



European Securities and
Markets Authority

Report

Supervisory Measures and Penalties under Articles 4, 9, 10 and 11 of EMIR





Acronyms

Countries:

AT	Austria
BE	Belgium
BU	Bulgaria
CY	Cyprus
CZ	Czech Republic
DK	Denmark
DE	Germany
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta

NL	Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom

NCAs that contributed to the Report

ACPR	French Prudential Supervision and Resolution Authority (FR)
AFM	Dutch Authority for Financial Markets (NL)
AMF	Autorité des marchés financiers (FR)
ATVP	Securities Market Agency (SI)
AZN	Insurance Supervision Agency (SI)
BaFin	Federal Financial Supervisory Authority (DE)
Bdl	Banca d'Italia (IT)
BdP	Banco de Portugal (PT)
BNB	Bulgarian National Bank (BU)
BoE	Bank of England (UK)
BoG	Bank of Greece (EL)
BS	Bank of Slovenia (SI)
CBoC	Central Bank of Cyprus (CY)
CBol	Central Bank of Ireland (IE)

CAA	Commissariat aux Assurances (LU)
CNB	Czech National Bank (CZ)
CMVM	Comissão do Mercado de Valores Mobiliários (PT)
CNMV	Comision Nacional del Mercado de Valores (ES)
Consob	Commissione Nazionale per le Società e la Borsa (IT)
Covip	Commissione di vigilanza sui fondi pensione (IT)
CSSF	Commission de Surveillance du Secteur Financier (LU)
CySEC	Cyprus Securities and Exchange Commission (CY)
DNB	Dutch Central Bank (NL)
FCA	Financial Conduct Authority (UK)
FCMC	Financial and Capital Market Commission (LV)
FFSA	Finanssivalvonta (FI)
FMA	Financial Market Authority (AT)
FSA	Finanstilsynet (DK)
FSC	Financial Supervision Commission (BU)
FSAS	Finansinspektionen (SE)
FSMA	Financial Services and Markets Authority (BE)
FSAN	Finanstilsynet (NO)
HANFA	Croatian Financial Services Supervisory Agency (HR)
HCB	Hungarian Central Bank (HU)
HCMC	Hellenic Capital Market Commission (EL)
HNB	Croatian National Bank (HR)
IVASS	Istituto per la vigilanza sulle assicurazioni (IT)
KNF	Komisja Nadzoru Finansowego (PL)
MFSA	Malta Financial Services Authority (MT)

NBB	National Bank of Belgium (BE)
NBoS	National Bank of Slovakia (SK)
PRA	Prudential Regulation Authority (UK)
SIS	Social Insurance Services (CY)

Other acronyms:

CCP	Central counterparty
FC	Financial counterparty according to Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).
LEI	Legal Entity Identifier
NCA	National Competent Authority
NFC	Non-financial counterparty according to Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).
OTC	Over the counter
PTSC	Post-trading Standing Committee
RTS	Regulatory Technical Standards
TR	Trade Repository
UTI	Unique Transactions Identifier

Legislation:

CRR	Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012
EMIR	Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories.
MIFID II	Directive 2014/65/EU on Markets in Financial Instruments

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Executive Summary

Reasons for publication

ESMA is tasked under EMIR to draft and submit an annual report on the penalties imposed by competent authorities, including supervisory measures, fines and periodic penalty payments to the European Parliament, the Council and the Commission.

EMIR entered into force in 2012 and its obligations, as further defined in several subsequent Commission Delegated Regulations, have since gradually become applicable and enforced. This report is the first report on supervisory measures and penalties under EMIR.

Content

The present report is structured in five Sections and two Annexes.

Section 1 describes the background for this exercise and the reasons why ESMA considers the current moment appropriate for its publication.

Section 2 sets out the scope and focus of the report.

Section 3 details the source of information used for the analysis detailed in the report, i.e. the answers to a survey on supervisory measures and penalties submitted by the NCAs of 26 countries.

