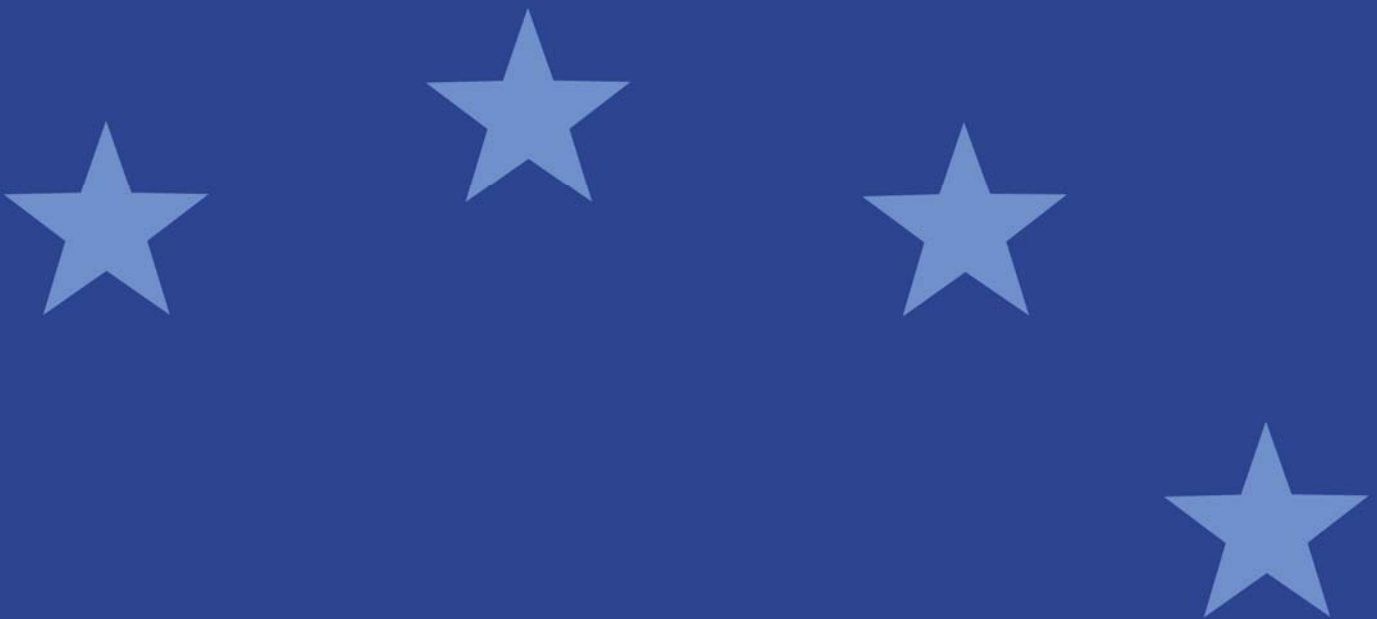




European Securities and
Markets Authority

Report

Summary of the report on the mapping of contingency measures



ESMA has replaced the the Committee of European Securities Regulators (CESR), as of 1 January 2011. The work accounted for in this report was finalised in December 2010 under CESR.

Please see for further information www.esma.europa.eu

I Introduction

1. The financial crisis revealed the importance of Competent Authorities being able to undertake emergency actions in a coordinated fashion to intervene in crisis situations when critical market conditions with potential systemic impact arise that may cause disruption of the securities market or affect the stability of the whole or of a part of the securities system. Examples may be the power to shut down the market, to suspend the redemption and repurchase of UCITS-units, to deal with market insolvencies and major fails by market traders, clearing houses or settlement systems.
2. To deal with these emerging crises and situations, CESR decided in December 2009 to map the existing emergency powers and contingency measures available to CESR Members at a national level.
3. This mapping of contingency measures is conducted in the context of the legal framework for action in emergency situations according to the ESMA regulation.¹ In the event of adverse systemic developments and, in case of emergency situations declared by the Council, the ESMA Regulation² gives ESMA both the general role of facilitating and coordinating the actions to be undertaken at national level and the power of adopting individual decisions in certain conditions.
4. The mapping aims to provide an overview and understanding on the general availability of emergency powers and contingency measures at a national level and favour better coordination in future crisis events.^{3 4}
5. For the purpose of this mapping, crisis situations are defined as adverse developments that could potentially jeopardize the orderly functioning and integrity of financial markets, the investor protection or the stability of the financial system (for example: severe stress at a systemically relevant firm, market

¹ Article 10 of the proposal of the Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority of 7 December 2009 ("ESMA Regulation"), approved on 22 September 2010 by the European Parliament.

