HERBERT SMITH FREEHILLS

THE LONG ARM OF REGULATION

RESPONDING TO CROSS-BORDER FINANCIAL SERVICES INVESTIGATIONS

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The long arm of regulation:

Responding to cross-border financial services investigations

Welcome to the fourth edition of "The long arm of regulation: responding to cross-border financial services investigations".

The continued scrutiny of financial services firms globally and sustained pressure on those charged with regulating them to deliver tangible results continue to drive financial services regulators to seek assistance from their overseas counterparts in investigating issues. This trend is not abating and questions such as how and when regulators interact with each other and with firms across borders, how firms are expected or required to respond, and whether duplicate proceedings can be brought in different jurisdictions, are more pertinent than ever. This publication gives an overview of the answers to these questions across 15 key jurisdictions, with South Africa added for the first time in this edition, and seeks to assist firms in navigating the differing regimes.

In compiling this publication, as in previous editions, we have sought to highlight here some of the interesting similarities, and divergences, which have emerged:

Breadth of powers

In each of the jurisdictions surveyed in this guide, the regulators have sweeping powers to assist overseas regulators. This reflects the influence of the principles embodied in the IOSCO Multilateral Memorandum of Understanding on consultation, cooperation and the exchange of information, and in EEA jurisdictions, of the European Securities and Markets Authority (**ESMA**) Multilateral Memorandum of Understanding on Cooperation Arrangements and Exchange of Information, and requirements to cooperate in a range of European legislation, most notably the recast Markets in Financial Instruments Directive (**MiFID II**) and the Market Abuse Regulation (**MAR**).

Perhaps unsurprisingly, in the majority of jurisdictions surveyed in this guide, regulators can, at the request of an overseas regulator, appoint an investigator to investigate an issue, obtain information/documents from firms/individuals, and compel attendance at interviews and answers to questions. Whilst a wide range of firms/individuals can be required to respond in this situation, in most jurisdictions, the powers may be exercised in respect of any person, whether or not involved in the financial services industry. Further, in five of the jurisdictions surveyed (Germany, Russia, Spain, Switzerland and the UK), regulators are ultimately able to change or cancel a firm's permission to carry out financial services activities following a request by an overseas regulator.

Where national regulators intend to share information with overseas regulators, the scope and opportunity for affected firms to object may be limited. This follows from the fact that in the 15 jurisdictions, regulators have a very wide discretion to comply with requests, and there is no general requirement (except in certain situations in Australia, the Dubai International Financial Centre (**DIFC**) and Switzerland) for firms to be notified before any information is transmitted. By contrast, forthcoming legislation in South Africa, when in force, will mandate such a notification.

It is interesting to note that, despite sweeping powers enabling national regulators to assist overseas regulators, none of the regulators included in this publication have to date been under a strict obligation to cooperate with all requests without exception. That said, all indications are that regulators are inclined to, and do, comply with requests. Further, under MiFID II and MAR, European regulators are obligated to cooperate, with each other and with the relevant European Supervisory Authority (**ESA**), where necessary for the purposes of the relevant regulation or directive (save in defined "exceptional" circumstances).

Mechanisms exist for overseas regulators to obtain information directly from firms, but may not be enforceable

In eight of the jurisdictions surveyed (France, Germany, Hong Kong, the Netherlands, Russia, Spain, Switzerland, and the UK), there are mechanisms that enable an overseas regulator to request information directly from firms. It is particularly noteworthy that the number of direct requests from regulators in EEA Member States to overseas EEA firms appears to have risen over recent years, as increasing use is being made of an enabling protocol in MiFID II. However, only in three of these eight jurisdictions is there a mechanism to enforce these direct requests. In the Netherlands and Germany, the regulators can issue a formal direction requiring compliance that may result in a penalty. In France, firms can be sanctioned as if they had refused to comply with a request from the national regulator. The Spanish authorities have fined a Gibraltar bank (passporting services in Spain without a place of business there) for failing to provide information direct to the Spanish authorities, despite the Gibraltar regulator's suggestion to use the established mutual cooperation route in order to protect the firm from breach of confidentiality obligations under Gibraltar law. In Singapore, although there is no express provision enabling direct requests from overseas regulators, the Monetary Authority of Singapore (**MAS**) can order compliance with such a request; non-compliance may result in a penalty and/or imprisonment.

Whether information can be withheld from regulators varies considerably

Whether information can be withheld from regulators on the basis of legal privilege varies to a significant extent across the 15 jurisdictions. Such divergences can create difficulties for firms in determining whether certain information can be disclosed or withheld in any particular case. In many jurisdictions, the concept of legal privilege is enshrined in the law. Nevertheless, regulators may put pressure on firms to disclose legally privileged material even

when production cannot be compelled. In Spain, where the regulator has conclusive evidence of a regulatory infraction, a firm can be sanctioned for failing to provide information even if it is legally privileged (although the sanction may be appealed on the basis that the information was protected from disclosure). It is not uncommon for regulators in Australia and the UK to challenge firms about the scope of privilege, including a recent high profile challenge in Australia.

In some jurisdictions, such as China and Japan, legal privilege is not recognised at all. In others, it only applies in limited circumstances. For example, in Russia financial institutions and individuals who are not 'advocates' cannot withhold documents on the basis of legal privilege. In Germany and Switzerland, communications by in-house lawyers are not covered by legal privilege; production of such communications could also arguably be compelled under powers exercised by the ESAs.

Determining whether a firm's limited waiver of privilege in an overseas jurisdiction constitutes a loss of privilege in the firm's home jurisdiction requires a careful analysis of the laws of each jurisdiction. In some jurisdictions, such as Germany, Spain and Switzerland, privilege is maintained regardless of any waiver overseas; in the UK, English law recognises the concept of limited waiver, but firms must take certain rigorous steps to ensure that the privilege is preserved. Other jurisdictions (ie, Australia, the DIFC, Hong Kong, Singapore and South Africa) require a more detailed analysis of the facts and context to determine whether privilege can be maintained. However, in the US, privilege is unlikely to be maintained if it has been waived on a limited basis in an overseas jurisdiction, unless the disclosure overseas is compelled and occurs after the firm makes objections and takes other reasonable steps to protect the privilege.

The extent to which evidence can be withheld on the basis of the privilege against self-incrimination across the jurisdictions also varies enormously. This, again, may create difficulties for those seeking to navigate the regimes. In France, Russia, Spain and the US, information can be withheld on the basis of the privilege against self-incrimination (although in France, this will be noted in the investigation report, and in the US, this will result in an adverse inference in a civil case). In other jurisdictions, this privilege can be relied on to a limited extent. For example, in Australia, Hong Kong, the Netherlands, Singapore, South Africa and the UK, an individual must disclose incriminating information, but, generally, the information cannot be adduced as evidence in criminal proceedings; in the Netherlands and the UK, criminal proceedings include market abuse cases. In Singapore and South Africa, incriminating information is admissible in certain proceedings relating to the provision of false or misleading information to the regulator. In Hong Kong, self-incriminating information can be adduced in civil market abuse proceedings. In Germany, it is unclear whether a person may refuse to disclose documents on the basis of the privilege against self-incrimination. In the DIFC, an individual must disclose incriminating information to the regulator; if the regulator is required by law or court order to disclose that information, the information becomes admissible in any proceedings against the individual. In China, the privilege against self-incrimination is not recognised at all. In Japan, the position is unclear, in that, although the privilege is not explicitly applicable to regulatory proceedings, it may be operative where a criminal investigation may be involved; similarly, in Switzerland, the law is unsettled but the privilege is generally accepted to be available.

Finally, in nearly all surveyed jurisdictions, client confidentiality is unlikely to provide a basis on which financial institutions can withhold information from the regulators who require its production. In the Netherlands, firms and individuals who are subject to a statutory duty of confidentiality as a result of their profession (eg, lawyers) can refuse to provide information. A narrow exception to disclosure on the basis of confidentiality exists in the UK, but it does not apply if the firm or client is under investigation.

Severe consequences for failing to comply

The importance of fully complying with requests for information, documents, interviews and answers to questions is underscored by the severe penalties that may be imposed in the event of a failure to comply. In Hong Kong, a failure to comply with a request from the Securities and Futures Commission (**SFC**), or knowingly or recklessly providing false and misleading information to the SFC, could result in up to seven years' imprisonment, where there is an intent to defraud. In Japan, staff responsible for a securities broker's failure to cooperate with the regulator can be punished with imprisonment for one year (with labour). In Singapore, a failure to comply with an order to provide assistance can be punished with two years' imprisonment. In Switzerland, a person who negligently provides false information can be imprisoned for up to three years; false witness testimony can be punished with five years' imprisonment; and the regulator can remove directorships, revoke licences and prohibit individuals from acting in any management capacity. In the UK, not only is an individual's failure to comply potentially a criminal offence, but a failure by a firm or a senior manager to comply with a regulator's request is also likely to amount to a regulatory breach, which may expose the firm to enforcement action and unlimited fines. In the US, failure by an entity regulated by the Securities and Exchange Commission to comply with a request for information (other than pursuant to subpoena) can result in imprisonment; however, if the request is made under subpoena, then failure to comply will expose the person to contempt proceedings.

