments on this issue). If the irregularities persist, the supervisory authorities will use their intervention powers and have recourse to more stringent measures. The range of available measures is examined in the next section.

Summary

Supervisory authorities have developed a set of indicators[10], which they use as a sort of "early warning system". Supervisory action/measures will be based on further in-depth analysis in order take the whole situation of the supervised institution into account. It also involves supervisory judgment with the view to taking the most appropriate action(s) to correct the situation. This flexibility is for the supervisory authorities a sine qua non of the exercise of their supervisory tasks.

These so-called "indicators" should therefore be clearly distinguished from the supervisory actions/measures available to the authorities.

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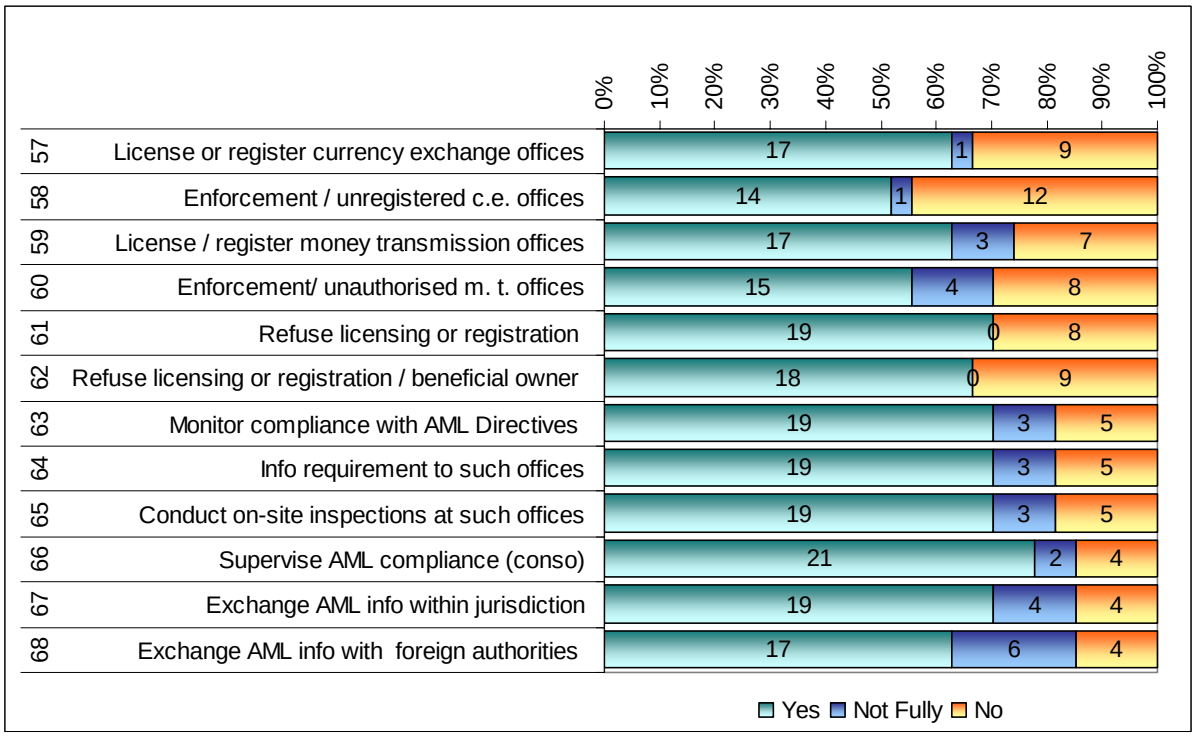
8 The analysis is performed on the basis of information collected either during an on-site inspection or on the occasion of a regular off-site assessment as credit institutions have the obligation to regularly communicate financial and prudential information to the supervisory authorities.

9 For the sake of completeness, one should also mention that supervisory authorities may also be alerted by the institution's external auditors.

10 We prefer the term "indicator" to the term "threshold", since the former may refer to quantitative and qualitative information whereas the latter usually refers to quantitative information only.

However, there is neither a minimum common set of indicators nor a common language agreed among supervisors to define each of these minimum common indicators. Further work could be considered in this respect.

C. Other remits : Anti-money laundering (i.e. questions 57 to 68)



166. Three banking supervisors (DK, ES and FI) have no authority in the area of anti-money laundering and counter-terrorist financing (AML/CTF). In Denmark the power is incumbent on the Danish Commerce and Companies Agency. There is no information available for Finland.

167. Regarding **licensing and registration of currency exchange offices** [Q57] a large majority of the authorities possess this power (AT, BE, CY, CZ, DE, ES, GR, HU, IE, IT, MT, NL, PT, RO, SE and SI). In several Member States, however, this power is assumed by another authority (DK, EE, FI, FR, LU, LV and PL). Even though in the case of LU the power lies with the Minister of Treasury and Budget, the Minister only acts upon the prior advice of the CSSF, which verifies that the necessary legal requirements are fulfilled. Four banking supervisors share this power with another authority; in SK it is the local authorities, in UK HM Revenue and Customs, in BG the Ministry of Finance. In one authority (LT), even though the authority does not have this explicit power it licenses the banks, the only entities that are the able to conduct currency exchange operations.

168. In relation to **enforcement against entities providing currency exchange services without the requisite authorisation / due registration** [Q58], half of the authorities possess this enforcement power (AT, BG, CY, CZ, DE, ES, GR, HU, IE, MT, NL, PT, SE and SI) whilst ten authorities do not (DK, EE, FI, FR, LT, LU, LV, IT, PL, RO and UK), and three (BE and SK) do not fully possess it and work together with other entities that have this power within their jurisdiction (law enforcement - police and judiciary - in BE and law enforcement authorities in SK). Of the authorities not possessing the power, in DK it is the Danish Commerce and Companies Agency that is responsible for enforcement against entities providing currency exchange services without registration or authorisation; in FR it falls within the competence of the Penal Court, in IT it lies with the police and judicial authorities, in LU and RO it is the judicial authorities that are empowered to enforce it and in the UK HM Revenue and Customs is responsible for enforcing that entities do not provide currency exchange

services without authorisation/due registration. In addition, in BE the competent authority warns the public in such cases.

169. Sixteen authorities (AT, BE, BG, CY, CZ, DE, EE, ES, GR, IE, IT, MT, NL, PT, SE, SI and SK) have the **power to license or register money transmission or remittance offices** [Q59]. Seven authorities (DK, FI, FR, LT, LU, PL and RO) do not have this power which is generally entrusted to a government body. In some cases this authority only acts upon prior advice from the supervisor (e.g. in LU the power lies with the Minister of Treasury and Budget, who only acts upon the prior advice of the CSSF, which is tasked with verifying that the necessary legal requirements are fulfilled). In France, money transmission or remittance activities can only be carried out by a credit institution, subject to the authorisation of the licensing authority (CECEI). In RO, money transmission or remittance offices are only registered in the National Commerce Register as with any other commercial company. Four supervisors (HU, LV and UK) either share this power with other authorities (e.g. in the UK with HM Revenue and Customs) or are requested to seek the opinion, which can be mandatory or not, from other authorities before taking a decision (e.g. in HU the prior opinion of the central bank is needed).

170. Regarding **enforcement against entities for providing money transmission or remittance services in the jurisdiction without authorisation/due registration** [Q60], fourteen out of the sixteen authorities mentioned above possess this power (AT, BG, CZ, DE, ES, GR, HU, IE, LV, MT, NL, PT, SE and SI). Eight authorities (DK, FI, IT, LT, LU, PL, RO and UK) do not have the power to enforce against unauthorised money transmission or remittance services. The six authorities (BE, CY, EE, FR, and SK) that do not have this power in full share it with the judicial authorities of their country or the Ministry of Finance. In addition BE warns the public in such cases.

171. Out of the 27 members surveyed, nineteen (AT, BE, BG, CY, CZ, DE, EE, ES, GR, HU, IE, IT, LV, MT, NL, PT, SE, SI and SK) have the **power to refuse licensing or registration** (e.g. if the person who effectively directs or will direct the business of such entities is not a fit and proper person) [Q61]. DK, FI, FR, LT, LU, PL, RO and UK do not possess this power, and in FR the power lies with the authority that is responsible for the licensing or registration of the business (CECEI). In UK HM Revenue and Customs has the power to refuse licensing or registration. In LU the authority lies with the Minister of Treasury and Budget which only acts on the prior advice of the CSSF.

172. Regarding the **power to refuse licensing or registration in the case that the authority is not satisfied that the beneficial owner of such entities are fit and proper persons** [Q62], eighteen members (AT, BE, BG, CY, CZ, DE, EE, ES, GR, HU, IE, IT, LV, MT, NL, PT, SE, and SI) possess this power. In BE, it is possible to appeal against the decisions of the CBFA, to the Courts for credit institutions and to the Minister of Finance for bureaux de change. SK has the power to refuse licensing or registration if it is not satisfied with the person who effectively directs the business (through fit and proper considerations), but it does not have this power in relation to a beneficial owner. SK therefore belongs to the group of the eight member states (DK, FI, FR, LT, PL, RO, SK and UK) that do not possess this power. In LU the power lies with the Minister of Treasury and Budget, who only acts upon prior advice given by the CSSF. In FR it falls within the competence of the CECEI.

173. Regarding the **power to monitor compliance with Directives 2005/60/EC and 2006/70/EC,** including for currency exchange offices and money transmission/ remittance offices, which might be only licensed/registered but not supervised as such [Q63], nineteen authorities (AT, BE, BG, CY, CZ, DE, EE, FR, GR, HU, IE, LV, LU, MT, NL, PT, SI, SK and UK) possess this power while three authorities (DK, ES and FI) do not and five (IT, LT, PL, RO and SE) do not possess it fully. In many cases (DE, ES, LU, MT, PL and SK) the FIU is also a competent authority in respect of

monitoring compliance with Directives 2005/60/EC and 2006/70/EC. EE shares this power with the Registrar of Economic Activities in respect of currency exchange offices and IT indicates that the Financial and Economic Police possess this power.