² Article 10(1) of the ESMA Regulation states: in the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the European Union, the Authority shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities.

³ According to Article 10 (2), where the Council has adopted a decision on the existence of an emergency situation the Authority may adopt individual decisions requiring competent authorities to take the necessary action in accordance with the legislation referred to in Article 1(2) to address any such developments by ensuring financial market participants and competent authorities satisfy the requirements laid down in that legislation. According to Article 1 (2, 2a) ESMA Regulation, the Authority shall act within the scope of the EU *acquis communautaire* in the securities sector.

⁴ In parallel to the elaboration of this report by CESR the EU-Commission developed a draft Regulation on contingency measures with regard to "Short Selling and certain aspects of Credit Default Swaps". These areas covered by the new draft regulation are not part of this report, even though they were included in the CESR project at the outset. The Commission's regulation illustrates the possible range of powers that may be used to address a specific market event or situation adequately, a consideration that also determined the structure of this CESR report.

turbulence, significant market liquidity shortage affecting investor confidence, market volatility and disruption, massive frauds with potential market impact, etc.).

6. The mapping does not aim at identifying specific risks or potential crisis scenarios, and analysing CESR Members' powers to address such identified risks or crisis scenarios. Such an exercise can only be done on the basis of a carefully researched determination of risks and potential crisis scenarios which is beyond the means of the Review Panel. This implies that the RP had to focus on powers available to members in all possible crisis scenarios, including situations which are not contemplated by the EU Directives and regarding which national provisions implementing EU-Directives without addition thus might not per se be applicable.
7. Indeed a crisis does not necessarily result in or consist of an infringement of EU-provisions or national law implementing such provisions; it is not necessarily contrary the immediate regulatory objectives of a legal provision of EU law (level 1 and level 2 measures) and may not even have been or be contemplated by such measures (though it often is). Therefore for the purpose of this mapping exercise it was considered relevant whether Members can use the power even beyond a case within the "usual" scope or e.g. case of infringement of the relevant Directives.⁵ In other words, a power is only considered as available for the purpose of this mapping exercise, if the crisis scenario not only meets at the same time the conditions for the regular application of the EU Directives, but if the available measures go beyond the regular scope of the EU Directives.
8. Since crisis situations may not be fully anticipated at any time and experience with past crisis cases may not be exhaustive, a review of the legal provisions that grant Members powers without reference to a specific situation ("general clauses") or with reference to a more or less unspecified emergency situation, will be addressed in this report as well.
9. The structure of this executive summary, based on the answers to the questionnaire (Ref: CESR /10-311), is divided into eight sections as follows.
 - Contingency powers based on general clauses;
 - Use of supervisory and investigatory powers in connection with a crisis;
 - Powers in a crisis with respect to collective investment schemes (UCITS and non-UCITS);
 - Powers in a crisis with respect to regulated entities;
 - Powers in a crisis with respect to markets of financial instruments;
 - Powers in a crisis with respect to clearing and settlement;

⁵ The reason for this approach is that most CESR Members have built up and/or shaped their arsenal of supervisory and intervention powers in the course of implementing EU-Directives over the years. As these powers may be of particular help in combating crisis situations of known and unknown form and dimension it appeared to be necessary to find out whether Members can only use these powers as contemplated in the Directives (as mapped beforehand) or even in situations where application of a Directive to the letter would not render the competent authority capable of using the power. The questions in the questionnaire that referred back to specific provisions of the directives therefore aim for "grey areas" beyond the immediate applicability of existing Directives and thus are going beyond what was mapped in prior exercises. Accordingly Members were asked to assess the availability of these powers – or of comparable powers, where *stricto sensu* the Directive would not be applicable. For the sake of completeness, and differently from other mapping exercises, respondents were also requested to provide details on the legal basis and criteria for exercising the contingency powers, since they may not be grounded on national rules implementing existing EU measures.