Firms/individuals may be sanctioned in multiple jurisdictions for the same conduct

Whether firms or individuals can be subject to sanctions in multiple jurisdictions in respect of the same conduct is a key question

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considered in this publication: the answer varies across the jurisdictions. Russia and Spain are the only jurisdictions covered by this publication where the principle against double jeopardy would prevent the domestic regulator from bringing regulatory and criminal action where the same firm/individual has already been sanctioned by an overseas regulator. In other jurisdictions (namely Australia, Germany, Hong Kong, the Netherlands, Switzerland, the UK and the US), the regulators can bring regulatory, administrative or civil proceedings, even where the firm has already been sanctioned overseas in respect of the same conduct. However, firms in some of these jurisdictions are protected from duplicative criminal proceedings to a large extent. In other jurisdictions, such as China, the DIFC and Japan, the principle against double jeopardy does not apply at all in a multijurisdictional context (although in China and Japan, criminal penalties may be reduced where a criminal sanction has already been imposed abroad). The question remains unsettled in Singapore and South Africa.

Whilst it is clear that firms can simultaneously be subject to investigation by regulators in different jurisdictions in respect of the same matter, it is less clear how regulators are required to coordinate with each other. A failure on the part of regulators to synchronise their actions, together with variances in regimes as highlighted above, can cause real practical difficulties for firms in the internal management of the process. ESMA is empowered to take a more active role in the coordination of European national regulators' investigations and interventions under MiFID II and MAR.

Managing competing obligations can be tricky

A perennial challenge for firms is how to coordinate their responses to simultaneous investigations in multiple jurisdictions. Competing regulatory obligations to, on the one hand, keep an investigation confidential and, on the other hand, report such an investigation to another regulator, may place firms in situations which are extremely difficult to navigate. In over half of the jurisdictions surveyed (ie, Australia, the DIFC, Germany, the Netherlands, Russia, South Africa, Switzerland and the US), firms are generally permitted to share information about domestic investigations with overseas regulators unless prohibited by direction or order; in Singapore, firms may share this information with the exception of any investigation report issued by MAS, which must be kept confidential. However, in other jurisdictions firms are generally prohibited from sharing this information with overseas regulators. In China, firms cannot directly share this information with overseas regulators; in Spain, firms are prohibited from divulging unless required to do so by cooperation agreement or court order. Sometimes consent from domestic regulators is expected or recommended: in Japan, though no restrictions apply in principle, in practice firms are expected to seek regulatory consent before sharing; in Hong Kong, firms are generally subject to statutory secrecy and therefore recommended practice is to seek regulatory consent. In the UK, regulators expect confidentiality but, subject to any statutory confidentiality requirements, firms are entitled to notify overseas regulators about domestic investigations where required; it is nonetheless generally recommended that UK regulators are given advance notice of any such notification.

Requirements to self-report regarding regulatory matters also vary considerably across jurisdictions, and the extent to which these requirements apply to notifications about the commencement of investigations by overseas regulators is mixed. In the UK, regulators generally expect to be notified of relevant overseas investigations. In Hong Kong, disciplinary actions by other regulators must be reported, and a regulatory investigation by an overseas regulator may give rise to a reporting obligation. By contrast, in Germany and the US, firms are not required to self-report regulatory breaches, though this is encouraged in the US and may lead to regulatory leniency.

In producing this publication, we have drawn on the expertise of our financial services regulation practice across our international network of offices and through our formal alliance with Prolegis (Singapore). In addition, we are enormously grateful for contributions from law firms Anderson Mori & Tomotsune (Japan), Stibbe (the Netherlands) and Homburger (Switzerland).

We hope you find this publication of interest. If you have any questions, please do not hesitate to contact us or any of our colleagues listed at the end of each chapter.

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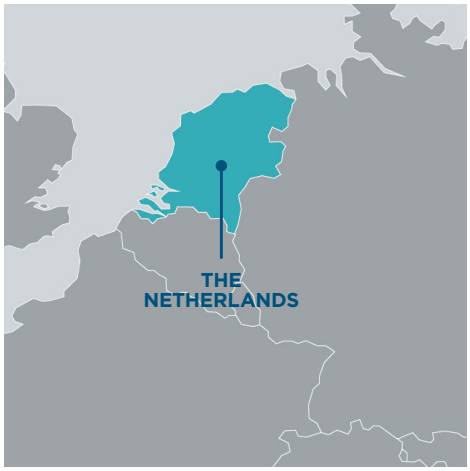

01. National measures enabling the domestic financial services regulator/s to comply with requests for assistance from overseas regulators

Can the national regulator appoint an investigator to investigate an issue in your jurisdiction, at the request of an overseas regulator?

Yes.

The Dutch Financial Supervision Act[1] (the **Act**) does not give the Netherlands Authority for the Financial Markets (**AFM**) or De Nederlandsche Bank (**DNB**), in general, an express power to appoint an investigator, independent adviser or expert to assist the Dutch regulators in their regulatory functions. However, the Dutch regulators can appoint an investigator to investigate an issue at the request of an overseas regulator, where the regulator is in a European Economic Area (**EEA**) Member State, and where the request relates to an "on-the-spot" verification or investigation of certain financial undertakings, including but not limited to credit institutions subject to consolidated supervision, management companies of an investment fund, or investment firms (ss.1:55, 1:55a, 1:56 and 1:56a2[2] of the Act).

Also see paragraph 5 Annex 1 for information on the obligation to cooperate pursuant to the IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information (**IOSCO MMOU**) generally.

Can the national regulator obtain information/ documents where they are located in your jurisdiction, at the request of an overseas regulator?

Yes.

The AFM and DNB have the power to require the production of information/documents at the request of an overseas regulator, to the extent that the overseas regulator requires the information for the performance of their statutory duties (ss.1:51(3) and 1:52 of the Act and 5:13 and 5:20 Dutch General Administrative Law Act (**GALA**)).

Who can be required to provide information/documents in these circumstances?

The Dutch regulators are not restricted in who they may request information/documents from. In principle, therefore, information may be requested from anyone. However, following the principle of proportionality, the regulators may not exercise their information gathering powers in respect of anyone in any circumstances. The regulators must use their powers, within reason, insofar as necessary to fulfil their duties (s.5:13 GALA).

Can the national regulator compel people located in your jurisdiction to attend interviews and answer questions, at the request of an overseas regulator?

Yes.

There is no express statutory power which enables the AFM or DNB to compel people in the Netherlands to attend interviews and answer questions at the request of an overseas regulator, or otherwise. However, the regulators may obtain oral information, pursuant to the obligation on any person to cooperate fully with regulators in the exercise of their statutory supervisory and investigatory powers (within a reasonable period). This is provided that the request is reasonable and it is anticipated that the requested information will be useful (s.5:20 GALA). This obligation may in practice require persons to attend interviews and answer questions pursuant to a request from a foreign regulator, provided that such request is reasonable.

Who can be required to attend interviews and answer questions?

Any person can be expected to attend interviews and answer questions, pursuant to the general obligation to cooperate with regulators (see above).

Can a representative of the overseas regulator attend the interview?

Yes.

The Act and GALA do not expressly provide for the possibility of representatives of overseas regulators attending interviews (although this is permitted by the IOSCO MMOU - see paragraph 5 Annex 1). In practice it would be difficult for an individual to object, if the national and overseas regulators agree that a representative can be present. Whether an overseas regulator may attend will depend on the factual circumstances of the case, for example whether the disclosure of the information to that regulator would be in breach of the duty of confidentiality to which the Dutch regulators are bound (see Question 3).

Can the national regulator change or cancel a firm's permission to carry out financial services activities in your jurisdiction at the request of an overseas regulator?

No.

The Act does not provide explicitly for such a possibility, in that it does not permit the AFM or DNB to change or cancel a firm's permission to carry out financial services activities in the Netherlands at the request of an overseas regulator.

However, the AFM and DNB do have the general power to withdraw or cancel licences or permissions, or to amend an existing licence or permission in their capacity as home regulator.

02. Compliance with the overseas regulator's request for assistance

Is the national regulator obliged to comply with a request from an overseas regulator?

No.

The Dutch regulators have a general discretion to comply with requests for assistance from overseas regulators.

If compliance with the request is discretionary, what factors will the national regulator consider when deciding whether to comply with a request?

In complying with requests from overseas regulators, the AFM and DNB must exercise their powers proportionately and with care, in accordance with the general administrative law principles of good governance and administration.