174. Nineteen authorities (AT, BE, BG, CY, CZ, DE, FR, GR, HU, IE, IT[11], LU, LV, NL, PT, RO, SE, SI and UK) have the **power to compel the institutions and persons mentioned above and any supervised institution to provide any information, data or documents relevant for AML/CFT** [Q64]. Four authorities share this power with the national FIU (EE, LT, PL and SK). DK, ES and FI do not possess the power to require information, data or documents from the relevant institutions and persons. In ES, the power lies with the FIU, with which the supervisory authority has signed a MoU for cooperation and exchange of information. In MT the FIU is the competent authority on AML/CFT issues. However, non-compliance by institutions or persons is controlled by the MFSA pursuant to its role as agent of the FIU. In the cases of BE, BG and LU it is stated that the FIU also has the power to compel the institutions and persons to provide any information, data or documents relevant for AML/CFT. In DE the State Prosecutor has this power.

175. The same figures are valid for the **power to conduct on-site inspections at institutions and persons mentioned above and at any supervised institution for AML-CFT purposes** [Q65]. Thus, there seems to be a correlation of related rights and powers.

176. In determining whether the authorities carry out **AML/CFT supervision also on a consolidated basis** for institutions and persons mentioned above and any supervised institution [Q66], twenty one (AT, BE, BG, CY, DE, EE, FR, GR, HU, IE, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK) possess the power to do so. DK, ES, FI and LT do not have the power and CZ and IT share the power with the FIU.

177. While eighteen authorities (AT, CY, DE, EE, FR, GR, IE, IT, LU, LV, NL, PL, PT, RO, SE, SI, SK and UK) have the **power to cooperate and exchange AML-CFT related information regarding institutions and persons (as mentioned in the questions above) and any supervised institutions with other authorities tasked with AML-CFT within their jurisdiction** [Q67], DK, ES, FI and MT do not have this power. The other authorities (BE, BG, CZ, HU, LT) do not fully possess or are not the sole authority in possession of the right to cooperate and exchange this kind of information. BG, CZ, HU and LT work together with the FIU or judicial authorities, whereas BE indicated that it will be incumbent upon its FIU to share information with foreign FIUs in cases of exchange of information for the purposes of analysing potential AML/CFT cases. AT mentioned that it is bound by law with certain restrictions. For the three authorities that do not possess this power at all, it lies with the national FIU in the case of MT. In DK it is the Danish Commerce and Companies Agency that is responsible for any tasks in connection with ALM/CTF, while there is no information available for Finland.

178. For the **cooperation and exchange of information with foreign authorities tasked with AML/CFT** [Q68], only sixteen authorities (AT, BE, CY, DE, EE, FR, GR, IT, LT, LV, NL, PT, RO, SE, SI and UK) have this power. Nevertheless BE and RO indicated that they will share information with foreign supervisors, i.e. for purposes of conducting their supervisory role and AT mentioned that it is bound by law with certain restrictions. Parallel with the cooperation and exchange of information on a national basis, DK, ES, FI and MT do not have this power internationally. In addition, eight authorities (BG, CZ, HU, IE, LU, PL and SK) do not fully possess the power to cooperate and exchange information with foreign authorities tasked with AML/CFT.

[11] However, in IT this power is entrusted to the Guardia di Finanza (Financial and Economic Police) with regard to currency exchange offices and sub-agents of money remittance intermediaries.

As indicated above in the case of the four authorities that do not have this power, it lies with the national FIU in the case of MT. In DK it is the Danish Commerce and Companies Agency that is responsible for any tasks in connection with ALM/CTF while there is no information available for Finland. As to the member countries that are not fully in possession of the power to cooperate and exchange AML/CFT information BG, IE, PL and SK work together with the FIU whereas CZ and HU are bound by law with certain restrictions. LU may exchange information with foreign competent supervisory authorities but not with foreign FIUs.

D. Conclusions

The responses received do not identify any significant deficiency in the domestic institutional structure for organising AML-CFT. All but two supervisory authorities report being entrusted with AML-CFT related powers, although the scope of these powers can vary significantly depending on the more or less crucial tasks and responsibilities granted to the national FIUs.

Beyond the differences in institutional setting mentioned above, and as AML-CFT rules are cross-sectoral ones, there is a case for initiating further work from a 3L3 perspective regarding the effectiveness of supervision in the implementation of the European legal framework, in particular Directive 2005/60/EC. This work could be allocated to the 3L3 AML Task Force.

III. Actual use of Sanctioning Powers

179. All EU supervisors have the power to punish conduct that is in breach of the provisions regulating banking activity, by way of imposing sanctions on institutions and/or the persons who direct the business. However it is worth noting that the concept of "administrative sanction" as opposed to "administrative measure" remains ambiguous since there is no common definition of "sanctions" shared by the EU supervisory authorities. On the basis of the replies provided by national supervisors it is apparent that a wide range of administrative measures - such as reprimands, orders, disqualification of individuals, revocation of authorisations - are considered or used in some Member States as a mean of punishment. These measures can also be activated in other EU countries as an alternative or in addition to pecuniary sanctions or penal sanctions in a stricter legal sense (e.g. permanent disqualification from office). Another point to be mentioned is that the survey does not take into account the type and seriousness of the conduct punished in Member States by means of administrative measures/sanctions. Therefore, similar or even identical conduct could be punished in some countries by an administrative measure or by a sanction imposed by the supervisory authority, while criminal sanctions, which are not covered by the present analysis, would be applied in other Member States.

180. In more general terms, national approaches to sanctions vary in accordance with the local legal, administrative and judicial systems and this may explain differences in the actual use of sanctioning powers and in the number and level of sanctions applied.

181. Finally as regards the scope of administrative sanctions, the majority of European authorities may impose sanctions against both natural and legal persons. Two supervisors (AT, IT) stated clearly that they may only punish natural persons with fines, while one authority (BE) specified that it may only impose sanctions on legal persons.

A. Type and severity of the sanctions, i.e. questions 10 to 12 and 15 to 16

182. All supervisory authorities, except for IT, have the **power to take non-pecuniary administrative sanctions** against credit institutions [Q10]. This type of sanction is not available in IT.

183. The survey shows a certain variability concerning the **lowest/highest form of punitive sanction**. For some countries the lowest punitive provision is a private/public warning (BE, BG, ES, FI, FR, GR, IE, LT, RO and UK) or the publication of the sanction (PT); for others the minimum penalty consists of orders/directions issued against the bank or the persons responsible for its direction and management (CZ, DE, DK, GR, HU, LV, MT, NL, PL, SE and SK); some authorities also indicated removal from office (CY) or the restriction/suspension of directors (LU and FR).

184. For a large majority of EU supervisory authorities the most punitive non-pecuniary sanction available against a legal person is the revocation of their banking licence (BG, CY, CZ, DE, ES, FR, HU, IE, LT, MT, NL, PL, RO, SE, SI, SK and UK). Three authorities indicated that the suspension of authorisation or the temporary prohibition from carrying out activities (LU, LV and PT) is their highest sanction. As regards natural persons, some members referred to disqualification/removal from office (DE, ES, FR, IE, LU, PT and UK).

185. For all the EU supervisory authorities the **level of a pecuniary sanction** is discretionary[12] [Q11]. According to the explanation provided by some authorities, national legislation often provides for a minimum and/or maximum amount against which supervisors may choose the sanction to apply to actual cases. As mentioned in the introduction, this can depend on different national approaches to administrative sanctions[13] (for instance in some countries more serious offences are punished by criminal sanctions), differences in economic wealth and cost of living, as well as the size and volume of business of the intermediaries.

186. As for the **minimum and maximum amounts** in EUR (or EUR equivalent) set by the legal and regulatory framework for a pecuniary sanction [Q12], the results show a great variation which reflects different national approaches to administrative sanctions (for instance in some countries more serious offences are punished by criminal sanctions), differences in economic wealth and cost of living, as well as the size and volume of business of intermediaries. In a few countries cross sectoral differences also appear: in FI for example pecuniary sanctions are not available against banks and their managers for breaches of banking laws and regulations but only in cases of non compliance with market rules[14] . In DK and UK there is no minimum or maximum amount that the national supervisor is bound to when imposing a pecuniary sanction[15]. In AT, CZ, ES, FR, IE and PL there is no fixed minimum amount, but only a maximum one.

187. In 24 countries the lowest and/or the highest amounts that institutions and/or individuals may be fined are established in terms of a monetary value. In addition, in three of these 24 countries (ES, HU and LT) local provisions also refer to a variable amount expressed as a percentage of own funds[16], registered capital[17] or total annual income[18] in the case of legal persons; net annual income[19] or average monthly salary[20] in the case of natural persons. This variable reference is used in combination with the fixed monetary value: the highest value is to be chosen in ES while in HU fixed monetary values apply to financial enterprises or legal persons providing auxiliary financial services.

188. In certain countries, such as BE and CY, pecuniary sanctions may result from the application of an administrative fine plus a daily penalty, both determined with regard to minimum and maximum amounts[21].

189. The different approaches and reference points in place make it difficult to provide a comprehensive overview at a glance. The table below simply shows the minimum and

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[12] In FI pecuniary sanctions are not available against credit institutions.

[13] For instance in some countries administrative fines could be not applied for the most serious offences the punishment of which would be regulated under the criminal law; in other Member States pecuniary sanctions are available only against natural persons and this may explain a lower level of the minimum or maximum pecuniary sanction provided by the legislation.

[14] Pecuniary sanctions can only be used in cases of non-compliance with the Market Abuse Directive, and not for a failure to comply with banking regulation.

[15] With regard to DK, the national supervisor may impose only weekly or daily pecuniary sanctions.

[16] In ES the maximum amount of pecuniary sanctions is the highest of 1% of own funds or 300,000 Euro.

[17] In HU the minimum and maximum amounts of administrative fines are established respectively as 0.1% and 3% of registered capital.

[18] In LT the minimum and maximum amounts of pecuniary sanctions are established respectively as 0.1% and 2 % of the total annual income of a bank.

[19] In HU a min. of 10% of the net income of the previous year (or 400 Euro); max. 50 % of the net income of the previous year (or 4,000 Euro).

[20] In SK the maximum amount of a pecuniary sanction that may be imposed on a natural person is 50% of twenty times his average monthly salary for the previous year.