Section 4 covers the findings and is composed of the following sub-sections: (1) NCAs' structure and allocation of competences; (2) NCAs' interaction with market participants; (3) Sources of information checked by NCAs; (4) Supervisory activities; (5) Investigations conducted in 2017; (6) Enforcement actions; (7) Enforcement procedures; (8) Criminal penalties; and (9) Penalties imposed in relation to Articles 4, 9, 10 and 11 of EMIR.

Finally, Section 5 presents the conclusions. Annex I contains the questions of the survey used to gather information from NCAs, and in Annex II, more granular information can be found in different tables that give detailed information per country.

The report sheds some light on areas that are highly harmonised, such as the sources of information used by NCAs for the purpose of verifying the compliance of the supervised entities with EMIR provisions. Data from TRs is used by 72% of the NCAs to check compliance in relation to the clearing obligation; by 92% of the NCAs for the reporting obligation and by 64% for the risk management procedures of Article 11 of EMIR. Likewise, the majority of the NCAs use concurrently other information directly submitted by the supervised entities: 72% of the NCAs gather data directly from entities to check compliance with both the clearing and reporting obligation, and 76% of the NCAs for EMIR risk mitigation techniques.

Another area highly harmonised, concerns the supervisory competences of the NCAs in relation to Articles 4, 9 and 11 of EMIR, where the vast majority of the NCAs are competent to perform four main activities: ask for documentation from the counterparties (on average for Articles 4, 9 and 11, 99% of the respondents to the survey); conduct on-site investigations (on average 95%); summon and interview people (on average 88% of the respondents); and ask information from third parties (on average 83%). Similarly, the picture looks highly harmonised concerning the enforcement actions identified in the different NCAs, where 88% of the NCAs can issue non-binding as well as binding letters; and 96% can impose administrative fines.

Nevertheless, other aspects covered by this report appear less harmonised, although a common pattern (with variations and different options) can be identified. With respect to the enforcement procedures for imposing disciplinary measures for an infringement of EMIR, NCAs follow processes that could be divided in three steps: a warning, a decision and the sanction. Furthermore, regarding the criteria and the systems used to quantify the administrative fines, we observe that there are four groups of countries: countries where administrative fines are defined up to a maximum amount; countries with a range between a floor and a cap amount; countries where fines combine a fix and a variable amount; and countries in which different amounts are prescribed depending on whether the infringement is committed by a legal or a natural person.

However, the aspect that appears less unified concerns the amounts of the fines, where the level of harmonisation is very low, with amounts ranging between a minimum of 125 euros and a maximum of 100 million euros. In addition, in terms of criminal sanctions related to EMIR infringements, only seven countries envisage this possibility in their legislation.

In terms of sanctions, up to December 2017, three have been imposed. Commissione di Vigilanza sui Fondi Pensione (Covip) in Italy imposed two fines in connection with both Articles 9 and 11 of EMIR (amounting to 105,000 and 60,000 euros respectively); and the Financial Conduct Authority in the United Kingdom, imposed a fine of 35 million pounds for an infringement of Article 9 of EMIR.

1 Background

1. Under Article 85(5) of EMIR, ESMA has to submit to the European Parliament, the Council and the Commission an annual report on the supervisory measures and the penalties imposed by competent authorities, including supervisory measures, fines and periodic penalty payments.
2. EMIR's implementation has been a phased process. Indeed, following the entry into force of EMIR in 2012, different start dates have applied to a range of requirements. Looking at the obligations under Title II of EMIR, the risk mitigation techniques, except for the bilateral margin requirement, have started to apply first, then reporting, the clearing obligation and then last year bilateral margining. Furthermore, some of these requirements have been further phased-in per category of counterparties, per individual requirements or per specific OTC derivative. As a matter of fact, certain start dates have not yet kicked in for the clearing obligation and for bilateral margining for certain counterparties.
3. As a result, ESMA considered it more insightful to perform this first annual exercise once the key requirements had all become applicable for the most part and thus after the different counterparties had implemented them and NCAs had had the opportunity to implement, supervise and enforce the relevant provisions. However, for this first report, it is important to remember that while the majority of the EMIR provisions are applicable, currently some requirements are yet to be implemented (e.g. the clearing obligation for counterparties in category 3 and 4 will start applying as of 21 June and 9 of May 2019 respectively), while others have only recently become fully applicable (e.g. variation margin requirements for non-centrally cleared trades apply to all categories of counterparties since 1 March 2017). ESMA is of the view that at this stage market participants and authorities have had sufficient interaction on the enforcement of the EMIR obligations to undertake this first report and produce meaningful findings.