- Powers in a crisis with respect to marketing of financial instruments
- Additional powers and supervisory cooperation

10. In order to enhance the readability, only the major findings and analysis based on the responses provided by Members have been presented.

II Main findings

11. The main conclusion of this mapping is that it is unlikely that CESR Members can address a crisis situation on a common or comparable legal basis and accordingly act in a coordinated way in a crisis. The availability of powers for members in a crisis with respect to the different areas of securities regulation is diverse; the nature and scope of Members' contingency powers as well as the legal conditions governing their exercise are differing.

- Members are more prepared to address those crisis situations that have a connecting point with the existing EU Directives. Many Members reported that they can apply powers contained in provisions implementing EU Directives in a crisis situation by assuming that the crisis might meet the conditions required for a "regular" application of such provisions implementing EU Directive. In cases that do not meet the conditions for the regular use of such provisions based on EU-law the basis for supervisory action according to certain powers remains sometimes unclear.
- The availability of powers that might need to be applied in a crisis situation generally has not been assessed throughout the CESR Membership before; this may be the reason why CESR Members reported practical experience mainly with respect to the ban of short-selling in specific financial instruments.
- A more profound understanding of CESR Members with respect to the availability of powers in situations which are not contemplated by the EU Directives and which do not constitute or indicate a breach of law according to the requirements of the EU Directives on Securities Regulation would be one of the ways to promote a better coordination among CESR Members in crisis situations.

12. Article 10 of the ESMA Regulation⁶ states that in the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the European Union, ESMA shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities. Moreover, the ESMA Regulation provides that where the EU Council has adopted a decision on the existence of an emergency situation ESMA may adopt individual decisions requiring competent authorities to take the necessary action in accordance with the legislation referred to in the ESMA Regulation⁷ to address any such developments by ensuring financial market participants and competent authorities satisfy the requirements laid down in that legislation.

⁶ The proposal of the Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority of 7 December 2009 ("ESMA Regulation"), approved on 22 September 2010 by the European Parliament.

⁷ The *acquis communautaire* in the securities sector – Article 1(2) of the ESMA Regulation.

13. In order to enable ESMA and its members to effectively fulfil their functions and roles in a crisis, steps seem to be necessary in order to vest Competent Authorities with a suitable tool to address future situations that constitute or might lead to a crisis.
14. The main findings with respect to each section are described as follows.

Contingency powers based on general clauses

15. This part describes the ability of the CESR Members to act in crisis situations on the basis of “general clauses”. For the purpose of this exercise general clauses are understood as legal provisions being composed by two elements: 1. they provide the legal basis for the exercise of certain powers that can address a situation that might constitute or might lead to a crisis situation; 2. the respective powers can be applied under certain legal preconditions that are designed or suitable to cover situations that constitute or might lead to a crisis situation.
16. Only part of the Membership has provisions in place that serve as “general clauses” in case of a crisis situation. The picture amongst those Members that have described that their legislation provides for general clauses is diverse. Against the background of the aforementioned structure there is no common understanding of the notion “general clause”. Some Members indicated that they have a specific legal provision in place that is tailored to address adverse developments on the financial markets by vesting the Authority with suitable powers available in situations that might require contingency measures being applied. Other members refer to a conjunction of powers – sometimes provided for e.g. by national provisions implementing the Lamfalussy Directives - that might serve for crisis situations; others refer back to the mission statements of the regulators that require these authorities to, for example, enhance market confidence, protect investors and ensure the orderly functioning of the market. In this respect, the information given by Members does not allow to draw a final conclusion on the extent to which the mission statement itself serves as a legal basis for supervisory action and to which extent a complementing legal provision that empowers the authority to adopt certain measures is needed. It is furthermore not always clear, whether a general clause can only be used in order to ensure compliance with the respective supervisory law generally (and by doing so preventing adverse developments). Where Members refer to certain powers provided for e.g. by implementations of the Lamfalussy Directives, no final conclusion could be drawn on whether members would be able to use such powers in cases not contemplated by the Directives;

Findings

- The availability of a general clause in all Members States could enable CESR Members to impose measures in a way that ESMA could more easily coordinate;
- A common “tool box” of possible measures applicable to address crisis situations could further promote comparable reactivity and the ability of CESR Members to act in a coordinated way;
- The exercise reveals that the conditions for applying general clauses are different in the CESR Member States. A common understanding of the conditions for applying powers and measures could promote a common basis for reacting on a crisis on the same grounds;
- A more profound understanding of CESR Members with respect to the availability of powers in situations which are not contemplated by the directives and which do not e.g. constitute of breach

of law according to the requirements of the EU Directives on Securities Regulation could promote a better reactivity of CESR Members in crisis situations.