[21] For BE the minimum amount is a 2,500 Euro administrative fine plus a daily penalty; maximum amount: 2,500,000 Euro administrative fine plus 50,000 Euro as a daily penalty (with a maximum of 2,500,000 Euro); for CY minimum amount: 1,000 Euro administrative fine plus 100 Euro per day; maximum amount 80,000 Euro administrative fine, plus 8,000 per day.

maximum amounts of pecuniary sanctions or administrative fines applicable to legal and/or natural persons, as laid down in law or regulation in 24 Member States (for maximum amounts only in AT, CZ, ES, FR, IE and PL), as there are no legal references of amounts for pecuniary sanctions in DK and the UK and no pecuniary sanctions are available in FI for breaches of banking regulation. Individual responses should be consulted for further information.

Minimum pecuniary sanctions

Scale in Euro		MS[22]	Amount in (eq) Euro
≤500	9	DE	5.00
		EE	32.00
		LU	125.00
		MT	232.94
		PT	250.00
		LT*	290.00
		SI	400.00
		BG	500.00
		SE	500.00
>500 ≤1000	3	HU**	800.00
		NL	600.00
		CY	1000.00
>1000 ≤3000	3	LV	1,423.00
		BE	2,500.00
		IT*	2,582.00
>3000 ≤5000	2	SK	3,333.00
		RO	3,950.00
>5,000	1	GR	10,000.00[23]

*The reference level only applies to natural persons

**The reference level only applies to financial enterprises or legal persons providing auxiliary financial services.

Maximum pecuniary sanctions

scale in Euro	n.	MS[24]	Amount in (eq) Euro
<15,000	4	LT*	2,900.00
		HU**	8,000.00
		LU	12,500.00
		RO	13,250.00
>15,000 ≤50,000	2	EE	32,000.00
		AT*	50,000.00
>50,000 ≤100,000	2	MT	69,881.20
		CY	80,000.00
>100,000 ≤200,000	4	BG	125,000.00
		IT*	129,114.00
		LV	142,287.00
		ES*	150,000.00
>200,000 ≤500,000	3	PL	260,484.52
		SI	370,000.00
		DE	500,000.00
>500,000 ≤1,000,000	2	SK	666,666.00
		NL	900,000.00
>1,000,000 ≤2,500,000	3	CZ	2,012,072.00
		BE	2,500,000.00
		PT	2,500,000.00
>2,500,000 ≤5,000,000	3	GR	3,000,000.00
		IE	5,000,000.00
		SE	5,000,000.00
>5,000,000	1	FR	50,000,000.00

[22] For IT and LT the amount applies to pecuniary sanctions applicable to natural persons.
[23] In GR the minimum threshold only applies for AML-related sanctions (10,000€ for natural persons; 30,000€ for legal persons).
[24] ES, IT, LT: the amount is for pecuniary sanctions applicable to natural persons.

190. Regarding the existence of **guidance relating to suitable ranges of amounts for pecuniary sanctions** [Q15], only 7 authorities (AT, EE, ES, IE, MT, NL and PL) replied positively. Three 3 of them (EE, ES and MT) clarified that these guidelines are binding.

191. With regard to the criteria followed by national authorities in order to establish the size of the sanctions:

192. For non-pecuniary sanctions[25]:

a) all respondents evaluate the seriousness of the breach in order to establish the amount of the penalty;
b) 7 supervisors (BG, ES, FR, HU, NL, PL and SK) take into account the level of funds of the institutions;
c) the legal status of the institution is relevant for only 4 authorities (BG, HU, NL and RO);
d) cooperative behaviour is an element evaluated by 16 supervisors (BG, CZ, DE, EE, ES, FR, HU, IE, LT, LU, LV, NL, PL, PT, SE and UK);
e) previous infringements of the same provisions is a criterion used by all EU supervisors, with the exception of CZ and DK;
f) 14 authorities (BG, CY, DE, EE, ES, FI, IE, LT, LU, NL, PT, SE, SK and UK) referred to the benefit (e.g. earnings) derived from the offence in order to assess the size of the sanction; and
g) the loss incurred by third parties is an element that is evaluated by the large majority of EU supervisors (BG,CY, DE, EE, ES, GR, HU, IE, LT,LU,MT, NL, PL, PT,SE, SK and UK).

For pecuniary sanctions [26]

a) all authorities take into account the seriousness of the breach;
b) the level of funds is considered by half the respondent supervisors;
c) only 3 authorities (CY,HU and NL) take into account the legal status of the institution;
d) cooperative behaviour is an element assessed by 20 authorities; it is not considered by BG, CY, DK, IT, RO and SK;
e) all EU supervisors, except DK, evaluate the sanction against precedent infringements;
f) the benefit from the offences is an element considered by 17 authorities (AT, BE, BG, CY, CZ, DE, EE, ES, GR, IE, LU, NL, PT, SE, SI, SK and UK); and
g) with the exception of BE, DK, FR, IT, LT, LV and RO, the other EU authorities consider the losses incurred by third parties in order to graduate the sanction;

193. With regard to other elements that authorities consider to determine the size of the sanction, some respondents referred to financial conditions, market share, systemic relevance and independence. IE and UK provided a detailed explanation regarding the criteria the national authorities follow in assessing the amount and/or severity of sanctions imposed.

B. Actual use of sanctioning powers, i.e. questions 13 to 14 and 19 to 20

194. Regarding **non-pecuniary sanctions that have been imposed since 2005** by the authorities, two member states (BE and IT) indicate that they do not have such a power, but rather can only impose pecuniary sanctions. For the authorities that can

[25] The results do not take into account AT, BE, IT and SI for which non-pecuniary sanctions are not available.
[26] The results do not include FI where pecuniary sanctions are not available for credit institutions.

take non-pecuniary sanctions five (AT, CZ, FI, LT and SK) have not used them since 2005. The authorities that have taken non-pecuniary sanctions mostly withdrew the authorization of an entity (BG, DK, ES, HU, RO, SE and UK) and/or removed a director (DE, DK, EE, GR, IE and PT). Other non-pecuniary sanctions imposed were suspension of shareholders' voting rights (LU), directions to shareholders to exercise their right of voting (GR), a warning of removal of a director (LV), restrictions on certain kinds of activities like prohibition on opening new accounts for non-resident clients (LV), abandoning particular forms of advertising (PL), revocation of a licence (MT), emergency regulation (DL and NL) and petition in bankruptcy (NL). FR indicates that it imposed reprimands with disclosure. SI mostly issued warnings and orders with a view to restore compliance with the banking law.

195. While three authorities (BE, FI and LT) indicated that they have not made use of pecuniary sanctions **since 2005**, the range of answers concerning the amount of the **lowest and highest pecuniary sanctions taken** during this period from the other Member States is very wide. The lowest pecuniary sanction imposed is €65 (EE) whilst the highest is €4,000,000.00 (FR). The motivation behind the lowest pecuniary sanction was breaches of requirements for market conduct, and for the highest it was non compliance with the Regulation relating to internal control.

196. Whilst not every authority communicated the reasons for imposing lower sanctions it can be stated that failure to comply with reporting duties usually results in low pecuniary sanctions (DE, FR, HU, IT and LU). Other reasons for low pecuniary sanctions are cold calling (DE), lack of transparency (GR), non-observance of ratios and prudential limits (PT), and failure to obtain adequate customer information (UK). The motivation behind the highest pecuniary sanctions include breaching a condition of a banking licence (CZ), non-compliance with rules on booking transactions and preparation of accounts (ES), lack of internal controls (FR), management irregularities and dissimulation of the bank's effective financial situation in order to obtain authorization to conclude buy-out operations (IT), false information provided to the authority (PT), governance and control, non-compliance with AML (SE) and violation of obligations in relation to acting as a depository for an asset management company (SK).

197. Regarding the range for the lowest pecuniary sanctions, one can categorize the amount into three groups in ascending order:

Lowest pecuniary sanctions		
< 1,000 €	1,000 € to 10,000 €	> 10,000 €
AT, DK, EE, ES, MT, RO and SE	LV, LU, PT, FR, GR, IE, NL, DE and UK	BG and CY

198. Regarding the range of the highest pecuniary sanctions, they can also be categorized in three groups in ascending order.

Highest pecuniary sanctions		
10,000 € to 100,000 €	100,000 € to 500,000 €	≥ 1,000,000 €
AT, BG, CY, CZ, DE, HU, IE, IT, MT and NL	GR, LV, PT and RO	ES, FR, SE and UK

199. EE is an outlier with 400 € as the highest pecuniary sanction. So is DK to a certain extent with 2,684 € as the highest pecuniary sanction.

200. SI is the only authority that distinguishes in the amount of the sanction whether it was taken against a natural or a legal person: for a natural person the lowest sanction was 417.90 € and the highest 2,500 €, for legal persons they started at 4,172.93 € and went up to 80,000 €.

201. The **number of sanctions** relating to banking supervision or AML that have been taken in 2006, 2007 and the first quarter of 2008, and in particular the number of pecuniary sanctions, varies significantly between the supervisory authorities. Whilst BI, CZ, FI, IE and LT indicated that no sanction of any kind had been imposed, the number of sanctions by the other authorities varies from 1 (SK) to 1,424 (IT). Such a disparity in the answers confirms that the use of sanctions differs substantially between the various authorities, which makes it difficult to draw any meaningful comparisons in this respect. This should be taken into account when reading the quantitative results in the table below.

Number of sanctions relating to banking supervision or AML taken in 2006, 2007 and first quarter of 2008			
0 per year	≤ 25 per year	25 to 60 per year	>100 per year
BI, CZ, FI, IE and LT	AT, BG, CY, EE, FR, LU, LV, SI and SK	NL, PT, RO and SE	DE, DK, ES, GR, HU and IT

202. DK and IT are outliers with respectively 909 and 687 in 2006, 1,121 and 1,424 in 2007 and 109 and 582 in the first quarter of 2008. Variance in the number of sanctions imposed during the relevant periods is to be read in to the context of other elements that might not have been considered for the purposes of the present assessment, such as: the number of institutions supervised, the kind and number of conducts that are punished by national supervisors by means of administrative sanction, the preference given at national level to penal v pecuniary sanctions. Another element to be considered is the extent to which sanctions are imposed on natural persons. Where sanctions are normally applied to individuals rather than to corporate bodies or where - as in the case of IT - personal sanctions are the sole option available to supervisors, the number of penalties or fines imposed may tend to be higher, since for an offence applicable to a single bank the authorities may punish several corporate officers (e.g. all members of the board).