2 Scope

4. This first Annual Report on supervisory measures and penalties focuses on the provisions related to:
 - a. the clearing obligation (Article 4 of EMIR);
 - b. the reporting obligation (Article 9);
 - c. non-financial counterparties (Article 10); and
 - d. the risk mitigation techniques (Article 11).

5. Other EMIR requirements are not covered in this report because they are addressed in different exercises conducted by ESMA, specifically:
 - a. the Peer Review under Article 21 of EMIR for CCPs, which indeed already covers the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs; and
 - b. the direct supervision of trade repositories under EMIR; as indeed the penalties and supervisory measures imposed on trade repositories, such as the fine imposed by ESMA in 2016 do not fall in the scope of the report as defined in Article 85(5) of EMIR.
6. With regards to the two exercises mentioned in paragraph 5, the related documents are published on ESMA's website¹.
7. For this first report, with some of the EMIR requirements still being phased-in the attention is mainly focused on the supervisory measures undertaken by NCAs rather than on the penalties. Nevertheless, the report includes references to the enforcement tools and procedures together with the penalties that have been already imposed.

3 Source of the information

8. In order to have greater transparency on the supervisory activities of NCAs in their enforcement of counterparties compliance with the EMIR requirements and thus to draw more informed conclusions in this report, ESMA ran a survey that served as a baseline for the preparation of the first annual report on supervisory measures and penalties.
9. The survey contained 20 questions with different items that allowed for multiple answers. The respondent NCAs could further detail or explain any specific circumstance referred to the jurisdiction of their NCAs. The questions can be found in Annex I of this report.
10. The questions were grouped in four different parts: A General information part and three Sections. The first one was dedicated to collect *General information* on the NCAs submitting the answers. *Section I* then focused on the means used to get feedback from market participants and on the organisational aspects of the

¹ ESMA's last peer review report on CCP supervisory activities of NCAs is accessible at the following address: <https://www.esma.europa.eu/press-news/esma-news/esma-review-finds-good-supervision-ccps%E2%80%99-default-management>
ESMA's communication on the first fine imposed on a trade repository is accessible at the following address: <https://www.esma.europa.eu/press-news/esma-news/esma-fines-dtcc-derivatives-repository-limited-%E2%82%AC64000-data-access-failures>

supervisory activity in each country, such as the centralisation of competences in a single authority or the allocation of competences between several. *Section II* focused on the supervisory activities, the enforcement powers and the sources of information used by NCAs for this purpose. Finally, *Section III* focused on the actual supervisory measures undertaken by the NCAs up to December 2017 and on the penalties imposed.

11. The findings in this report do not strictly follow the order and sections of the survey. Instead, all the data was compiled and analysed with the objective to use it in the most comprehensive manner. For instance, several answers from different sections can be used together to corroborate one specific finding in the report.
12. The survey on supervisory measures and penalties was addressed to the NCAs that are members of ESMA's Board of Supervisors². Out of the 31 NCAs, ESMA received answers from the NCAs from the following 26 countries³: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary⁴, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia⁵, Spain, Sweden, and the United Kingdom. The 5 NCAs from the following countries did not provide their answers to the survey: Estonia, Lithuania⁶, Romania, Iceland and Liechtenstein. Iceland and Liechtenstein are a particular case and did not contribute to the survey because EMIR was implemented in EEA countries only recently.
13. In addition, it is to be mentioned that concerning the supervisory measures related to the reporting obligation, the report also leverages on the on-going work undertaken jointly by NCAs and ESMA which aims at improving the quality and usability of data that is reported to trade repositories and allows to identify cross-border issues in relation to the EMIR reporting obligation.