- As far as mission statements are relevant for taking contingency measures,⁸ consistent mission statements of CESR Members and, where relevant in addition to that, general clauses that enable the Authority to adopt measures once the objectives of the regulator's mission needs to be ensured, could put CESR Member's reactivity in a crisis situation on a broader common basis.

Use of supervisory and investigatory powers in a crisis situation

17. This part describes which supervisory and investigatory powers are available to CESR Members in crisis situations and how Members use these powers as contingency measures, in particular the powers a) to access any document in any form whatsoever and to receive a copy of it, b) to demand information from any person (including groups of persons) and if necessary to summon and hear any such person, c) to carry out on-site inspections, d) to require existing telephone and existing data traffic records and e) to require the cessation of any practice.
18. Whereas the aforementioned powers are in principle implemented by all CESR Members on the basis of the Lamfalussy Directives (see earlier CESR Mapping reports on several EU-Directives⁹), only the majority of Members can apply the aforementioned powers in a crisis situation. It seems that many Members consider that they can use these powers in crisis situations, because they assume that many crisis situations could be tackled by applying these powers in the "regular" use as contemplated by the EU Directives on Securities Regulation. On the other hand, with respect to the conditions for applying these powers, many CESR Members refer to "general provisions" without being able to explain technically, under which circumstances the power would be available.

Findings

- Neither the notion of "crisis situation" nor the respective contingency measures to be exercised in a crisis situation are clearly defined in the legislation of most CESR Members.
- In addition some CESR Members refer to a general clause as the legal basis for using the aforementioned supervisory and investigatory powers. The criteria that may be applicable are provisions on investor protection, transparency and/or orderly function of the capital market.
- Some CESR Members also report that they may exercise the aforementioned supervisory and investigatory powers only on regulated entities.
- Finally, no more than 10 CESR Members have reported that they have actually used such powers for the purpose of a crisis situation.
- The availability of the aforementioned supervisory and investigatory powers throughout the CESR Membership could further promote coordinated actions of CESR Members by applying the same powers in a crisis situation.

⁸ Some jurisdictions indicated that they use certain powers in order to address a crisis situation by referring to their mission statements.

⁹ Reports filed under http://cesr.eu/index.php?page=contenu_groups&id=23&docmore=1#doc.

Powers in a crisis situation with respect to collective investment schemes (UCITS and non-UCITS)

19. This Part describes the powers available to CESR Members in a crisis with respect to collective investment schemes, in particular the powers a) to require the temporary suspension of the repurchase or redemption of a UCITS or non-UCITS unit, and b) to prevent the carrying out of further transactions or activities by a UCITS or non-UCITS in crisis situations. In every section, the specific provisions in national legislation to exercise these powers for the purpose of a crisis situation are set out and any situation in which Members made use of those provisions.
20. This section shows that only a slight majority of Competent Authorities has the power to require the temporary suspension of the re-purchase or redemption of a UCITS or non-UCITS unit in a crisis situation. Some Member States define circumstances or provide criteria for using the above mentioned powers in national legislation. These legal circumstances are generally defined through a general clause and are quite broad (e.g. a need to protect the interests of investors or the public). Only very few Members of those who have mentioned to have the power in question reported to have actually used it in a crisis situation. Given this heterogeneous situation of powers coordinated action by CESR Members appears difficult to achieve.
21. The power to prevent the carrying out of further transactions / activities by a UCITS in a crisis situation is available only to the slight majority of Members while, with reference to non-UCITS, the same power is available only to the minority of Members. Some CESR Members define circumstances or provide criteria for using the above mentioned powers in national legislation. These legal circumstances are generally quite broad (e.g. a need to protect the interests of investors or the public). Only few Members have actually used these powers in practice.