203. Having this in mind, it can be stated that there is a group of authorities that uses sanctions in a restrictive way as they do not exceed 25 per year (AT, BG, CY, EE, FR, LU, LV, SI and SK). A second group lies within the range of up to 60 per year (NL, PT, RO and SE), while in DE, ES, GR, HU and IT the number of sanctions exceeds 100 per year, DK and IT being outliners with respectively 909 and 687 in 2006, 1.121 and 1.424 in 2007 and 109 and 582 in the first quarter of 2008.

C. Sanctioning procedure, i.e. questions 17 to 18 and 21 to 25

204. The **body within an authority that has the power to take sanctions** is in a majority of cases (AT, DE, EE, FR, HU, IE, IT, LT, LU, MT, PL, PT, RO and SE) the board of directors or the board of managers (executive board) or the usual representative organ of the financial supervision authority like the Supervisory Council in MT. Five authorities have a natural person as the sanctioning body (CY, CZ, FI, NL and RO), for example the Governor, Vice-Governor or the Director of the Central Bank (CY, FI, NL and RO) or the executive director of a department of the National Bank (CZ). Two authorities (BE and GR) have a special body charged with the power to impose sanctions, the Sanctions Committee of the CBFA (BE) and the Banking and Credit Committee of BoG (GR), whose President is the Governor and members are BoG Directors. Depending upon the nature (LV), or upon the seriousness of the infringement (BG and ES), or otherwise just generally (DK, SK and UK) some authorities have different bodies that impose sanctions. In ES, the decision is taken by the Banco de Espana for most infringements and by the Ministry of Finance, on the recommendation of Banco de Espana, for very serious infringements.

205. In LV, for administrative offences it is the Financial and Capital Market Commission that is the sanctioning body while for criminal offences it is the prosecutor's office. In

DK there are two different bodies as the autonomous Danish Securities Council makes decisions in principal cases concerning the securities market and the Financial Business Council, which is not an autonomous authority, makes decisions in principal cases concerning banking and insurance. The Danish Financial Supervisory Authority (composed of two bodies, the Danish Securities Council and the Financial Business Council) also has the power to refer persons or institutions to the Public Prosecutor for Special Economic Crimes. In the UK the body charged with deciding upon the sanctions imposed is the Regulatory Decisions Committee, based on recommendations from the FSA. In less serious and/or settled cases, FSA staff in their roles as Settlement Decision Makers can be the final adjudicators. The split of these powers is dependent upon the nature of the decision, its complexity, importance and urgency. In SK there is a mixed system: first the power to impose a sanction is shared depending on the nature of the breach, either with the FIU in AML /CFT or with the National Bank of Slovakia. In other cases there are different bodies with the sanctioning power depending on the stage of the procedure: Vice-Governor in the first instance and Financial Supervision Division or Bank Board in the second instance.

206. Regarding the **frequency of meetings of the sanctioning body** [Q18], a substantial variety of situations has been reported. Two authorities (CZ and DE) stated that their sanctioning body is permanent, which is quite close to ad hoc meetings when necessary (CY). One authority (UK) reported more than a hundred meetings a year in 2006 and 2007, although this figure relates to the three financial sectors and not to the banking side only and has undergone a sharp decrease since the introduction of an early settlement procedure[27]. Conversely, HU moved from one meeting every three weeks in 2006 to a high frequency of meetings as it stated there were meetings twice a week in the second half of 2007 and during the first semester of 2008. At the other end, one authority mentioned that the sanctioning body had never held any meeting since 2006 (BG), others indicated only a couple of meetings per year (such as LU and GR). Twelve supervisory authorities (AT, EE, ES, DK, FR, IE, IT, LT, LV, MT, PT and SK), indicated a frequency ranging between one meeting a week to one meeting a month on average, or as part of regularly scheduled meetings.

207. In one authority (LT), only a supervisory assessment can **trigger the sanctioning process** [Q21]. In BE a supervisory assessment may trigger a sanctioning process that will begin with an investigation. In a large majority of the other authorities (BG, CY, CZ, DK, ES, FI, HU, IE, IT, LU, LV, MT, NL, PL, PT, RO, SE and UK), the sanctioning process may be triggered by both a supervisory assessment or an investigation, whereas in four authorities (AT, FR, GR and SI) it is mostly triggered by an investigation and in one (SK) mostly by a supervisory assessment. Furthermore, some authorities gave complementary means that could lead to a sanctioning process, such as complaints (BE), warnings (CZ), information from a person or an institution (IE), any information received by the authority (PL), denunciation (PT) or others. EE mentioned that depending on the case, the initial information may be received from clients or the facts may be apparent.

[27] The early settlement procedure allows firms in certain circumstances to agree the facts of misdemeanours with the authority (and accordingly accept the level of the punishment the authority will impose), and if a matter is settled without the need to go to the sanctioning body, then up to a 30% discount is available if any pecuniary sanction is imposed. Sign-off of a formal settlement document must be given by at least two senior members of staff from the FSA. However, firms are advised that if they dispute any part of the case against them (however small), including the level of penalty to be imposed, the early settlement procedure is not appropriate and a meeting of the sanctioning body will be convened for the issues to be discussed. Matters that have been settled early are subject to the same publication rules as if the sanctioning body had made the decision to impose sanctions.

208. A large majority of the authorities (BE, BG, CZ, DK, EE, ES, FI, FR, GR, HU, IE, IT, LT, LU, PL, PT, SE, SK and UK) give the persons against whom action is being taken the **right to defend themselves** [Q22] both during the investigation and at the time of the sanction. In FR it is not legally required at the investigation stage but the authority has decided to allow it. In SI, if no appeal is allowed against non pecuniary sanctions, the person or institution concerned have the right to express their views about the facts and circumstances under scrutiny, before the sanction is taken; in the case of pecuniary sanctions, the right of defence, including through representation by a lawyer, is available both at the time of the investigation and after the sanction is taken.

209. The person or the institution can only invoke the right to defend themselves at the time the sanction is taken according to the answers of four authorities (CY, DE, LV and MT). One authority (AT) mentioned the right for persons to defend themselves at any stage of an investigation.

210. A majority of authorities (BE, BG, CY, CZ, DE, DK, EE, ES, FR, IE, IT, LT, LU, MT, PL, PT, SI, SK and UK) detailed in their answers the formal means set up by law or by administrative rules to enforce these rights of defence: they range from the obligation to investigate in charge and discharge (BE), the formulation of objections against the investigation report, the possibility to present evidence and to access the file with the assistance of a lawyer, to the right to be heard before the sanction is pronounced and assistance by a translator (LT) or a lawyer (SI). Other authorities (AT, HU, LV, PL and SE) also mentioned other means that are used to enforce this right of defence through current direct contact with the person or the institution (e.g. SE), through the right to have access to the papers of examination and to make observations on the report (HU, LV).

211. Regarding the legal or administrative rules on the **length of the sanctioning procedure** [Q23], eight authorities (BE, CY, GR, IE, LU, MT, PL and SI) declared that they don't have explicit rules and do not mention any time limit on the sanctioning procedure.

212. Six authorities (DE, DK, EE, FI, FR and SK) explained that although they do not have legal or administrative rules, time limits exist and are based on rules of internal practice. In those authorities the solutions are however very different: DE stated that the length of the procedure has to be adequate; DK has no specific length, it depends on the procedure used; and FI mentioned a reasonable time. Other authorities indicated more specifically a length to the sanctioning procedure, which varies: in the case of EE, the time for the procedure is considered lapsed two years after the misdemeanour was committed; FR mentioned only the constraint of the case-law of the Conseil d'Etat that there has to be at least one procedural action every 18 months; HU mentioned 6 months and SK an objective rule (10 years since the violation occurred) and a subjective rule (2 years since it has been revealed to the National Bank of Slovakia). In the case of a disciplinary penalty, 6 months after the Bank of Slovakia detected the breach of the obligation but no later than 3 years from the date of the breach). One authority (SE) reported that although no specific time frames are stipulated in regulations, the authority has to act in a speedy manner according to administrative rules governed by the Swedish Administrative Act.

213. The eight other authorities (BG, CZ, ES, HU, IT, LT, LV, NL, PT and UK) declared that they have legislation or administrative rules concerning the length of the sanctioning process. Various judicial processes exist: for CZ it is an administrative procedure with a 30 day time limit, which can be lengthen to up to 60 days (but in reality it is more than 5 months); ES mentioned 1 year from the opening the procedure and in exceptional circumstances it can be expanded by 6 months; for LV it depends on the kind of administrative matter, if it is initiated on the basis of a submission, it is one month from the day the submission is submitted, and it can be extended to up to four months; for IT and UK which also mentioned administrative rules (IT has a limit

of 240 days and UK of 2 years). HU indicated that it worked under strict deadlines, set out in binding Acts, for its examinations, preparation of reports and resolutions. Others authorities such as BG, LT, NL and PT have a legal rule on the length of the sanctioning procedure: LT's limit (for legal entities) is 2 years, PT's limit is 5 years but BG and NL do no mention the length.

214. [Q24] In a large majority of authorities (AT, BE, BG, CY, DK, EE, FI, FR, GR, HU, IE, IT, LT, LU, LV, MT, PL, PT, RO, SE, SI and UK), the person or the institution can **lodge an appeal against the sanction** decision directly with a court, that can be either an administrative court, a high court, a court of appeal or an equivalent (AT, BE, BG, CY, EE, FI, FR, GR, HU, IT, LT, LU, LV, PL, PT, RO, SE and SI) or with a specific tribunal dedicated to this type of litigation (DK, IE, MT and UK). In these last cases it can be the Company Appeals Board in DK, the Financial Services Appeals Tribunal in IE, the Financial Services Tribunal in MT or the Financial Services and Markets Tribunal in the UK. Four countries (CZ, DE, NL and SK) provide for an additional possibility for legal redress before the appeal can be lodged with a court, this appeal for reconsideration may be brought before the Board of the authority (Central Banks of CZ and SK) or the authority itself (DNB in NL and BAFIN in DE). Lastly, in ES all sanctioning decisions taken by the supervisory authority can be appealed before the Ministry of Finance. Sanctioning decisions taken by the latter can be appealed before the Courts.