² Members: AT, BE, BU, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LV, LT, LU, MT, PL, PT, RO, SK, SI, SE, NL, UK; Including EEA countries (non-voting members): IS, LI, NO.

³ NCAs submitting the survey: FMA (AT), FSMA (BE), FSC (BU), CySEC (CY), CNB (CZ), BaFin (DE), FSA (DK), HCMC (EL), CNMV (ES), FFSA (FI), AMF (FR), HANFA (HR), HCB (HU), CBoI (IE), Consob (IT), CSSF (LU), FCMC (LV), MFSA (MT), AFM (NL), FSAN (NO), KNF (PL), CMVM (PT) NBoS (SK), FSAS (SE), ATVP (SI), FCA (UK).

⁴ Hungary provided partial answers to certain questions of the questionnaire, which is indicated accordingly in the relevant sections.

⁵ Slovenia did not provide information on item 4.4 dedicated to *supervisory activities* in this report.

⁶ Lithuania explained that their national market for derivatives transactions is small and that the impact of the clearing obligation is low. In addition, they also informed ESMA of the fact that no sanctions have been imposed in their jurisdiction.

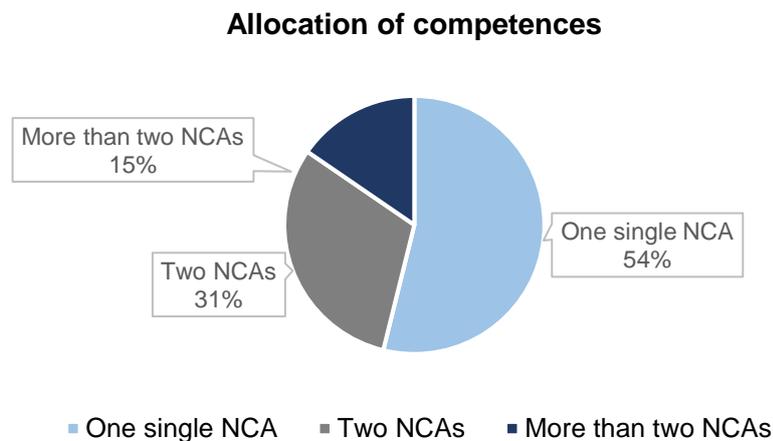
4 Findings

14. Under this section of the report, ESMA presents the findings stemming from the information submitted by the NCAs in response to the survey on supervisory measures and penalties prepared by ESMA.

4.1 NCAs structure and allocation of competences

15. Regarding the organisation and allocation of competences related to the provisions in Articles 4, 9, 10 and 11 of EMIR, 14 of countries⁷ (out of 26) have the supervisory powers and the power to impose penalties centralised in one single NCA. However, in other 12⁸ countries, these competencies are split or shared between more than one authorities. In these cases, in order to respond accurately, the NCA that is member of the ESMA Board of Supervisors has reached out to the relevant NCA(s) in their country to include their contributions for this report⁹.

Figure 1: Allocation of competences for the supervision and the imposition of penalties between NCAs in relation to provisions in Articles 4, 9, 10 and 11 of EMIR



16. In a more granular analysis, we observe that, among the countries with a single NCA in charge of the supervision and the imposition of penalties, in 5 out of 14¹⁰, both the supervisory actions and the imposition of penalties are taken care by the same team/unit within the single authority. On the contrary, the other 9 out of the 14 countries with a single authority¹¹, have a clear separation between the teams in

⁷ AT, CZ, DK, DE, FI, HU, IE, LV, MT, NO, PL, ES, SE, SK.

⁸ BE, BU, CY, EL, FR, HR, IT, LU, NL, PT, SI, UK.

⁹ In particular, the following NCAs were asked to contribute as they share some of the competencies are relevant to this report: the NBB (BE), BNB (BU), the CBoC and SIS (CY), ACPR (FR), BoG (EL), the HNB (HR), CAA (LU), BdI, Covip and IVASS (IT), the DNB (NL), BdP (PT), the BS and AZN (SI), BoE and PRA (UK).