The AFM and DNB have extensive obligations to share information with other regulators in EEA jurisdictions (s.1:90 of the Act). However, the AFM and DNB may not share information that is provided or obtained by virtue of the Act with another regulator in an EEA jurisdiction if one of the following exceptions applies:

- the purpose for which the information will be used is insufficiently clear;
- the intended use of the information is incompatible with the supervision of financial markets or of persons active on those markets;
- the supply of the information would be incompatible with Dutch law or public order;
- the confidentiality of the information would not be sufficiently safeguarded;
- the supply of the information is or might reasonably be contrary to the interests which the Act seeks to protect; or
- the safeguards to ensure that confidential data or information will not be used for purposes other than for which it is supplied are inadequate.

Further, Article 83 of the Markets in Financial Instruments Directive II (2014/65/EU) (**MiFID II**) (as implemented by s.1:56b of the Act) provides three grounds in which the AFM and DNB may exercise their discretion to refuse a request for cooperation (see paragraph 1 Annex 1).

The obligation (and applicable exceptions) on the AFM and DNB to share information with other regulators in EEA jurisdictions also applies to information sharing with non-EEA regulators, provided that the regulator is subject to similar confidentiality requirements.

Also see paragraph 5 Annex 1 for the grounds the regulators may rely on to deny cooperation pursuant to the IOSCO MMOU.

Are there specific grounds on which the national regulator must refuse to comply with the request?

Yes, see above.

03. Sharing information with overseas regulators

What information can the national regulator share with the overseas regulator?

The AFM and DNB may share with an overseas regulator any information/documents already in their possession and that they have obtained through their information gathering powers, unless one of the exceptions in Question 2 applies.

Although the AFM and DNB are subject to a duty of confidentiality (s.1:89 of the Act), in practice the regulators have a discretion in disclosing confidential information and it would be difficult to prevent disclosure to an overseas regulator.

Are there any restrictions on how the receiving regulator can use the transmitted information?

See paragraphs 1 and 5 Annex 1 for information on restrictions, as contained in Article 81 MiFID II and the IOSCO MMOU, respectively, on how the receiving regulator can use information. Further, any parameters governing the exchange of information between the AFM and DNB and regulators in non-EEA jurisdictions will depend on the terms of any cooperation agreements in place.

Is the national regulator obliged to notify the firm before it shares the information?

No.

Neither the AFM nor DNB are under a statutory obligation to notify firms before they share information with overseas regulators.

Are there any grounds on which a firm can object to the national regulator providing information to overseas regulators?

In practice it would be difficult to persuade the AFM or DNB not to share information with its overseas counterparts. However, where the overseas regulator does not provide equivalent protection under the European Convention on Human Rights and Fundamental Freedoms (eg, the jurisdiction does not recognise the privilege against self-incrimination), this may provide a basis upon which to object.

04. Direct requests by overseas regulators to firms

Are there any mechanisms which enable an overseas regulator to request information directly from firms or individuals in your jurisdiction?

Yes.

Regulators in EEA Member States may issue a direct request for information to certain financial undertakings which are subject to supervision in their respective home Member State, but which are active in the Netherlands (eg, a Dutch branch of a foreign bank), or

to an investment firm in the Netherlands (Article 80 MiFID II (see paragraph 1 Annex 1) as implemented by ss.1:55-1:56a of the Act).

Is there a mechanism for enforcing such requests?

Yes.

Under Dutch law, if an investment firm fails to comply with a direct request for information/documents from an overseas regulator, the Dutch regulators can enforce the request by issuing a formal direction to the firm requiring compliance within a reasonable period. If the direction is not complied with, the Dutch regulators may impose a penalty or administrative fine, or prevent the firm from carrying out further transactions in the Netherlands.

05. In what circumstances can a firm/individual withhold information/evidence from a regulator on the basis of:

Legal privilege

Firms/individuals cannot be forced to provide information/documents requested by regulators if they fall within the scope of legal privilege. As in other jurisdictions, this legal privilege is inherent to the legal profession.

Based on Dutch case law, legal privilege applies to:

- all communication between the client and its lawyer, including the legal advice from the lawyer (eg, lawyers' working papers) and all documents which the lawyer received from the client in relation to the legal advice;
- documents drawn up by the client, insofar as these contain legal advice from the lawyer or information that is meant to be shared with the lawyer in their professional capacity (eg, to obtain legal advice); and
- advice or reports from third party experts, insofar as these are prepared on the instructions of the lawyer for purposes of the advice from or representation by the lawyer.

The Dutch Supreme Court recognised the existence of a general legal privilege for in-house lawyers in a landmark decision of 15 March 2013 (Hoge Raad der Nederlanden (*Vaal/Stichting H9 Invest*) (LJN: BY610, NJB 2013, 670)). This issue had been cast into doubt by the European Court of Justice's ruling in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* (C-550/07 P, 14 September 2010). This case held that legal privilege for Dutch in-house lawyers in the context of investigations by competition authorities did not apply on the basis that the employment relationship precluded an in-house lawyer from being sufficiently independent to justify granting the privilege.

Following that decision, the question was whether the Dutch Supreme Court would adopt the same approach for in-house lawyers outside the context of investigations by competition regulators. From the recent ruling it follows that the answer is no: the Supreme Court has firmly recognised the existence of legal privilege for such in-house lawyers, provided they have been admitted to the bar and comply with requirements guaranteeing their independence. The Supreme Court's decision therefore safeguards the confidentiality of advice and communications of in-house lawyers in the Netherlands (in matters not related to competition investigations), insofar as they are acting in the interests of their client/employer as a lawyer.

Nevertheless, in practice it is still advisable to indicate explicitly on documents whether they are legally privileged or not.

If privilege has been waived on a limited basis in an overseas jurisdiction, can privilege be maintained in your jurisdiction?

No case law is available with regard to the situation that legal privilege has been waived on a limited basis in an overseas jurisdiction. However, based on case law of the Dutch Supreme Court it could be argued that if legal privilege has been waived on a limited basis in an overseas jurisdiction, legal privilege could be maintained in relation to other parties in the Netherlands.

Confidentiality

Firms/individuals that are subject to a statutory duty of confidentiality as a result of their profession (eg, lawyers and civil law notaries) can refuse to cooperate with information requests where such requests conflict with their duty of confidentiality.

In principle, contractual duties of confidentiality that financial institutions may owe to their clients, would not override the requirement to disclose information to regulators, provided that the regulator's request is reasonable and proportionate. In practice, it would be very difficult to withhold information from a regulator, and it would depend highly on the specific circumstances of the information request.

Privilege against self-incrimination

Individuals suspected of a criminal offence, or an offence that can be punished with an administrative sanction, may invoke the privilege against self-incrimination in certain circumstances. In general, this privilege prohibits evidence given by the suspect under the use of compulsory powers from being used in criminal or market abuse proceedings against that suspect. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent.

This means that self-incriminating oral statements provided voluntarily by the suspect can be used against that suspect in criminal or market abuse proceedings. Self-incriminating statements given by the suspect pursuant to an obligation to cooperate with the regulators (therefore given involuntarily) cannot be used against that suspect in criminal proceedings or administrative market abuse proceedings. Consequently, individuals must exercise caution when considering giving voluntary statements.

Incriminating information/documents may generally be used as evidence in criminal proceedings and/or administrative market abuse proceedings against that person, whether they are provided voluntarily or not.[3] However, the request for information/documents should be reasonable (a "fishing expedition" by a regulator would, for instance, be regarded as unreasonable). Before providing self-incriminating documents which contain information that could be used as evidence in criminal and/or market abuse proceedings, it is advisable to seek legal advice, to check whether the request is reasonable.

The foregoing only applies to suspects. If an individual is being interviewed and the regulator considers imposing an administrative fine on another person, the individual does not have a right to remain silent[4] and this evidence may be used in criminal proceedings or administrative market abuse proceedings against that other person. If the statement is incriminating against the

person that was interviewed, this statement cannot be used as evidence in criminal or market abuse proceedings against himself, should such proceedings be brought.

Other

See Question 6.

06. Are there any national measures in place which restrict the export of personal data held by firms, to regulators in overseas jurisdictions?

In accordance with the General Data Protection Regulation (Regulation (EU) 2016/679) (**GDPR**) (see paragraph 6 Annex 1) and the Dutch GDPR Implementation Act, an export of personal data to regulators in other countries is forbidden, unless a legal ground as specified in the GDPR and the Dutch GDPR Implementation Act is available, such as specific consent or a legitimate interest that does not outweigh the fundamental rights and freedoms of the data subject.

Following the GDPR, the transfer of data to non-EEA Member States may only take place when:

- the European Commission has decided that the third country ensures an adequate level of protection (Article 45 GDPR);
- the transfer is subject to appropriate safeguards, such as an approved code of conduct; standard contractual clause approved by the Commission; an approved certification mechanism together with binding commitments of controller or processor in the third country; or binding corporate rules (Article 46 GDPR); or
- one of the derogations for specific situations applies, such as the consent of the data subject or the necessity for the establishment, exercise or defence of legal claims (Article 49 GDPR).

The Dutch GDPR Implementation Act does not add to or diminish the GDPR regime in this respect.

07. What are the consequences for firms and/or individuals of not complying with the national regulator's request for information, documents, attendance at interviews and answers to questions?