215. As regards the question **whether the sanctions are made public and/or on a named basis** [Q25], seven banking authorities (FI, IT, MT, NL, SE, SK and UK) answered positively, declaring that sanctions are published as a matter of course and on a named basis without restriction. SK specifies that publication of sanctions does not belong to the authority but to the credit institutions concerned which have a legal obligation to do so. LV specifies that the sanctions are published in a summarized form. BE, GR, IE, DK and LT specify that their sanctions are made public systematically and on a named basis but if there are market safety reasons or if it will create damage to the interested parties, the sanctions won't be published or will be published on an unnamed basis. In the case of FR, the sanctions are made public systematically but the Banking Commission may decide to make it unnamed. In PT, sanctions are not made public systematically, but when publication is decided it is on a named basis (ancillary sanction).

216. Other supervisory authorities have discretionary power regarding publication of the sanctions and whether the name of the sanctioned institution is revealed.

217. Six banking authorities (BG, CY, HU, LU, PL and SI) declared that they do not make their sanctions systematically public and on a named basis. HU may publish, or not, only a part of the sanction called "resolution", which provides information on the nature of the sanction (pecuniary or not), the legal grounds (e.g. breach of which legal provisions) and the possibility of appeal against the sanction. When a decision to publish is taken, it can be on a named basis or not. Publication takes place on the authority's website. LU specifies that the sanctions are usually disclosed on an unnamed basis in the CSSF's Annual Report. DE does not make the sanctions public but they are disclosed on an anonymous basis in the BAFIN's Annual Report. Other authorities such as AT, CZ and ES specify that they make a sanction public on a named basis only when it concerns the most serious of infringements. EE does not make its sanctions systematically public and on a named basis but it publishes them when it is necessary for the protection of investors, clients or the public, or for ensuring the lawful or regular functioning of the financial market. As regards RO, sanctions are not made public except when the authorization of a credit institution is withdrawn.

D. Disclosure of sanctions to other authorities, i. e. questions 26 to 27

218. All authorities can **disclose a sanction imposed on a supervised natural or legal person to another competent prudential** (domestic or foreign) authority [Q26]. In most of the authorities, disclosure is conditional upon certain circumstances, and only LT state that they do not have any conditions or restrictions on disclosure. Four authorities indicate that all sanctions (BE, IE, SE and UK) are published and can be consulted by other authorities. This is also the case in practice in IE although publication is not mandatory. Some authorities indicate that the information disclosed to a supervisory authority must be necessary for the performance of its duties/tasks (AT, BE, BG, DE, EE, FR, IT, NL, PT and RO) or that they share information with the supervisory authority of the person concerned (LU and PL). Seven authorities indicate that they share information with authorities subject to an equivalent obligation of professional secrecy (BE, BG, DE, EE, GR, DK and UK).

219. In eleven authorities, disclosure conditions are different depending on whether the recipient of the information is the authority of an EEA Member State (BE, CY, CZ, DK, ES, FR, IT, LU, NL, PT, RO). Seven authorities indicate that the disclosure of information, including the disclosure of sanctions, is regulated through Memoranda of Understanding or international or reciprocity agreements (BE, FR, LV, MT, PL, PT and SK). Those agreements can be established with the domestic authorities (PT) or authorities of a non-EEA Member State (BE, FR and PT).

220. Nine authorities have an obligation to communicate some information (CY, CZ, DE, ES, GR, LT, LU, NL and PL). LT has a right but not an obligation to inform other prudential authorities about sanctions imposed. In DE, the supervisory authority states that it must disclose any suspicion of money laundering to the domestic competent authority. Five authorities must disclose major sanctions and remedial measures of exceptional significance imposed on a bank to the authorities of other Member States concerned (CY, CZ, LU, NL and PL).

221. Regarding the **ratio of sanctions disclosed to other prudential authorities** over the total number of sanctions (both pecuniary and non-pecuniary) [Q27], four authorities gave figures (less than 5% for SI and PT, 5% for HU, 12% for LV and about 50% for EE) and five authorities reported that they did not disclose any sanctions (CY, CZ, ES, LU and GR). Eight authorities point out that the ratio of sanctions disclosed is not available (AT, BE, DK, DE, IT, MT and SK).

222. FR and UK state that all sanctions are published and can therefore be viewed by other authorities. BG and RO indicate that all requested information was disclosed and SE noted that a summary of the sanction decisions can normally be disclosed to the host Member States where a credit institution provides cross-border activities.

E. Conclusions

All supervisory authorities are able to act against institutions and corporate officials liable for breaches of rules on banking activity by way of penalties, fines and/or other supervisory measures. Although large variations can be observed in the frequency and severity of sanctions any assessment of their effectiveness would have to consider the seriousness of the breaches and aspects relating to the legal, administrative and judicial frameworks of each Member State as well the size and structure of the local financial system.

In any case, there are no signs that differences in the approaches followed in the application of sanctions by Member States and national supervisors have lead to arbitrage between EU countries in the establishment of banking activities.

However, further consideration could be given to reaching a common understanding of the concept of "sanction" having regard also to the wider issue concerning the exercise

of supervisory powers relating to licensing, early interventions and closure of banks. The desirability of having requirements to disclose sanctions, in particular for cross-border banks, could also be explored.

VI. Annexes

Annex 1 – Request from the European Commission on supervisory powers and objectives

Annex 2 - Request from the European Commission on early intervention measures

Annex 3 – Questionnaire on supervisory objectives and actual use of sanctioning powers

Annex 4 – Questionnaire on supervisory powers

EUROPEAN COMMISSION
Internal Market and Services DG

Director-General

Brussels, 31.03.08 00001209
MARKT G1/KO/ rb D(2008) 4117

Ms Kerstin af Jochnick
Chairwoman
Committee of European Banking
Supervisors
Floor 18, Tower 42
25 Old Broad Street
UK-London EC2N 1HQ

Dear Kerstin,

The ECOFIN Council on 4th December 2008, when reviewing the functioning of the Lamfalussy process, invited the Commission to study the differences in supervisory powers and objectives between national supervisors and to conduct a cross-sectoral stock taking exercise of the coherence, equivalence and actual use of sanctioning powers among Member States and the variance of sanctioning regimes. As indicated in the Roadmap endorsed by the Council these actions are expected to be completed by the end of 2008.

This work is of high importance. In the absence of equivalent supervisory and sanctioning powers, there is a risk that EU law will not be applied in a consistent way. Furthermore, the capacity to act on an equal footing for the performance of supervisory and sanctioning powers is necessary for the national supervisory authorities to fulfil their tasks in terms of EU supervisory cooperation and convergence. I cannot stress enough the importance these issues have been given in the context of the current financial turmoil.

The Council has asked the Level 3 Committees to cooperate with and assist the Commission in accomplishing these tasks. Taking into account the substantial workload of CEBS already resulting from the October ECOFIN Roadmap on the credit crisis, the Commission would like to ensure that there is a smooth and effective cooperation in delivering these studies which minimises, as much as possible, the amount of additional work required.

My services have already started to work on these matters, as part of the transposition check of Article 136 of the CRD and the public consultation on the review of the Winding-Up Directive. We are ready to provide you with the information at our disposal. However, given the fact that the differences in supervisory and sanctioning powers stemming from the banking directives have not yet been formally studied in detail, a

mapping exercise carried-out by the members of CEBS appears to be a prerequisite for the Commission's subsequent work to fulfil the Council's request.

To this end, I would be very grateful if CEBS could provide my services with an overview of the existing powers of supervisory authorities in all EU Member States as well as with an analysis of the differences in the respective supervisory powers (both in terms of the legal attribution of powers as well as their actual use). There are three questions which need to be answered:

I. What are the powers that each national supervisor has under the national law transposing the EU banking directives and in particular those implementing Article 136 of the CRD?

II. What are the main differences that can be observed between the powers entrusted to supervisors?

III. Taking into account that the EU banking legislation contains only a list of adequate minimum powers and sanctions (i.e. in Article 136 of the CRD), what other supervisory and sanctioning powers do supervisors have at their disposal under national laws?

The Commission suggests that CEBS explicitly examines the differences in supervisory powers in relation to:

I. "Core" prudential supervisory activities in relation to:

- Taking-up of business / licensing of credit institutions;
- On-going activity / compliance with prudential rules and powers towards third parties;
- Credit institutions in difficulties and crisis management (reorganization and insolvency proceedings and other supervisory tools in crisis situations referred to in the ECOFIN crisis management roadmap);

II. rule-making;

III. administrative measures and sanctioning powers against the undertaking and/or the administrative and management body (including amounts of fines linked to a type of financial institution and the type of breach committed)

IV. other remits that might fall under the scope of banking supervisors in relation to the domestic rules such as anti-money laundering and fight against terrorist financing; consumer protection etc.

With regard to the objectives of the national supervisory authorities I would suggest that CEBS builds on the results of the enquiry of national mandates prepared for the Financial Services Committee. The purpose would be to create a comprehensive list of the

objectives given to all EU supervisory authorities under national laws which would then allow for the comparative analysis.

The Commission welcomes the Level 3 committees' commitment to continue the work, on the identification of possible obstacles stemming from differences in supervisory and sanctioning powers as well as objectives (cf. letter of the Level 3 Committees' Chairs to Commissioner McCreevy of 27 February 2008). Keeping in mind the deadlines endorsed by the ECOFIN Council, it would be desirable to accelerate this work as much as possible. To this end, the Commission would welcome CEBS sharing its preliminary findings on supervisory powers and objectives in July 2008. We would highly appreciate receiving the analysis of the findings on supervisory powers and objectives and a comparison at 3L3 level of the sanctioning powers until the end of October 2008.