Findings

- A more convergent regime with respect to the suspension of re-purchase / redemption of units of collective investment schemes and a convergent definition of responsibilities of fund managers on the one hand and regulators on the other could further facilitate addressing liquidity issues of funds that may lead to or constitute a crisis situation;
- A more convergent regime with respect to the possibility of the regulator to prevent the carrying out of further transactions / activities by an UCITS or non-UCITS might be necessary to facilitate addressing a crisis situation in a coordinated way.

Specific powers in a crisis with respect to regulated entities

22. This section reflects powers in a crisis with respect to regulated entities¹⁰ and captures a) powers in connection with crisis resolutions; b) the power to request the freezing of assets; c) requesting temporary prohibition of professional activity and d) the power to convene / suspend / replace boards of regulated entities. It has to be noted that such powers might be the shared responsibility of different competent authorities in some countries and the report only describes the powers of CESR members with respect to regulated entities.

¹⁰ Investment firms, market operators, UCITS and relevant managers, non-UCITS and relevant managers, and operators of clearing and settlement systems.

23. In general, this section shows that the availability of powers of Members in crisis situations is diverse. The nature and scope of the powers described as well as the legal conditions governing their exercise differ significantly among Members. Although these powers can sometimes be grouped into larger categories, they differ significantly in scope and other respects. Generally, fewer Members seem to have the powers with regard to market operators and clearing and settlement systems than with regard to other supervised entities. Only a very small minority of Members has used these powers in practice.
24. With regard to all analysed supervised entities covered by this mapping, the powers in connection with the return of the assets to the clients / investors and / or the transfer of assets / going concern into solvent entities do not appear to be wide-spread and nearly in all cases rest on generic supervisory powers rather than specific contingency powers. Less than 10 Members have such powers with regard to any of the relevant supervised entities covered in this mapping. Additionally, it should be noted that no Member stated that it had specific provisions for the exchange of information in crisis situations, although many Members can rely on their general rules on the exchange of information with foreign Competent Authorities. Some Members have powers to request the freezing and / or sequestration of assets or similar prohibition from the disposal of assets.

Findings

- The responses provided on the availability of the aforementioned powers with respect to regulated entities show that it appears unlikely that CESR Members are able to act in a coordinated way in response to a crisis situation.

Powers in a crisis situation with respect to markets of financial instruments

25. This part describes the powers of CESR Members in a crisis situation with respect to markets of financial instruments, more specifically the powers 1. to suspend the trading of financial instruments; 2. to prohibit trading on a regulated market; 3. to halt those markets and to require the removal of a financial instrument from trading in crisis situations. In every section, specific circumstances / criteria to exercise those powers for the purpose of a crisis situation are described and any situation where Members have made use of those provisions.
26. In general, there is a majority of CESR Members stating that they can exercise the afore-mentioned powers in a crisis situation according to the provisions contained in their respective legislations.
27. However, it is difficult to give a clear picture on the question of how Members could act in crisis situations as those stating that they can exercise the corresponding powers, refer to conditions of a general nature (e.g. general powers, to avoid danger to the regular and lawful operation of the market, investor protection) or just do not describe them. This seems to be a consequence of the absence of a definition of crisis situations, and of the lack of experience in this area (just a few Members – five or less with respect to each power – note that they have exercised the powers in crisis situations – and even less provide details on the specific cases). As a consequence, the fact that Members have the powers in a crisis situation does not necessarily mean that there are no differences in the way they will be able to use their powers.

Findings

- The availability of the aforementioned powers with respect to markets of financial instruments throughout the CESR Membership could further promote the possibility of coordinated actions of CESR Members by applying the same powers in a crisis situation;

Powers in a crisis situation with respect to clearing and settlement

28. This part describes the powers of CESR Members in a crisis situation with respect to clearing and settlement. First it captures the power to request information clearing and settlement facilities, other related powers, unsettled transactions, stringent margin calls and / or to demand more collateral in crisis situations. Secondly, the powers of Members to correct failed trades and / or unsettled transactions and the powers, if any, to impose stringent margin calls and to demand more collateral in crisis situations, are explored. It has to be noted that such powers might be the shared responsibility of different competent authorities in some countries, i.e. the Central Banks in charge of the operation and supervision of the local Payment Systems. The report only describes the powers of CESR Members with respect to clearing and settlement.