Where firms/individuals breach the Act, or the rules promulgated thereunder, this may amongst other things, result in an administrative fine being imposed by the regulators. Offences are subdivided into three categories, with corresponding administrative fines of €10,000, €500,000 and €2 million. Depending on the circumstances of the case, these fines may be reduced or increased (even doubled). Administrative fines based on these categories may also be imposed on directors or de facto directors involved in an offence (for example if they ordered the offence or did not prevent the offence) committed by a legal entity.

Further, where firms/individuals fail to cooperate with an information request, the Dutch regulators may impose a penalty payment (*last onder dwangsom*), which is a coercive measure, requiring compliance. The regulators may also issue a formal instruction (*aanwijzing*) where there has been a failure to comply with the rules under the Act and the rules promulgated thereunder.

Failure to comply with a request for information/documents also constitutes a criminal offence (s.184 Dutch Criminal Code).

If an individual is sentenced, an imprisonment of a maximum of three months or a fine (in the amount of €4,150 per offence) can be imposed. With respect to legal persons, the maximum fine per violation of s.184 of the Dutch Criminal Code is €8,300. These maximum fines can be increased by a third if, at the time of committing the offence, less than two years have passed since the individual or legal person was convicted of a violation of another offence under s.184 of the Dutch Criminal Code.

08. What agreements are in place for the national regulator to request the cooperation of overseas regulators in domestic matters?

Cooperation in administrative/disciplinary matters

Bilateral agreements:

DNB has a number of memoranda of understanding (**MOUs**) in place with a varied range of overseas financial services regulators, for example:

- the Australian Prudential Regulation Authority (concerning cooperation and exchange of information in prudential banking and insurance supervision);
- the Central Bank of Ireland (concerning cooperation and exchange of information relating to the prudential supervision of banks and their cross-border establishments);
- the China Banking Regulatory Commission (concerning cooperation and exchange of information in the supervision of banking organisations and their cross-border establishments);
- the Dubai Financial Services Authority (concerning cooperation and exchange of information in the prudential supervision of banks, securities institutions and insurers and their cross-border establishments);
- the French Commission Bancaire, Comité des Etablissements de credit (concerning cooperation and exchange of information in relation to the prudential supervision of banks and their cross-border establishments);
- the German regulator BaFin (concerning cooperation and exchange of information in relation to the prudential supervision of banks and their cross-border establishments);
- the UK Financial Services Authority (succeeded by the Financial Conduct Authority and the Prudential Regulation Authority) (concerning the cooperation and exchange of information in the prudential supervision of banks and their cross-border establishments); and
- the US regulators (various statements of cooperation with various state departments).

The AFM has a number of MOUs in place concerning the cooperation and exchange of information with, for example:

- the China Securities Regulatory Commission;
- the Dubai Financial Services Authority;
- the Czech Securities Commission;
- the Hungarian Financial Supervisory Authority;
- the Israeli Securities Authority;
- the Monaco Financial Supervisory Authority;
- the Polish Securities and Exchange Commission; and
- the Turkey Capital Markets Board.

The circumstances in which the AFM and DNB can request cooperation will depend on the content of the particular MOU in question.

Multilateral agreements:

See Annex 2.

Cooperation in criminal matters

Domestic mechanisms:

The AFM and DNB do not have the power to prosecute criminal cases in the Netherlands. As such, there are no domestic mechanisms which would enable them to request the assistance of overseas bodies in criminal matters. Where the AFM or DNB suspect a criminal offence, they may file a report with the Public Prosecution Service, who will deal with the matter. The Public Prosecution Service may then seek the cooperation of overseas authorities where required, on the basis of mutual legal assistance cooperation agreements (see Annex 3).

Bilateral agreements:

There are no bilateral agreements in place between the Public Prosecution Service and overseas regulators. However, the Public Prosecution Service may enter into an ad hoc agreement with an overseas regulator or enter into discussions with the regulator.

Multilateral agreements:

See Annex 3.

Do regulators or prosecuting authorities have powers to request the arrest and extradition of suspects located in overseas jurisdictions, from overseas authorities, in respect of regulatory misconduct?

As noted above, the AFM and DNB do not have the power to prosecute criminal cases in the Netherlands. However, where the Public Prosecution Service wishes to secure the arrest and extradition of suspects located in the EU, it may apply for the issuance of a European Arrest Warrant (s.44 and s.45 Surrender of Persons Act (2004), see paragraph 3 Annex 1).

The Netherlands has also entered into a number of bilateral extradition agreements with non-EEA Member State jurisdictions, which would enable the Public Prosecution Service to request the extradition of suspects located in a wide range of jurisdictions outside of the EEA, including Canada, Australia, the US and Hong Kong.

09. Are there any domestic judicial decisions regarding the cooperation of overseas and domestic regulators?

There are not many precedents of cooperation requests of overseas regulators. However, in one case, relating to an information request from the US Securities and Exchange Commission to the AFM (formerly the Stichting Toezicht Effectenverkeer), the court held that information which is not physically located in the Netherlands, but which is located in the Netherlands Antilles, must be provided to the AFM.[5] This was notwithstanding the fact that the agreement between the US and the Netherlands regarding the exchange of information, only applied to the US and the Netherlands. The Court of Appeal considered that the legislation of the Netherlands Antilles did not preclude provision by ING of information which is physically available at the branch office at the Netherlands Antilles.

This position may be different if an explicit banking secrecy public law applies. In interlocutory proceedings in the same case,[6] the court ruled that a particular information request conflicted with Greek public law. As a result, the information exchange agreement between the US and the Netherlands had, in that particular case, no effect in respect of information which was not physically located in the Netherlands, as Greek public law prevented the provision of such information.

10. What is the threshold for reporting regulatory breaches to the national regulators?

Dutch licence holders must report 'incidents' (*incidenten*) to the AFM and/or DNB. Dutch financial regulatory laws define an 'incident' as any act or event severely threatening the integrity of the financial undertaking.

There is no particular threshold for reporting regulatory breaches to the national regulator. Whether a breach must be immediately reported to the Dutch regulators will depend on the type and severity of the regulatory breach.

11. In what circumstances can a firm share information about a domestic regulatory investigation to which it is subject with overseas authorities?

Unless agreed otherwise between the firm and the Dutch regulatory authorities in respect of a specific investigation, a Dutch firm is free to share information about a Dutch domestic regulatory investigation to which it is subject with overseas authorities.

12. Can the national authorities take regulatory and/or criminal action against a firm or individual in circumstances where an overseas authority has taken action against that firm or individual for the same offence?

The Dutch Public Prosecution Service is not permitted to bring criminal proceedings against a firm/individual, where that firm/individual has already been tried and convicted, or acquitted, of the same offence in another contracting country, provided that – in the case of a conviction – the penalty has been enforced (s.68 Dutch Criminal Code and Article 54 of the Convention implementing the Schengen Agreement).

There are no formal restrictions which prevent the AFM or DNB from bringing administrative proceedings against a firm/individual where an overseas regulator has already taken action in relation to the same breach. However, as a general principle of law in administrative proceedings, no firm or individual can be prosecuted twice for the same offence.

13. What are the trends in relation to the regulator initiating or responding to cross-border investigations?

The AFM and DNB in general adopt a cooperative stance when dealing with overseas information requests. The regulators do not publish details of the incoming or outbound information requests, so details of how many requests are dealt with are not known.

A report by DNB (DNB Visie Toezicht 2010-2014) indicates that the financial crisis has demonstrated that a further improvement in international cooperation between foreign supervisors and the DNB is crucial, as well as the need to establish contacts and coordination between monetary and supervisory authorities. The DNB also considers that more emphasis should be given to the international dimension of supervision, which involves the need to intensify supervision on groups of banks and insurers whose activities are mostly situated abroad. Ahead of further international regulation, DNB has strengthened, as far as possible, its group supervision of such Dutch institutions. To this end, DNB has tightened its contacts with local supervisors, eg, by actively organising group meetings. DNB supports the development of a more 'centred' European supervision. In its most recent report (DNB Visie Toezicht 2018-2022) no particular attention is paid to cross-border cooperation.

In its annual reports for 2012 and 2013, the AFM mentioned the strengthening of international cooperation as one of the spearheads of its policy. The AFM is committed to influencing and strengthening international cooperation both on an operational level as well as on a policy level. It is the AFM's objective to promote the quality of international supervision. The AFM is not only actively involved in the development of an international regulatory framework and institutional changes in European regulatory cooperation, but has also taken significant steps regarding the practical cooperation with foreign supervisory authorities.

In its recent annual report for 2017, the AFM mentions that international legislation and standards largely determine the (European) supervisory framework of the AFM. Due to the internationalisation of the financial sector, a cross-border response from supervisors is required, in the form of increased cooperation and harmonisation between the various supervisors and in some cases even transferring duties to the European level.

From recent reports of DNB and AFM it is apparent that the regulators believe that following the financial crisis, cooperation with foreign regulators has gained importance, and an upward trend in relation to international supervision activities is noted.