I am sure that CEBS will share in our determination to swiftly implement the Council Conclusions on the Lamfalussy review. Building on our positive experiences of mutual cooperation to date I would appreciate it if you could keep my services regularly informed of your progress.

We remain of course at your disposal for any queries that you may have (Karolina Ostrzyniewska (Ph. +32 2 296 80 36) and Arvind Wadhera (Ph. +32 2 2986 344) are at your disposal to that effect).

Yours sincerely,

Jörgen HOLMQUIST

EUROPEAN COMMISSION
Internal Market and Services DG

Director-General

Brussels, 26 SEP. 2008 . 30082
Markt H1 TM/ek

Ms Kerstin af Jochnik,
CEBS Chair,
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25 Old Broad Street
UK-London EC2N 1HQ
e-mail: kerstin.jochnick@fi.se

Dear Kerstin,

Subject: Request for work by CEBS on early intervention in ailing banks

The European Commission considers that although there should be considerable focus on the steps to avoid a bank reaching insolvency, it is clear that there will always remain a risk that banks will fail. Given the potential consequences to depositors, contagion to other banks or damage to confidence in the financial system, the Commission believes that it is important to ensure that appropriate legal and other arrangements are in place to deal with such circumstances.

On 14 May, in the context of discussions about ongoing work on deposit guarantee schemes and crisis prevention, the ECOFIN Council requested the European Commission to look into possible linkages to early intervention and reorganisation of a failing bank.

The Commission has presented a paper to the EBC and the EFC on early intervention to deal with an ailing bank, and has announced its intention to produce a White Paper on this issue by mid 2009 at the latest.

I would therefore like to request the assistance of CEBS in compiling information about the specific and important issue of *when, under what conditions* certain crisis intervention tools are used at national level and *which* crisis intervention tools may be used. The interaction between those tools in a cross-border case will need to be considered at a later point in time.

I acknowledge that both prudential supervision and crisis management represent a combination of rules and discretions and that the CRD leaves the issue of early intervention open[1], resulting in significantly different approaches being applied at national

[1] Article 136 of the CRD sets out minimum requirements that competent authorities need to be able to take in order to ensure that credit institutions meet the requirements of the Directive – but precisely how is left to national implementation.

level. However, the Commission believes it is important to understand more fully how intervention works in practice in the Member States, in order to assess whether or not different processes and different trigger points have the potential to complicate smooth cross-border handling of a failing bank.

At this stage, we are confining our request for assistance to a simple stocktake, along the lines outlined in the annex to this letter. We are not issuing a formal call for advice. By "early intervention", we are interested in an overview of all pre-liquidation stabilisation measures aimed at achieving timely solutions for an ailing bank. This includes measures already covered in Article 136(1) of the CRD as well as other intervention measures e.g. suspension of payment of dividends, transferring or selling assets/liabilities to a healthy bank outside the group, taking over the management and assets of a bank and appointing a special administrator, setting up a bridge bank, creating a new bank or merging the bank with another bank, temporary public ownership, etc. The results of this evidence gathering will assist us to consider the possible policy options in the White Paper, although I should stress that at the start of this process, the Commission has no pre-conceived ideas about the possible outcomes.

Given the nature of our request, it is not necessary to revert to a formal call for advice. We would however welcome a contribution from CEBS once the stocktake has been completed – we would suggest this could be done at the same time as the Commission launches its own public consultation (February – April).

Taking into account the time constraints, we would be grateful if you would provide us with the requested information by 16 January 2009.

Yours sincerely

Jörgen Holmquist

Annex – details of the Commission's request for information on triggers for early intervention

Background

All MS operate some form of early intervention mechanism in order to handle a crisis in an ailing bank. But the nature of the measures, the criteria conditioning their application and the moment at which measures are activated are not harmonised and consequently differ across Member States. While speedy action may be critically important to the survival of the institution or to the ability for supervisors to minimise costs associated with a bank failure, such differences have the potential to complicate or impair efficient cross-border crisis handling.

The Commission intends to prepare a White Paper setting out its policy on Early Intervention Tools for dealing with Ailing Banks as a means of enhancing cross-border crisis handling. As part of this work, the Commission is requesting CEBS to compile information about the processes which lead up to decisions about whether or not to intervene in order to deal with an ailing bank (i.e. the bank is failing or is likely to fail), including the existence of any "clear cut" triggers.

There is a clear linkage between this work and the stocktake currently being undertaken on supervisory powers, due by November, and which should provide complete information about the options available to deal with various circumstances, including looming bank failures. However this new request is more focussed, and aimed at obtaining a more precise and broader picture of how decisions to apply one or other crisis resolution measure are reached in the different Member States and shedding further light on possible differences which have the potential to create problems in the case of a cross-border crisis. This stocktake should also complete information already gathered as part of the review of the Winding Up Directive

Scope of the exercise

In the White Paper on "early intervention", we intend to look at issues relating to the use of all pre-liquidation stabilisation measures aimed achieving timely solutions for an ailing bank. This includes e.g. suspension of payment of dividends, transferring or selling assets/liabilities to a healthy bank outside the group, taking over the management and assets of a bank and appointing a special administrator, setting up a bridge bank, creating a new bank or merging the bank with another bank, temporary public ownership, etc.. The main focus of the White Paper will be on assessing whether the current range of crisis management and resolution tools available to authorities can and should be complemented by additional tools and whether there is a case for further convergence of such tools at EU level.

The table in annex illustrates the intended scope of our analysis.

What do we need to know?

The purpose of this work will be to provide comprehensive information in all EU Member States about early intervention practices. By this, we mean the ***key moments in time,*** the ***criteria which condition the decision by the competent authority to act*** and the

1. The Commission wishes to obtain precise information about the **key moments**[2] during or preceding an unfolding banking crisis, in particular:

- Moment/event at which competent authorities trigger the requirement on a credit institution to take the necessary steps to redress the situation in order to meet minimum requirements in the Directive and to implement the measures referred to in Article 136(1) CRD.
- Moment/event at which other competent authorities need to be alerted about an emergency situation in a banking group (in accordance with Art. 130 CRD)
- Moment/event at which Member States trigger "early intervention measures" (to be understood in a broad sense which includes reorganisation measures) when the bank is still technically solvent (there is no EU legislation on this, so the rules vary across Member States).
- Moment/event at which insolvency is declared (in some cases, supervisors will participate in this decision - in others, not at all).
- Moment/event at which the DGS is triggered.

2. The Commission wishes to obtain precise information about the key ***conditions*** (including a detailed description of how these are determined) underpinning the key trigger moments, based e.g.:

- On the credit institution possessing adequate ***resources*** for it to be able to continue activities.
- On the credit institution maintaining adequate ***suitability*** for it to be able to continue activities
- Definition and assessment of ***insolvency/illiquidity***

Input from CEBS should focus on conditions assessed by supervisors as part of their supervisory powers. Where crisis resolution is a purely judicial driven process, information should be limited to relevant law and case law underpinning this assessment by judicial authorities.

3. With reference to the results of the stocktake on supervisory powers, the Commission wishes to obtain precise information about which ***actions*** may result from a particular trigger being activated

4. The Commission wishes to obtain precise information about which ***authorities*** (e.g. finance ministries, central banks, supervisors, judicial authorities) have the power to intervene for each specific tool, including any procedures which may need to be followed (e.g. consultation with finance ministry, Parliamentary approval, etc).

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[2] It is recognised that in reality there may be differences between perception and reality, and that in practice such moments may be very difficult to identify. However this should not exclude the possibility that legislation or internal guidelines may have attempted to describe or define such moments in precise or vague terms.

5. The Commission wishes to obtain information about whether national legislation of guidelines have already foreseen the possibility of conflicting trigger points in cross-border circumstances, and if so, what solutions have been adopted.

6. The Commission would expect, to the extent that it does not impinge on confidentiality requirements, that information on trigger events be substantiated by concrete cases of banks' resolution that competent authorities have experienced over the last decades.