¹⁰ AT, DK, FI, LV, SK.

¹¹ CZ, DE, ES, HU, IE, MT, NO, SE, PL.

charge of the supervisory measures and the imposition of penalties within the same NCA. In some NCAs, such as in the case of Germany and Ireland, although supervision and the imposition of penalties is dealt by different teams within the same authority, the supervisory function is also split depending on the type of counterparty¹² or on the specific provisions that are being monitored¹³.

17. In terms of the size of the teams and the number of people working per NCA on the supervision and on the penalties related to Articles 4, 9, 10 and 11 of EMIR, it is difficult to draw a clear picture. It is usual that NCAs cover different topics (not only EMIR related) with the same team. Only a few NCAs have specific units dedicated to EMIR provisions (such as Germany). Nevertheless, we observe that the range varies from one single person in Latvia to around 15 persons for part of their time in countries such as Germany or Sweden, that are dedicated to the supervision of the provisions in scope of this report.
18. In respect to the other twelve countries (out of 26) that have the supervisory powers and the power to impose penalties decentralised and split between different NCAs, we observe that the majority of them share these competences with their respective Central Banks. The exception being Luxemburg¹⁴, Italy¹⁵, Portugal¹⁶, Slovenia and the United Kingdom¹⁷.

4.2 NCAs' interaction with market participants

19. The data gathered from the survey sheds some light on the level of interaction and the means used by NCAs to interact with market participants in relation to the implementation or the phase-in of EMIR provisions (in particular, Articles 4, 9 and 11 of EMIR). The NCAs have engaged in different activities aimed at providing awareness, training and guidance. From the outcome received, ESMA has extracted data presented in Figure 2 for the specific actions undertaken by each country.

¹² In IE, sectoral supervision teams are responsible for supervising different entities' compliance with all applicable legislation (including EMIR). The team responsible for supervising funds is also responsible for monitoring non-financial counterparties.

¹³ In DE, one team focuses on matters related to Arts. 4, 10-11 and the other, to art. 9 of EMIR.

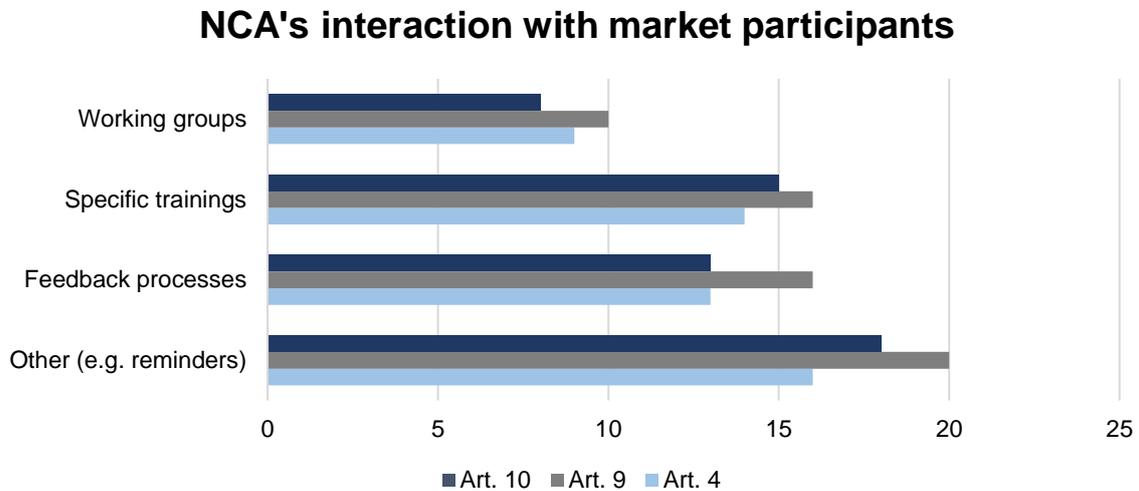
¹⁴ Where the Commissariat aux Assurances (CAA) takes care of the insurance and reinsurance undertakings and the Commission de Surveillance du Secteur Financier (CSSF) of the rest of counterparties.