14. Are there any proposals to change the national regulators' powers to assist overseas regulators? If so, how, and what impact will those reforms have on firms or individuals?

No.

15. In relation to domestic investigations instigated by the national regulator, what powers does the regulator have to compel the production of information/documents from firms/individuals where they are located in an overseas subsidiary or related company?

The AFM and DNB can request the production of information/documents from firms/individuals where they are located in an overseas subsidiary or related company, pursuant to their broad powers to request information from regulated entities and any other person or entity (which is not limited to persons located in the Netherlands).

16. Does the national financial services regulator have a competition remit or objective (or is it vested with competition powers) that extends to enforcement?

No, neither DNB nor the AFM have a competition remit or objective (or are vested with competition powers) that extend to enforcement.

In the Netherlands, the Netherlands Authority for Consumers and Markets (**ACM**) is charged with competition oversight, sector-specific regulation of several sectors, and enforcement of consumer protection laws.

Note however that as regards financial services and products, the AFM is charged with enforcement powers if a party violates the unfair commercial practice rules (implementing the Unfair Commercial Practices Directive (2005/29/EC), which may be enforced in various other EU countries by the competent competition authorities).

17. Can firms/individuals settle regulatory investigations with the regulator? What is the impact of settlement with an overseas regulator?

It is not common practice for firms/individuals to settle regulatory investigations with AFM or DNB.

However, in a subsequent enforcement scenario, settlement may in some matters be reached with the regulators (for instance, if the firm/individual agrees to adhere to a revised business conduct plan or to implement remediating measures).

A settlement with an overseas regulator in itself does not end pending regulatory investigations by the Dutch regulators or the Dutch Public Prosecutor.

It is more common that firms/individuals settle investigations by the Dutch Public Prosecutor.[7]

Endnotes

1. The Dutch Financial Supervision Act and the rules promulgated thereunder provide the regulatory framework for financial services regulatory cross-border investigations, applicable to financial institutions in the Netherlands.
2. This section implements Article 80 of the Markets in Financial Instruments Directive II (**MiFID II**) (see paragraph 1 Annex 1 for further information).
3. According to certain case law, the Dutch Supreme Court makes an exception for documents that basically contain the statement of the suspect. Under specific circumstances, incriminating documents obtained compulsorily which contain the statement of a suspect, may not be used against that person in criminal or market abuse proceedings. However, the meaning of this case law is not yet fully clear.
4. Except for where the individual may incriminate himself or a family member by answering the question.
5. Amsterdam Court of Appeal (2 March 2000) *STE v ING Bank NV* (163/99 SKG, JOR 2000/83).
6. District Court Amsterdam (20 May 1999) *STE v ING Bank NV* (JOR 1999,180).
7. For instance, a major bank announced on 4 September 2018 that it had reached a settlement agreement with the Dutch Public Prosecutor related to an investigation that found serious shortcomings in the execution of customer due diligence and transaction monitoring requirements related to fighting financial economic crime.

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Annex 1

International mechanisms and European measures

01. Cooperation and information sharing in regulatory/administrative matters between regulators in EEA Member States

Obligation to cooperate

Financial services regulators in EEA Member States[1] are required to cooperate with each other wherever necessary for the purpose of carrying out their duties, or exercising their powers, under the Markets in Financial Instruments Directive (2014/65/EU) (**MiFID II**) and the Markets in Financial Instruments Regulation (600/2014) (**MiFIR**), or national law (Article 79, MiFID II). This includes exchanging information and cooperating in investigations (even where the conduct does not constitute a breach of law/regulation in that Member State) and supervisory work. Where a regulator has good reason to suspect that a breach of MiFID II or MiFIR has been committed by an entity in another Member State that is not subject to its supervision, it is obliged to notify the relevant regulator, whereupon that regulator is obliged to take action.

Where a regulator receives a request for assistance in an investigation or "on-the-spot verification", the regulator has the option of carrying out the investigation or verification itself, or allowing the requesting regulator, auditors or experts, to do so (Article 80, MiFID II).

Commission Implementing Regulation (EU) 2017/988 lays down implementing technical standards (**ITS**) with regard to standard forms, templates and procedures for cooperation arrangements in respect of a trading venue whose operations are of substantial importance in a host Member State.

Direct requests on firms

Regulators in EEA Member States are entitled to make direct requests for cooperation on investment firms that are remote members of that regulator's regulated market (Article 80, MiFID II). In this situation, the regulator must inform the regulator in the home Member State of the request. The scope of direct approaches to remote investment firms may relate to supervisory matters or market abuse enquiries in relation to the activities of those remote members on those markets (CESR Guidance 09/697 on MiFID; while this guidance relates to the MiFID I regime, it is presumed to also relate to MiFID II). This mechanism does not extend to direct requests on individuals (subject to national law).

Commission Delegated Regulation (EU) 2017/586 lays down regulatory technical standards (**RTS**) for the exchange of information between competent authorities when cooperating in supervisory activities, on-the-spot verifications and investigations. Commission Implementing Regulation (EU) 2017/980 lays down ITS with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities.

Article 80 of MiFID II is not directly applicable as law in Member States. As such, it does not create a legal obligation on investment firms that are remote members of a regulated market in another EEA Member State to respond to direct requests from the regulator in that jurisdiction. Nor is there a mechanism within MiFID II that enables regulators to enforce such direct requests. However, there may be requirements imposed at the domestic level that require investment firms to cooperate with overseas regulators, which may encompass complying with direct requests.

Information sharing between regulators

Where the requested regulator already possesses the information sought, the regulator must share it with the requesting regulator without delay. Otherwise, the regulator must immediately take the necessary steps to obtain the required information and immediately provide it (Article 81, MiFID II).

Additionally, regulators must cooperate with ESMA for the purposes of MiFID II, in accordance with the Regulation establishing the European Securities and Markets Authority (Regulation 1095/2010) (**ESMA Regulation**) and provide ESMA, without undue delay, with all information necessary to carry out its duties under MiFID II and MiFIR, in accordance with Articles 35 and 36 of the ESMA Regulation (Article 87, MiFID II).

Restrictions

Regulators may stipulate that the recipient regulator should not disclose the information without the express agreement of the regulator providing the information. This means that information may be exchanged solely for the purpose for which the regulator gives its agreement (Article 81, MiFID II).

Regulators are not entitled to transmit information received from other regulators to entities which are not regulators designated as "competent authorities", without the express agreement of the disclosing regulator, except in "duly justified circumstances" (Article 81, paragraph 2, MiFID II). This means that a regulator cannot send information to, for example, a competition regulator, in another Member State, unless there are justified circumstances. This proviso gives regulators discretion to share information with a wide range of authorities in other Member States.

Where regulators receive confidential information, unless the transmitting regulator agrees otherwise, they may only use that information in the course of their duties, including to: ensure licensing conditions are satisfied, monitor the conduct of firms particularly with regard to capital adequacy requirements and internal controls, and impose sanctions (Article 764, paragraph 4, MiFID II). These restrictions do not prevent regulators from transmitting confidential information to ESMA, the European Systemic Risk Board (**ESRB**), central banks, the European System of Central Banks (**ESCB**) and the European Central Bank (**ECB**), in their

capacity as monetary authorities, or other bodies responsible for payment and settlement systems (Article 81, paragraph 5, MiFID II).

A regulator may only refuse to act on a request to cooperate in carrying out an investigation, supervisory activity or "on-the-spot verification" or to exchange information where judicial proceedings have commenced, or a final judgment has been delivered, against a firm or individual in respect of the same conduct in the requested state.

Regulators may ask ESMA to mediate in cases where a request for assistance has been rejected or has not been acted upon within a reasonable time, and to use its powers under the ESMA Regulation to reach a settlement (failing which ESMA could address requests directly to firms) (Article 82, MiFID II).

The Market Abuse Regulation

The Market Abuse Regulation (596/2014) (**MAR**) also imposes duties on the relevant regulators to cooperate with and render assistance to each other[2] and with ESMA[3] as necessary for the purposes of MAR (Articles 24 and 25, MAR); in particular, regulators must exchange information without undue delay and cooperate in investigation, supervision and enforcement activities. Regulators may also request assistance from the regulator of another Member State with regard to on-site inspections or investigations (Article 25, paragraph 6, MAR). The receiving regulator may then carry out the inspection itself or together with the requesting authority; allow the requesting authority to carry out the inspection itself; and/or appoint auditors or experts to carry out the inspection. MAR also provides that ESMA may, if requested to do so by one of the competent authorities, coordinate investigations or inspections with cross-border effect.

Commission Implementing Regulation (EU) 2018/292 lays down ITS with regard to procedures and forms for exchange of information and assistance between competent authorities according to MAR.

An authority may refuse to act on a request for information or to cooperate in exceptional circumstances, including where:

- communication of relevant information could adversely affect the security of the Member State addressed, in particular the fight against terrorism and other serious crimes;
- complying with the request is likely to adversely affect its own investigation, enforcement activities or, where applicable, a criminal investigation;
- judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or
- a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed (Article 25, paragraph 2, MAR).