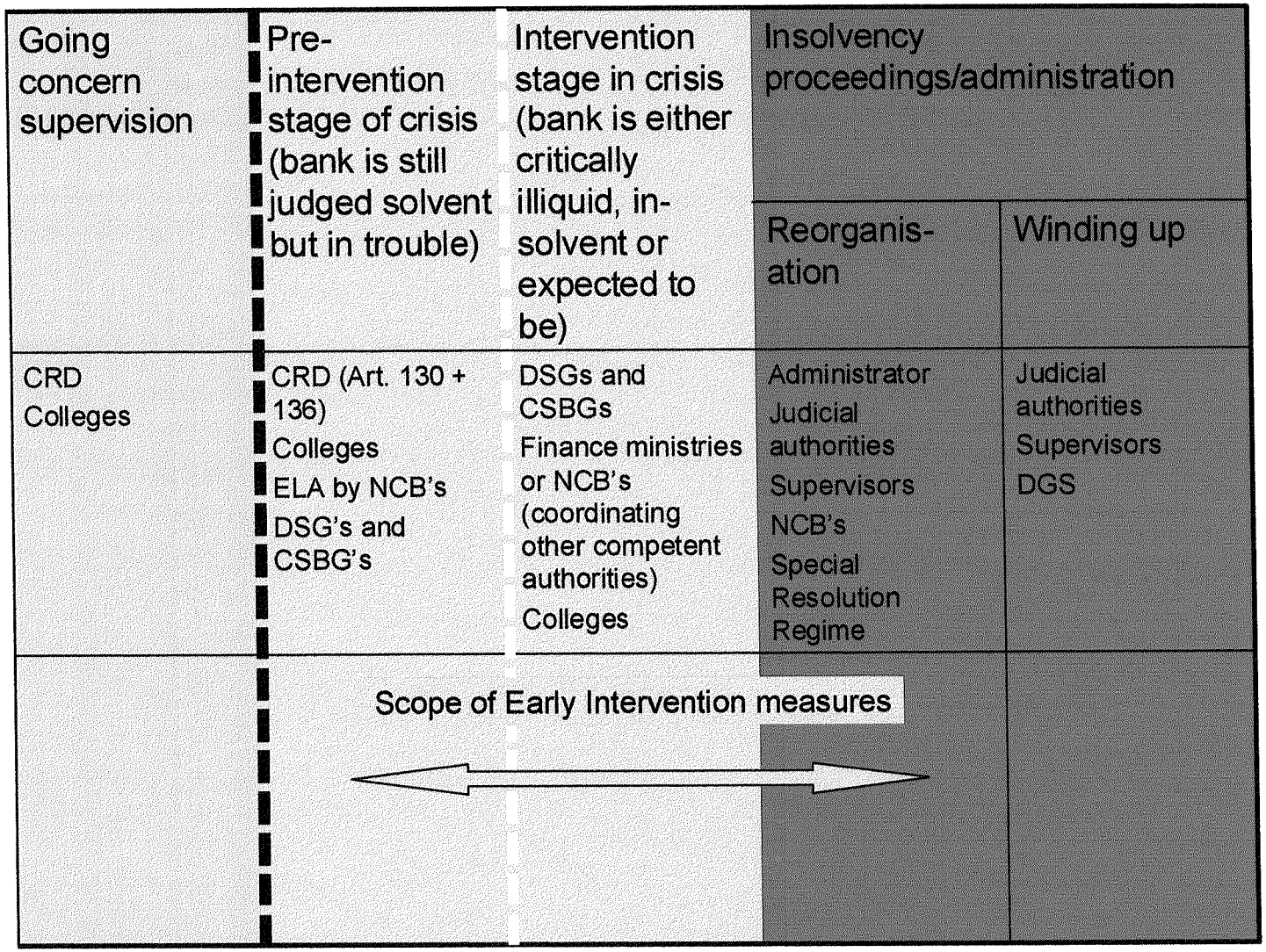
Procedure

This request is based on an informal request to CEBS chair. In view of the time constraints, the Commission is not issuing a formal call for advice. This should avoid the need for CEBS to conduct its own public consultation. The Commission intends to launch its own consultation on the White Paper before publication. CEBS will have an opportunity to provide its own assessment during the public consultation phase.

Timing

- Launch end September
- Delivery 16 January 2009

Commission's White Paper on Early Intervention: Intended scope of analysis



REVIEW PANEL RP 2008 13

23 July 2008

Survey on Supervisory Powers and Objectives, including actual use of sanctioning powers

Introduction

1. The December 2007 ECOFIN Council, when reviewing the functioning of the Lamfalussy process, invited the Commission, in cooperation with the 3L3 Committees, first to study the differences in supervisory powers and objectives entrusted to national EU supervisors and second to conduct a cross sectoral stock taking exercise of the coherence, equivalence and actual use of sanctioning powers among Member States and variance of sanctioning regimes. That stock taking exercise would in particular allow ascertaining whether such sanctioning powers have sufficiently equivalent effect. Both work streams should be completed by the end of 2008.

2. By a letter dated 31 March 2008, the European Commission asked CEBS to provide assistance in this matter. The sectoral mapping exercise has been designed in order to serve the following purposes:

   (i) Providing an overview of common supervisory objectives and powers, highlighting the rationale for differences and assessing the adequacy of those powers to the stated objectives;

   (ii) Analysing any difference in practical implementation of the sanctioning powers, taking into account notably the decision-making process and publication/cooperation with other supervisory authorities.

3. Letters from the European Commission calling for assistance have been sent to CEIOPS and CESR as well. A close coordination has therefore been ensured with the sister Committees, more particularly with CEIOPS due to the almost identical request put to that Committee. As for CESR, which has already conducted mapping exercises on the

implementation of other market directives[28] since the last two years, it focuses its present analysis on the stock take of powers, including sanctioning powers, derived from Directive 2004/39/EC (MiFID) only.

4. CEBS questionnaire entails both a descriptive part (See below) and a more quantitative part, based on a tick-box approach (See excel file in Annex 1). The descriptive part will provide general information (Section A) as well as material for the analysis of the supervisory objectives (Section B) and the actual use of sanctioning powers (Section C); the quantitative part takes stock of the existence of supervisory powers granted to national supervisors (section D).

5. The quantitative questionnaire is divided into 4 main sections relating to (i) core banking activities, (ii) rule making, (iii) other remits that might fall under the responsibility of banking supervisors (the example of Anti-Money Laundering) and (iv) administrative measures and sanctioning powers. For the purpose of this exercise, core banking activities have been broken down into the following subsets :

   - taking-up of business/licensing of credit institutions
   - on-going activities, including crisis management,

6. When answering the questions, members are invited to bear in mind the main EU directives relevant for the exercise of supervisory powers by banking supervisors, i.e. Directives 2006/48/EC, 2006/49/EC, 2000/46/EC, 2005/60/EC and 2006/70/EC. Similarly, questions on powers stemming from the MiFID regarding supervision of credit institutions and investment firms have not been incorporated here as they are already dealt with in CESR's questionnaire, with explicit reference to direct entrustment to market authorities or, where applicable, to indirect/shared entrustment with other financial authorities.

7. Both questionnaires should be completed by **17 September 2008**. The related report should be finalised before end November 2008.

Explanatory notes on the design of the questionnaires

Substantial consideration was given to the form of the questionnaire and which areas should be covered. Key elements in drafting this questionnaire were:

- To find the right balance between a complete mapping of the supervisory and sanctioning powers and a focused and comprehensive questionnaire given the limited time for this project;
- To draft the questions in a way that the answers should be comparable as to make sure that the answers are valuable and useable to report.
- The questions related to the day to day implementation of sanctioning powers should focus on the most meaningful areas (decision-making process, disclosure, adequacy of limits for pecuniary sanctions …).

A. General information

In this section, members are expected to provide general information on their authorities, with regards to their status and the institutions supervised, by clicking the relevant boxes and elaborating on their answers when necessary. For integrated supervisors, it is important to provide information only as far as banking supervision is concerned and anti-money laundering responsibilities, if the case may be.

B. Supervisory Objectives (Questions 1 to 8)

In this section members are expected to describe what objectives have been explicitly given to their authority. This part of questionnaire is built on a survey conducted by the IMF in November 2005 on Governance Practices of Financial Regulatory and Supervisory Agencies. Members are asked to answer yes, no or not fully, and to provide explanation notably regarding the legally binding nature of the objectives assigned to supervisors.

C. Actual use of sanctioning powers (Questions 9 to 27)

In this section members are asked to describe their policies and practices with regards to sanctioning powers, including pecuniary sanctions. The frequency of use of these powers will be of relevance in this respect. In some cases members only have to answer yes, no or not fully: they are asked to strikethrough the non appropriate answers. The format of this questionnaire clearly shows in which cases a descriptive answer is required. In the latter case, members are requested to specify if their answer relates to a natural person (please indicate "NP"), a legal person (please indicate "LP") or if it is applicable to both (please indicate "NP and LP").

D. Supervisory Powers, including sanctioning powers (questions 28 to 90 of the attached Excel spreadsheet)

In this section, please provide answers by clicking the relevant boxes. In the case of a positive answer, please clarify whether these powers are exercised in your jurisdiction

- Directly by your Authority
- By delegation of the related tasks to another Authority/Entity.
- By delegation of the related responsibility to another Authority/Entity.

In the case your Authority uses delegation of tasks or responsibilities related to certain powers or if certain powers are entrusted to another authority/Entity in your jurisdiction, please provide the name of this authority in the dedicated text column.

In the last column of this section members are also expected to provide information in relation to the circumstances under which the powers can be exercised on supervised institutions. For sanctioning powers, this last column should be filled in only for providing information that is not reflected in the answers provided in Part C (Actual use of sanctioning powers). Further, the last column can be used to provide any other comments that would be deemed useful, on a voluntary basis.

This part of the questionnaire has to be answered **in the excel file attached in Annex 1**. The format of the questionnaire will look as follows:

			By whom and how are these powers exercised?				
No	**Does your authority have the power to**	**Yes / No / Not fully**	**Directly**	**By delegation of task**	**By delegation of responsibility**	**In the case that another Body has and/or exercises this power within your jurisdiction, please specify which Body**	**Under what circumstances can this power be exercised / this measure be taken? Plus other comments if necessary**
1	……	Yes	X	X		Name(s) of the delegatee(s)	
2	……	No				If the case may be, name(s) of other Authority/ies	Specify circumstances (e.g. Once an institution has been declared insolvent)

Please note that in some cases several ticks can be filled in. Please use a X when filling in the columns as done in the example.

A. General Information

Country's name _____
Supervisory authority's name _____
Status of supervisory authority: ❑ Stand-alone banking supervisor
❑ Stand-alone integrated financial supervisor
❑ National Central Bank

In case the responsibilities for banking supervision are shared between several authorities, please specify:

Type of institutions supervised: ❑ Credit institutions
❑ Investment firms
❑ Providers of currency exchange services
❑ Providers of money transmission or remittance services
❑ Others

In the case the box "Others" is ticked, please specify which other institutions are under your supervision as a banking supervisor or as an authority tasked with anti-money laundering responsibilities:

B. Supervisory Objectives

Please indicate the following in the table below, (i) which of the following represents an explicit mandate for your authority; and (ii) what is the source for each. If the source is not law or regulation, please specify in the last column whether it is binding or not.

Q	Elements of the Mandate	Yes / No / Not fully	Source	Specify / Explain
1	Maintaining financial stability			
2	Ensuring compliance with banking regulation			
3	Promoting competition			
4	Protecting banks' clients from misconduct and/or bad business practices			
5	Preventing financial crime including anti-money laundering/combating financing of terrorism (AML/CFT)			
6	Promoting access to banking services (e.g., access by small and medium size business, low income individuals, etc)			
7	Promoting supervisory cooperation and convergence of supervisory practices in the EU? (please provide an English version of the related statement in the last column)			
8	Other(s) (please specify and also indicate the reasons)			

C. Actual use of sanctioning powers (including for breaches of Anti-Money Laundering (AML) provisions, when applicable)

Please specify if your answer relates to a natural person (indicate "NP"), a legal person (indicate "LP") or both (indicate "NP and LP").