29. Responses to this section reflect the very different market situation amongst the CESR Members with respect to this section. One particular important issue is that at least half of the Members state that they do not have the power to request information from providers of key services, mainly IT related, that are usually outsourced by Clearing and Settlement operators. Since the IT component is critical to these services, Members may need access to this information either direct or indirectly through the operator of the clearing and settlement facilities.

30. Another point of concern, which has been highlighted by some CESR Members, is the heterogeneity of powers of Members with respect to unsettled transactions and the demands of collateral. There is no harmonised regulation in this field¹¹. Those few Members who dealt with these issues have very limited, if any, powers to correct failed / unsettled trades and to impose and demand stringent margin calls and more collateral. Most of them seem to rely on powers in the context of the general oversight exercised on the operator of the Clearing and Settlement facility.

Findings

- The availability of a power to request information from providers of key services, mainly IT related, that are usually outsourced by Clearing and Settlement operators, throughout the CESR Membership could promote the reactivity of CESR Members in crisis situations;
- The availability of powers to impose and demand stringent margin calls and more collateral throughout the CESR Membership might help avoid a crisis or facilitate coordinated approaches in a crisis scenario.

Powers in a crisis situation with respect to the marketing of financial instruments

31. This part describes the powers of CESR Members in a crisis situation with respect to suspend a public offer or admission to trading and more in specific: the power to prohibit or suspend advertisements on financial instruments, the power to require disclosure of all material information which may have an effect on the assessment of the financial instruments. In every section, specific circumstances / criteria

¹¹ It is expected that future EU Regulation on market infrastructures (on Central Counterparties and Central Securities Depositories) will contribute to clarify this non regulated area in the field of financial services.

to exercise those powers for the purpose of a crisis situation are described and any situation in where Members have made use of those provisions.

32. The availability of powers to adopt contingency measures in a crisis situation with respect to the marketing of financial instruments is diverse. On average half of the Members can suspend a public offer or admission to trading, prohibit a public offer, suspend advertisements, require disclosure of all material information with respect to marketing of financial instruments and can prevent the carrying out further marketing activity on financial instruments in cases not contemplated by the directives. On average half of the Member States who granted the powers, have circumstances defined in their legislation to use such powers.

Findings

- Given the availability of the aforementioned powers with respect to the marketing of financial instruments, it appears unlikely that CESR Members would be able to act in a coordinated way in response to a crisis situation.

Additional powers

33. Under this section CESR Members were asked whether they have any additional powers compared to those already covered by this Report with respect to investment firms, market operators, CIS, markets of financial instruments and clearing & settlement.

34. Only a small minority of Members indicated that they have additional powers. The following specific powers were mentioned: to convene a general assembly, to inform the public and to appoint a registered auditor.

Findings

- Responses to this set of question indicate that certain existing powers (e.g. according to the Lamfalussy Directives) may be applicable in a flexible way in a crisis situation that is not contemplated by the directives; however there seems to be no uniform interpretation on whether these measures can be used by all CESR Members in crisis situations.

Powers to cooperate with other securities regulators

35. This section describes CESR Member's capability to cooperate amongst each other and with respect to 3rd countries in crisis situations.

36. There is a broad framework of cooperation agreements among CESR Members. Some of these cooperation agreements are on the multilateral and some are on the bilateral level. Some of those arrangements are general in nature but some also address specific issues, like cooperation in crisis management. Generally it can be established that the majority of CESR Members do not have special provisions on cooperation in crisis situations; however, in most cases their general rules on cooperation might be applicable also in case of crisis / emergency situations. Some Members however indicated that they do not have the power to cooperate and coordinate their actions with other competent authorities of CESR Members concerning crisis situations. It seems that different interpretations exist as to whether the general cooperation arrangements might be applicable in cases of crisis situations.



Findings

- The availability of consistent powers to cooperate with respect to third countries throughout the CESR Membership could provide for better coordination among CESR members in a crisis

III Recommendations

- CESR should consider promoting the further coordination of crisis management plans;
- CESR should consider improving the relevant processes in order to ensure cooperation and communication in case of crisis situations.