Where a regulator is convinced that acts contrary to the provisions of MAR are being, or have been, carried out on the territory of another Member State or that acts are affecting financial instruments traded on a trading venue situated in another Member State, it must give notice of that fact in as specific a manner as possible to the regulator of the other Member State and to ESMA. The regulators of the Member States involved are required under MAR to consult each other and ESMA on the appropriate action to take and inform each other of significant interim developments. They are also required to coordinate action, in order to avoid possible duplication and overlap when applying administrative sanctions and other administrative measures to those cross-border cases, and shall assist each other in the enforcement of their decisions (Article 25, paragraph 5, MAR).

02. Cooperation and information sharing in regulatory/administrative matters sharing between regulators in EEA Member States and non-EEA Member States

Regulators in EEA Member State jurisdictions and ESMA (in accordance with the ESMA Regulation) are entitled to enter into cooperation agreements with regulators in non-EEA jurisdictions, including those responsible for the supervision of financial institutions, the liquidation and bankruptcy of investment firms, the statutory auditing of financial institutions, and the oversight of persons active on emission allowance markets and agricultural commodity derivatives markets (Article 88, MiFID II; Article 26, MAR). Indeed this is the norm in practice. This is provided that the information to be disclosed is subject to at least the same standard of confidentiality provided for in MiFID II or MAR (as the case may be) and the exchange of information is pursuant to the performance of the functions of the authorities (Article 88, MiFID II; Article 26, MAR).

03. Cooperation in criminal matters between regulators in EEA Member States

European Convention on Mutual Assistance in Criminal Matters

The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000) lays down the conditions under which mutual assistance in criminal matters may be granted by authorities of EEA Member States. As a general rule, requests for mutual assistance and communications are made directly between judicial authorities, and must be executed as soon as possible. A judicial authority or a central authority in one Member State may make direct contact with police authorities or, in respect of requests for mutual assistance in relation to proceedings, with an administrative authority, for example regulators, from another Member State. Authorities may also establish joint investigation teams, where for example there are a number of Member States conducting an investigation where the circumstances necessitate coordinated action. The exchange of information without prior request may take place if the matter falls within the competence of the receiving authority.

The Convention permits the interception of telecommunications in one Member State, at the request of a competent authority from another Member State. However, Member States will consider such requests in accordance with their own national law and procedures.

A Member State which has obtained personal data under the Convention may use them only for:

- judicial or administrative proceedings covered by the Convention;
- preventing an immediate and serious threat to public security; or
- any other purpose, with the prior consent of the communicating Member State or of the data subject.

The communicating Member State may ask the Member State to which the personal data has been transferred to give information on the use made of the data.

EIO Directive

Directive 2014/41/EU regarding the European Investigation Order in criminal matters (**EIO Directive**) was due to be transposed by 22 May 2017 in EU Member States; while there was initially some delay, all Member States (with the exception of Denmark and Ireland) have now transposed the EIO Directive into national law. The EIO Directive streamlines the mutual legal assistance process, by introducing mutual recognition of other Member States' judicial decisions, standardised forms for making requests, specified time limits for responding, and prescribed grounds for refusal.

An EIO request can be issued to seek evidence that already exists, including documents and data. An EIO request can also include one or more of the following investigative measures in the requested Member State:

- preservation of evidence gathered;
- hearings of witnesses and suspects;
- searches of houses and other premises;
- checks of bank accounts and financial transactions;
- interception of telecommunications; and
- temporary transfer of persons in custody.

The EIO requires Member States to recognise a request within 30 days and execute the request within 90 days (although extensions can be sought). The prescribed grounds for refusal include (among others):

- immunity of privilege;
- national security interests or classified information;
- where the investigative measure would not be authorised in a similar domestic case;
- double jeopardy;
- where an EIO relates to an offence partially committed in the executing Member State but does not constitute a criminal offence there; and
- incompatibility with fundamental rights.

The EIO Directive is intended to replace the "corresponding provisions" of the mutual legal assistance conventions applicable between the Member States bound by the EIO Directive, including:

- European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols, and the bilateral agreements concluded pursuant to Article 26 thereof;
- Convention implementing the Schengen Agreement; and
- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol.

According to Eurojust (the EU's Judicial Cooperation Unit) and the European Judicial Network, a common understanding is that the EIO Directive does not cover the transfer of criminal proceedings, the setting up of a Joint investigation team, freezing property for the purpose of subsequent confiscation, restitution, spontaneous exchange of information and service of procedural documents, gathering of extracts of the criminal records register, police-to-police cooperation, or customs-to-customs cooperation.[4] However, Member States have interpreted the scope of "corresponding provisions" differently, and there is no accepted comprehensive list of the provisions that are definitively replaced by the EIO Directive. The mutual legal assistance conventions therefore remain applicable where relevant in cross-border criminal matters.

Arrests and extradition

The European Arrest Warrant (**EAW**) is available to police and prosecutors in EU Member States and is now widely used to secure the arrest and surrender of suspected criminals.

The Framework Decision to establish the EAW entered into force on 1 January 2004 and sought to replace extradition proceedings between Member States, speed up and remove any political dimension affecting the transfer of suspected criminals. The EAW can be used to secure the arrest and surrender of an individual for the purpose of conducting a criminal prosecution, or executing a custodial sentence or detention order. The EAW applies in relation to any offence punishable under the law of the requesting state by at least 12 months' imprisonment or, where there has already been a conviction, a sentence of at least four months has been imposed. The requesting state does not have to demonstrate that there is a case to answer. The merits of the request are taken on trust and there are limited mandatory and discretionary grounds for refusing enforcement (the person has already been finally judged by another Member State). Where the arrested person does not consent to surrender, they are entitled to a hearing in accordance with the law of the executing Member State.

The Market Abuse Regulation

MAR places obligations on Member State regulators to cooperate with each other and ESMA in relation to criminal investigations for infringements of MAR. In particular, MAR requires Member States to ensure that, where they have chosen to lay down criminal sanctions for infringements of provisions of MAR, appropriate measures are in place so that regulators have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations of proceedings commenced for possible infringements and provide the same to other regulators and ESMA (Article 25, MAR).

04. Principle against double jeopardy

Given the growth of cross-border financial services, firms are increasingly subject to investigation and ultimate sanction by regulators in different jurisdictions. This makes the question of whether regulators can bring proceedings in relation to the same conduct in multiple jurisdictions an important one.

Of the jurisdictions covered in this publication, France, Germany, the Netherlands, Spain and Switzerland are signatories to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (1990) (**Schengen Convention**). Although the UK is not party, it has opted to participate in certain aspects of the convention, including provisions relevant to the rule against double jeopardy. In jurisdictions which are signatory to the Schengen Convention, regulators are prevented from bringing criminal proceedings against a firm or individual where that firm or individual has been tried and convicted, or acquitted, of the same offence in another contracting country, but only when, if a penalty has been imposed, it has been enforced, is being enforced or can no longer be enforced (Article 54, Schengen Convention). This principle does not prevent conflicts in jurisdiction while

simultaneous prosecutions are ongoing in more than one Member State (but where no conviction has yet been secured).

This provision, however, is subject to potential reservations made by signatory jurisdictions limiting its scope of application.[5] Furthermore, the provision does not extend beyond criminal cases, so it does not prevent duplicate enforcement/administrative proceedings from being instigated.

In the MTS case the Belgian authorities concluded that they were prevented from taking enforcement action by Article 54 of the Schengen Convention because the UK's regulator had already imposed a sanction dealing with, *inter alia*, transactions on the Belgian market. Regulators in Italy and Portugal, on the other hand, did not consider themselves similarly constrained and imposed their own sanctions.

Regulators in most EEA Member States are also bound by Article 4 of Protocol 7[6] of the European Convention on Human Rights (1950), which prevents criminal proceedings being brought against an individual where that person has already been acquitted or convicted of the same offence in that jurisdiction. Regulators may however seek to reopen criminal cases if there is evidence of new facts, or if there was a fundamental defect in the previous proceedings, which could affect the outcome of the case.

The Charter of Fundamental Rights of the European Union (2000) also provides that no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the EU (Article 50). The charter became binding in 2009.[7]

In the Zoran Spasic case,[8] the Court of Justice of the European Union (**CJEU**) considered whether Article 54 of the Schengen Convention complied with Article 50 of the Charter, holding that:

- the additional "enforcement condition" set forth in the Schengen Convention did not infringe the principle against double jeopardy as provided in Article 50 of the Charter, and
- in cases where a court has imposed a penalty consisting of imprisonment and a fine, payment of the fine does not alone establish that the penalty is in the process of being enforced to satisfy the enforcement condition set forth in the Schengen Convention and therefore enable the principle against double jeopardy to be relied on.