Q No	QUESTIONS	ANSWERS	
9	Does your authority have the power to impose sanctions, including pecuniary ones, to a supervised institution, its directors or managers?	Yes/No/Not fully	
If "not fully", please elaborate			
10	What are the lowest and highest penal provisions set by the legal and regulatory framework for non pecuniary sanctions, excluding sanctions related to criminal offences?	Lowest penal provision	Highest penal provision
11	Are the amounts of the pecuniary sanctions fix or variable? (Please explain)		
12	What are the minimum and maximum amounts in EUR (or equivalent EUR) set by the legal and regulatory framework for a pecuniary sanction?	Minimum amount(s)	Maximum amount(s)
Please indicate the rationale for choosing these amounts.			
13	What have been the more penalizing non pecuniary sanctions taken since 2005 by your institution?		

14	What have been the lowest and highest pecuniary sanctions (in EUR or equivalent EUR) taken since 2005 by your institution?	Lowest pecuniary sanction	Highest pecuniary sanction
Please indicate the motivations behind these pecuniary sanctions (non-compliance with which legal provisions...).			
15	Does your national framework provide any further guidance on pecuniary sanctions regarding the suitable range of amounts for non-compliance with certain provisions/types of provisions?	Yes/No	
If yes, are these amounts binding? (please elaborate)			
16	Please indicate whether the amounts of the sanctions imposed vary depending on the following items.	non pecuniary sanctions	Pecuniary sanctions
a) the seriousness of the breach?		Yes/No	Yes/No
b) the level of the institution's own funds?		Yes/No	Yes/No
c) the legal status of the institution?		Yes/No	Yes/No
d) the cooperative behaviour of the person or the bank during the investigation?		Yes/No	Yes/No

e) whether or not the person or the bank has been sanctioned before for non compliance to the same provisions?		Yes/No		Yes/No
f) the benefit (earnings,…) derived from the offence?		Yes/No		Yes/No
g) the loss incurred by third parties as a consequence of the offence?		Yes/No		Yes/No
h) any other criterion? (please specify)				
17	Which body has the power to take sanctions?			
18	How often did this body meet in 2006? 2007? First semester of 2008?	2006	2007	First semester 2008
19	How many sanctions relating to banking supervision or AML, have been taken ?	2006	2007	First semester 2008
20	Among those sanctions, how many were pecuniary sanctions?	2006	2007	First semester of 2008
21	Is the sanctioning process triggered by supervisory assessment or investigation only? (Please elaborate)			

22	Can the person or the institution invoke his or its right to defense during the investigation and/or at the time the sanction is taken? (Please explain)		
23	Are there legal or administrative rules on the length of the sanctioning procedure? (please explain)		
24	Can the person or the institution lodge an appeal against the sanction decision with a specific authority? Please specify.		
25	Are the sanctions made public systematically and on a named basis?	Yes/No	
Please elaborate on the legal or administrative procedures and/or practices underpinning publication of sanctions.			
26	Can your authority disclose a sanction imposed on a supervised natural or legal person to another competent prudential (domestic or foreign) authority?	Yes/No	
If yes, please specify: - under which conditions, - how (upon request only? Full disclosure?),			
27	What is the ratio of sanctions disclosed to other prudential authorities over the total number of sanctions (both pecuniary and non pecuniary) since 2006?		

REVIEW PANEL

D. Stock take on supervisory powers - including sanctioning powers - among national supervisors

CEBS Member:

			By whom and how are these powers exercised?				
Q No	QUESTIONS Does your authority have the power :	Yes / No / Not fully / Not Applicable	Directly	By delegation of task	By delegation of responsibility	In the case that another Body has and/or exercises this power within your jurisdiction, please specify which Body	Under what circumstances can this power be exercised / this measure be taken? Plus other comments if necessary
1 - "Core" prudential supervisory activities							
a.	**Taking-up of business / licencing of credit institutions**						
28	To enforce that entities do not provide banking services in your jurisdiction without authorisation/due notification?						
29	To grant initial authorisations?						
30	To grant subsequent authorisations (new branches, new businesses…) ?						
31	To verify if the persons who effectively direct the business are fit and proper?						
32	Others (please specify in the last column)?						
b.	**Ongoing activity, including crisis management**						
32	To submit supervised institutions to (regular or special) on-site inspection?						
33	To submit entities performing outsourced functions for supervised institutions to on-site inspection?						
34	To require supervised institutions to provide information, document and data on a regular basis?						
35	To require supervised institutions to provide any information on demand (e.g. in times of crisis)?						
36	To require supervised institutions to provide any information within a defined time period (e.g. in times of crisis)?						
37	To require that entities performing outsourced functions for supervised entities provide any information (including special reporting during times of difficulty) on demand ?						
38	To require that entities performing outsourced functions for supervised entities provide any information (including special reporting during times of difficulty) within a defined time period?						
39	To require an institution to meet supervisory requirements that are stricter than the legal requirements (capital, liquidity or other : please specify in the last column)?						
40	To require an institution to enhance governance, internal controls and risk management systems?						
41	To apply a specific provisioning/write-off policy?						
42	To restrict, limit or place conditions on the business conducted by the institution?						
43	To require the closure of existing branches/offices?						
44	To require an institution to downsize its operations (e.g. through selling assets)?						

Q No	QUESTIONS Does your authority have the power :	Yes / No / Not fully / Not Applicable	Directly	By delegation of task	By delegation of responsibility	In the case that another Body has and/or exercises this power within your jurisdiction, please specify which Body	Under what circumstances can this power be exercised / this measure be taken? Plus other comments if necessary
44	To require an institution to adjust the risk profile of its business (e.g. switching to lower risk weighted assets)?						
45	To require an institution to negotiate new agreements with viable but weak debtors?						
46	To require an institution to take possession of loan collateral or other assets of debtors?						
47	To require an institution to reduce or restructure unprofitable activities?						
48	To require an institution to cease practices, such as those which are harming the institution, e.g. irregularities and violation of laws or regulations governing the bank's activity?						
49	To limit intra-group asset transfers and transactions ?						
50	To limit asset transfers and transactions outside the group?						
51	To require a supervised institution to submit a recovery plan?						
52	To exercise supervisory forbearance (i.e. to waive supervisory requirements)?						

2 - Rule making

53	To lay down legally binding general rules or principles ?						
54	To lay down non legally binding general rules or principles?						
55	To lay down interpretative guidance or best practices?						
56	Others (please specify which in the last column)						

3 - Other remits that might fall under the scope of banking supervisors: the example of Anti-Money Laundering and Counter Financing Terrorism (AML/CFT)

57	To license or register currency exchange offices?						
58	To enforce that entities do not provide cuurency exchange services in your jurisdiction without authorisation/due registration?						
59	To license or register money transmission or remittance offices?						
60	To enforce that entities do not provide money transmission or remittance services in your jurisdiction without authorisation/due registration?						
61	To refuse licensing or registration (e.g. if you are not satisfied that the persons who effectively direct or will direct the business of such entities are fit and proper persons)?						
62	To refuse licensing or registration (e.g. if you are not satisfied that the beneficial owner of such entities are fit and proper persons)?						
63	To monitor compliance with Directives 2005/60/EC and 2006/70/EC? (Please indicate in the last column how this is handled for the institutions or persons mentioned in Questions 59 and 61, which might be only licensed/registered but not supervised as such)						
64	To compel the institutions and persons mentioned in Questions 59 and 61 and any supervised institution to provide any information, data or document relevant for AML/CFT?						
65	To conduct on-site inspections at institutions and persons mentioned in Questions 59 and 61 and at any supervised institution for AML-CFT purposes?						

Q No	QUESTIONS Does your authority have the power :	Yes / No / Not fully / Not Applicable	Directly	By delegation of task	By delegation of responsibility	In the case that another Body has and/or exercises this power within your jurisdiction, please specify which Body	Under what circumstances can this power be exercised / this measure be taken? Plus other comments if necessary
66	To carry out AML/CFT supervision also on a consolidated basis for institutions and persons mentioned in Questions 59 and 61 and any supervised institution?						
67	To cooperate and exchange AML-CFT related information on institutions and persons mentioned in Questions 59 and 61 and on any supervised institution with other authorities tasked with AML/CFT in your jurisdiction?						
68	To cooperate and exchange information with foreign authorities tasked with ALM/CTF?						

4 - Administrative measures and sanctions, including in the AML/CFT field

69	To issue a public warning or reprimand against a bank?						
70	To withdraw all or part of the license?						
71	To suspend the exercise of all or part of an institution's activities, or prohibit these activities altogether?						
72	To oppose to the nomination of a board member or managing director?						
73	To replace or require a bank to replace a director or manager, or all of its directors or managers?						
74	To appoint a person or body who has general or specific powers to authorize acts or take decisions? (please specify under which circumstances and which types of acts/decisions fall under these powers, eg transfer/sell assets...)						
75	To limit compensation (including management fees and bonuses) to directors and senior executive officers?						
76	To suspend the voting rights attached to shares held by a specific shareholder or by all shareholders?						
77	To require the transfer of the shares or share certificates held by a specific shareholder?						
78	To require a change in ownership?						
79	To prohibit or limit the distribution of profits or other payments to shareholders?						
80	To require commitments/actions from shareholder to support the institution if needed with cash (equity)?						
81	To prohibit or limit principal or interest payments on subordinated debt?						
82	To require the conversion of subordinated debt into preferential or new equity?						
83	To limit, prohibit or require prior supervisory approval for any major capital expenditure, material commitment or contingent liability?						
84	To set a deadline by which a bank has to comply with specific supervisory requirements, non-compliance with which may trigger a public disclosure, by the supervisor, of the facts involved?						
85	To initiate an insolvency proceeding (either reorganisation or winding-up)?						
86	To control or play a role in the reorganisation or winding-up? Please specify the extent of your powers in this respect.						
87	To coordinate a rescue plan before insolvency is declared (e.g. by setting-up a bridge bank, creating a new bank, coordinating a private sector take-over,...)? Please specify the range of actions available.						

88	To impose a moratorium (closing a bank for business without declaring insolvency)?						
89	To refer a particular action by a bank to the judicial authorities?						
90	To take any other administrative measure (excluding the measures mentioned in article 136 §1 of the CRD, which under European law your authority necessarily has the power to take)? If so, please describe each of theses other administrative measures in the last column.						