Although they relate to the issue of successive domestic regulatory and criminal prosecutions of insider dealing offences, the decisions of the European Court of Human Rights (**ECHR**) in the Grande Stevens decision[9] and of the French Constitutional Council ruling in the EADS case handed down on 18 March 2015[10] are also noteworthy.

In the Grande Stevens case, the ECHR found that Italy, which permits both regulatory and criminal prosecution for market abuse, violated Article 4 of Protocol 7 as it permitted the same person to be prosecuted twice for the same misconduct (in this case, market manipulation), first by the regulator and then by the prosecutor. In doing so, the ECHR confirmed that the main criteria to consider in assessing whether the double jeopardy principle has been infringed is whether the conduct targeted in both proceedings is essentially the same.

In March 2015, the French Constitutional Council considered (by way of a preliminary ruling on constitutionality) whether, *inter alia*, the provisions of the French Monetary and Financial Code (**CMF**) enabling successive prosecution of insider dealing by the Autorité des Marchés Financiers (**AMF**) (regulatory proceedings) and by the Public Prosecutor (criminal proceedings) breached the principle against double jeopardy and the principle of necessity and proportionality of criminal sanctions enshrined in the French Declaration of Human Rights.

In its decision, the French Constitutional Council stated that the existence of a dual system to punish the same conduct will only violate the French Declaration of Human Rights if the regulatory and criminal prosecutions, cumulatively:

- have a similar scope of application (in terms of the conduct and the persons targeted);
- protect the same social interest;
- lead potentially to sanctions of a similar nature (in terms of both the severity of the sanction and the elements taken into account in its evaluation); and
- are to be decided upon within the same domestic jurisdiction (either judicial or administrative).

The French Constitutional Council ruled that in the particular case (which related specifically to insider dealing) these four cumulative criteria were met. It therefore considered that the successive prosecutions violated the principle of necessity enshrined in the French Declaration of Human Rights.

As a consequence, the Constitutional Council decided:

- to repeal several provisions of the CMF related to insider dealing, effective on 1 September 2016 (allowing the legislator some time to change the law), and
- that, from the publication of the 18 March 2015 decision, no criminal prosecution will be possible where enforcement proceedings have already been initiated by the AMF Enforcement Committee on the basis of the same facts and against the same person, and vice-versa.

On 20 May 2015, the French Supreme Court (*Cour de cassation*) applied the Constitutional Council's ruling in another insider dealing case, quashing a Paris Court of Appeal decision which had found an individual guilty of insider trading (criminal offence) after the same individual had been found to have engaged in insider trading (regulatory offence) by the AMF Enforcement Committee.[11]

As a result of the French Constitutional Council decision, a law was passed in June 2016 setting a case referral system (*procédure d'aiguillage*). In accordance with article L. 465-3-6 of the CMF, and before being sent to the AMF Enforcement Committee, market abuse cases are referred to the French financial prosecution service (*Parquet National Financier*) for a decision on whether the criminal or administrative channel is the most appropriate choice for the punishment of the alleged facts.

05. IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information

Regulators from all of the jurisdictions surveyed in this publication are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information (revised 2012) (**IOSCO MMOU**).[12] In Hong Kong only the SFC (not the HKMA) is a signatory to the IOSCO MMOU. The MMOU sets out how signatory regulators are required to consult, cooperate, and exchange information for securities regulatory enforcement purposes. The IOSCO MMOU also sets out the signatories' intent with regard to mutual assistance and exchange of information, but is not intended to create legally binding obligations or supersede domestic laws (paragraph 6(a) of the IOSCO MMOU).

Scope of cooperation

Information requests can be made when authorities are in the process of investigating offences relating to the following activities under the various jurisdictions relevant laws and regulations:

- insider dealing and market manipulation;
- misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives;
- solicitation and handling of investor funds, and customer orders;
- the registration, issuance, offer, or sale of securities and derivatives;
- the activities of market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and
- markets, exchanges, and clearing and settlement entities.

Regulators must provide the fullest assistance permissible to each other. This includes:

- providing information/documents within the possession of the requested regulator;
- obtaining information/documents, from any regulated persons, or person who may possess the information/documents, including:
  - contemporaneous records sufficient to reconstruct all securities and derivatives transactions;
  - records that identify, for example the beneficial owner and controller of transaction, account holders and details of the transaction; and
  - information identifying persons who beneficially own or control persons within the jurisdiction of the requested regulator; and
- taking or compelling witness evidence from any person involved directly or indirectly in the activities subject to the request, or who is in possession of information which may assist in the request. A representative of the requesting regulator may be present during the interview and may provide specific questions to be asked.

Firms/individuals may not necessarily be aware that a request for information emanates from an overseas regulators' request made pursuant the IOSCO MMOU, given that regulators are obliged to keep requests confidential. This is unless disclosure is required to carry out the request, after consultation with the requesting regulator.

Even where there is no prior request, regulators must use reasonable efforts to provide information that is likely to be of assistance in securing compliance with laws/regulations.

In addition to the cooperation arrangements under the MMOU, IOSCO encourages regulators to consider having internal protocols for collaborating with other regulatory agencies. The IOSCO Joint and Parallel Investigations Guide provides a template. IOSCO envisages that such protocols may particularise the practical procedures for collaboration on cross border investigations, eg, establishing regulatory colleges to consider, where appropriate, enforcement objectives, information sharing, actions, timescales, prosecutions and settlements. In addition, when embarking on a joint or parallel investigation, regulators are urged to consider arrangements that address the extraterritorial impact of domestic enforcement, regulatory and legislative developments on other jurisdictions: for instance, a prosecution of misconduct in one jurisdiction may raise constitutional and/or legal issues, such as double jeopardy, in another; or the compulsion of testimony in one jurisdiction may affect the use that may be made of that testimony in another jurisdiction.

Refusal to cooperate

Requests may be denied:

- where the request would require the requested regulator to act in a manner that would violate domestic law;
- where criminal proceedings have already been initiated, or final sanctions have been imposed, in the jurisdiction of the requested regulator, where it is based on the same facts and charges, against the same persons. This is unless the requesting regulator can demonstrate that the relief or sanctions sought would not be of the same nature or duplicative of any relief or sanctions obtained in the jurisdiction of the requested regulator. There is nothing in the MMOU which prevents duplicative administrative or regulatory proceedings from being sought;
- on the grounds of public interest or national interest; or
- where the request is not made in accordance with the terms of the MMOU.

Assistance cannot be denied on the basis that the conduct in question does not breach the laws or regulations of the requested authority.

Use of information

Transmitted information may only be used for the purposes set out in the request for assistance, including ensuring compliance with the laws/regulations relating to the request, unless the requested regulator consents otherwise. Regulators cannot disclose non-public information or documents received pursuant to the MMOU, except for the purposes set out in the request for assistance, or in response to a legal obligation.

IOSCO Enhanced Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information

Regulators from Australia, Hong Kong, Japan, Singapore, the United Kingdom, and the United States are signatories to the IOSCO Enhanced Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information (2016) (**IOSCO EMMOU**).[13] In Hong Kong only the SFC (not the HKMA) is a signatory to the IOSCO EMMOU. The MMOU will remain in effect as long as, and until, any signatories continue to wish to use it. However,

the objective is for all MMOU signatories to migrate eventually to the EMMOU. Like the MMOU, the EMMOU is not intended to create legally binding obligations or supersede domestic laws (Article 2 paragraph 1(a) of the IOSCO EMMOU).

The EMMOU includes additional key powers that IOSCO has identified as necessary to ensure continued effectiveness in safeguarding market integrity and stability, protecting investors and deterring misconduct and fraud. In addition to those powers under the MMOU detailed above. the EMMOU includes powers relating to:

- obtaining and sharing audit work papers, communications and other information relating to the audit or review of financial statements;
- compelling physical attendance for testimony (by being able to apply a sanction in the event of non-compliance);
- freezing assets if possible, or, if not, advising and providing information on how to freeze assets, at the request of another regulator;
- obtaining and sharing existing Internet service provider records (not including the content of communications) including with the assistance of a prosecutor, court or other authority, and obtaining the content of such communications from authorised entities;
- obtaining and sharing existing telephone records (not including the content of communications) including with the assistance of a court, prosecutor or other authority, and obtaining the content of such communications from authorised entities; and
- obtaining and sharing of existing communications record held by regulated firms.

06. Restrictions on the disclosure of personal information by regulators in EEA Member States

EEA regulators providing the personal data of individuals held by those regulators, or by firms regulated in the EEA, to overseas regulators will amount to making a disclosure of those data subjects' personal data to a third party under the General Data Protection Regulation (EU) 2016/679 (**GDPR**), and any supplemental national legislation, where applicable (such as the UK Data Protection Act 2018 (**DPA 2018**)). Certain requirements will therefore apply to that disclosure, including compliance with the various data protection principles and disclosure requirements set out under the GDPR, for example those relating to international transfers of personal data. As a data controller, the EEA regulator should carry out a risk assessment on a case by case basis to carefully consider any overseas regulator's request to disclose personal data against ensuring compliance with data protection and privacy requirements. Failure to comply with the GDPR, including breach of the requirements relating to international transfers detailed below, can give rise to penalties of the higher of 4% of annual worldwide turnover or €20 million.

For example, in respect of international transfers of personal data, the GDPR permits the free flow of personal data within the EEA, but restricts the international transfer of personal data from inside the EEA to countries or organisations outside of the EEA (third countries), unless:

- the transfer is to a third country for whom the European Commission has issued an "adequacy decision" determining an adequate level of protection of personal data under its domestic law or international commitments;
- there are so-called adequate safeguards in place (Article 46, GDPR), which may be provided by way of (for example) a legally binding and enforceable instrument between public authorities or bodies (such as a mutual legal assistance treaty), standard contractual clauses adopted by the European Commission, or an approved code of conduct; or
- one of a limited number of exceptions applies (Article 49, GDPR), including where there is explicit consent from the individuals to whom the personal data relates, where the transfer is necessary for important reasons of public interest, or where the transfer is necessary for the establishment, exercise or defence of legal claims.

The GDPR also provides for specific exemptions to certain of the GDPR principles and requirements – for example, where the disclosure is necessary for the purpose of:

- prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and prevention of threats to public security;
- national security;
- other important objectives of general public interest of the EU or Member State;
- prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
- the enforcement of civil law claims; or
- legal proceedings (including prospective legal proceedings), obtaining legal advice or establishing, exercising or defending legal rights.

The extent to which these exemptions may apply to a cross-border regulatory investigation will depend on the nature of the request from the overseas regulator, the nature of the investigation itself and each case will need to be considered carefully by the data controller. If applicable, these exemptions serve to disapply certain obligations under the GDPR to which the data controllers would otherwise be subject. The obligations that are disapplied depend on the exemption relied upon which could include the relatively onerous obligation to provide fair processing information to all data subjects (first data protection principle regarding lawful, fair and transparent processing).

It is also worth noting that the GDPR does not apply to processing by competent authorities for the purposes of law enforcement (ie prevention, investigation, detection or prosecution of criminal offences, the execution of criminal penalties, including the safeguarding against and prevention of threats to public security) (Article 2(d), GDPR). This is dealt with in the Law Enforcement Directive (2016/680/EU) which has been implemented into the national legislation of each Member State (for example, the DPA 2018 in the UK). In particular, under the DPA 2018 in the UK, an international transfer of personal data from an EEA competent authority to a country outside the EEA or an international organisation is not permitted unless the transfer is:

- necessary for the law enforcement purposes: the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; and
- based on a finding of adequacy in respect of the third country, there being appropriate safeguards, or derogations in special circumstances that apply,

and the intended recipient is a body that has similar law enforcement functions to the competent authority or an international body that carries out functions for any of the law enforcement purposes.

There are also specific provisions for transferring personal data to bodies that so not have similar law enforcement functions, with additional safeguards which the competent authority must meet before the transfer can be carried out.

Endnotes

1. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Iceland, Norway and Liechtenstein.
2. Article 24 MAR.
3. Article 25 MAR.
4. Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order (June 2019) (https://tinyurl.com/y3nev9ab).
5. France has made such reservations; see Question 12 of the French chapter in this Guide.
6. The UK had not signed or ratified Protocol 7 of the ECHR as at the date of publication.
7. Whether the charter is applicable in Poland and the UK as a result of Protocol 30 to the Lisbon Treaty relating to the charter, which some commentators have viewed as an opt-out to the application of the charter in national law, has been a matter of debate. However, in April 2014, a UK House of Commons European Scrutiny Report concluded that Protocol 30 is not an opt-out and that the charter is "directly effective in the UK". The report also strongly supported the application of the charter in Poland (see the European Scrutiny Committee Forty-third Report of Session 2013–14, The application of the EU Charter of Fundamental Rights in the UK: a state of confusion (https://tinyurl.com/kc7go3a)).
8. CJEU (Grand Chamber) *Zoran Spasic* (C-129/14 – PPU), 27 May 2014.
9. ECHR Case *Grande Stevens and Others v. Italy*, 4 March 2014.
10. French Constitutional Council Decision n°2014-453/454, 18 March 2015.
11. Decision of the French Supreme Court, Criminal section, 20 May 2015, n° 13-83.489.
12. A full list of signatories is available on the IOSCO website (https://tinyurl.com/y4war3ur).
13. A full list of signatories is available on the IOSCO website (https://tinyurl.com/yxhpagv2).

Annex 2

Cooperation in administrative/disciplinary matters

	AUSTRALIA	CHINA	DIFC	FRANCE	GERMANY	HONG KONG
ESMA Multilateral Memorandum of Understanding on cooperation arrangements and exchange of information (2014)	✗	✗	✗	✓	✓	✗
Memorandum of Understanding on cooperation between the financial supervisory authorities, central banks and finance ministers of the European Union on cross-border financial stability (2008)	✗	✗	✗	✓	✓	✗
IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information (Revised 2012)	✓ (ASIC)	✓	✓	✓	✓	✓ (SFC)
IOSCO Enhanced Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information (2016)	✓ (ASIC)	✗	✗	✗	✗	✓ (SFC)
International Association of Insurance Supervisors Multilateral Memorandum of Understanding on cooperation and information exchange (Revised 2014)[1]	✓ (APRA)	✗	✓	✓	✓	✓ (Insurance Authority)
Hague Convention on the taking of evidence abroad in civil or commercial matters (1970)	✓	✓	✗	✓	✓	✓

JAPAN	NETHERLANDS	RUSSIA	SINGAPORE	SOUTH AFRICA	SPAIN	SWITZERLAND	UNITED KINGDOM	UNITED STATES
✗	✓	✗	✗	✗	✓	✗	✓	✗
✗	✓	✗	✗	✗	✓	✗	✓	✗
✓	✓	✓	✓	✓	✓	✓	✓ (FCA)	✓
✗	✗	✗	✓	✗	✗	✗	✓ (FCA)	✓
✓	✓	✓	✓	✓	✓	✓	✓ (FCA, PRA)	✗[2]
✗	✓	✓	✓	✓	✓	✓	✓	✓

Endnotes

1. Note that the Insurance Directives also contain specific provisions on information exchange which apply between EEA Member States. Cooperation agreements may also be concluded with third countries that meet equivalent standards of confidentiality.
2. Insurance regulators in the US states of California, Connecticut, Delaware, Florida, Iowa, Maine, Maryland, Michigan, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, Wisconsin and Washington are signatories.

Annex 3

Cooperation in criminal matters

	AUSTRALIA	CHINA	DIFC	FRANCE	GERMANY	HONG KONG
European Convention on mutual assistance in criminal matters between Member States of the European Union (2000)[1]	✗	✗	✗	✓	✓	✗
Protocol to the above Convention regarding locating bank accounts and providing banking information in criminal investigations (2001)	✗	✗	✗	✓	✓	✗
European Convention on laundering, search, seizure and confiscation of the proceeds of crime (1990)	✓	✗	✗	✓	✓	✗
Agreement on mutual legal assistance between the European Union and the United States of America (2003)	✗	✗	✗	✓	✓	✗
Scheme relating to mutual assistance in criminal matters within the Commonwealth (also known as the "Harare Scheme") (Revised 2011)	✓	✗	✗	✗	✗	✗
The United Nations Convention against transnational organised crime (2000)	✓	✓	✗[2]	✓	✓	✓

JAPAN	NETHERLANDS	RUSSIA	SINGAPORE	SOUTH AFRICA	SPAIN	SWITZERLAND	UNITED KINGDOM	UNITED STATES
✗	✓	✗[3]	✗	✗	✓	✗[4]	✓	✗
✗	✓	✗	✗	✗	✓	✗	✓	✗
✗	✓	✓	✗	✗	✓	✓	✓	✗
✗	✓	✗	✗	✗	✓	✗[5]	✓	✓
✗	✗	✗	✓	✓	✗	✗	✓	✗
✓	✓	✓	✓	✓	✓	✓	✓	✓

Endnotes

1. See paragraph 3 Annex 1.
2. Although the DFSA is not a signatory, the UAE is, having signed the convention on 9 December 2002 and ratified on 7 May 2007. In accordance with Federal Law No.8 of 2004, Article 5, a Financial Free Zone (such as the DIFC) may not do anything which may lead to a contravention of any international agreement to which the UAE is a party. The DFSA will seek to comply with the terms of its agreements with Dubai Public Prosecution and to provide full cooperation and assistance as required to comply with the UAE's obligations under the Convention.
3. However, Russia is party to the European Convention on Mutual Assistance in Criminal Matters (1959), which is the predecessor to the 2000 Convention.
4. However, Switzerland is party to the European Convention on Mutual Assistance in Criminal Matters (1959) as amended by the Convention Implementing the Schengen Agreement (1990), which is predecessor to the 2000 Convention.
5. Note that Switzerland has concluded a bilateral agreement with the US on mutual legal assistance.

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