¹⁵ In Italy, besides the role of Bdl, Covip and IVASS are responsible respectively for the regulatory surveillance of pension funds and insurances.

¹⁶ In addition to the Bank of Portugal, CMVM also shares competences with the Insurance and Pension Funds Supervisory Authority.

¹⁷ Where competences are distributed between FCA, PRA and Bank of England.

Figure 2¹⁸: NCAs' interaction with market participants



20. In the majority of the 26 countries, NCAs have engaged directly with market participants through different initiatives. Around 54% have launched processes to get feedback during the process of the EMIR implementation, with similar figures in respect to the clearing and the risk mitigation techniques and a higher percentage with respect to the reporting obligation. Around 58% of the NCAs have prepared specific trainings. In addition, 35% of the NCAs have engaged in working groups with market participants' representatives and a majority of countries (69%) have undertaken other actions that are summarised below.
21. Regarding the processes to receive feedback from market participants, an average of 14 countries have established a channel or a procedure for this purpose¹⁹. A group of 11 countries²⁰ launched **surveys / questionnaires** and another group of countries²¹ received the feedback mainly from market associations that were regularly invited to discuss regulatory implementation, e.g. the Austrian Economic Chambers in the case of Austria²².

¹⁸ More detailed information by country can be found in Annex II.

¹⁹ Thirteen countries in relation to Art. 4 of EMIR; 16, for Art. 9; and 13, for Art. 11 of EMIR. For detailed information on the particular countries, refer to the detailed table for Figure 2 in Annex I.

²⁰ BE, DE, FI, FR, HR, IT, LU, LV, PL, PT, UK.

²¹ AT, CZ, NL, NO. In CZ, the NCA has only addressed major market participants and banking associations in respect to obligations stemming from Art. 9 of EMIR, the reporting obligation. In the Netherlands, associations were approached in order to reach non-financial counterparties, e.g. the Dutch Corporate Treasurers.

²² Similarly, in Spain, CNMV organised several conferences on clearing, reporting and risk mitigation techniques and their staff have participated in a number of conferences organised by market participants and its associations.

22. In relation to the mentioned surveys, there are two different sub-groups: the first, made of nine countries²³, where NCAs have conducted one or more *one-off* surveys and another, where NCAs have established surveys conducted on a yearly basis²⁴.

One-off surveys:

23. In Belgium, Finland²⁵, Luxembourg²⁶ and Croatia²⁷, general surveys were launched by NCAs and addressed to all their respective supervised entities in order to assess their compliance with requirements in Articles 4, 9 and 11 of EMIR.
24. In Portugal, the CMVM addressed a general questionnaire on EMIR requirements to non-financial counterparties.
25. In Latvia, regarding reporting and before the requirement entered into force, the Financial and Capital Market Commission launched a survey investigating on the level of readiness of market participants, with special interest on whether entities had a pre-LEI and the relevant agreements with TRs in place.
26. In Belgium, the FSMA and the NBB conducted general surveys addressed to all their supervised entities covering reporting, central clearing and risk mitigation techniques.
27. In Italy, (i) Consob launched a self-assessment survey addressed to non-financial entities²⁸ on the level of compliance with the requirement to monitor their level of activity versus the clearing threshold, the adoption of risk mitigation techniques and the reporting of derivatives transactions to TRs; and (ii) Covip launched a self-assessment survey addressed to pension funds (in 2016) on the level of compliance with provisions on risk mitigation techniques.
28. In Germany, Bafin conducted a survey to assess the level of compliance with variation margin rules together with entities' exposure and volume of outstanding OTC derivatives contracts.

²³ BE, DE, FI, HR, IT, LU, LV, PT, UK.

²⁴ FR, PL.

²⁵ This survey took place in 2014 and in 2015.

²⁶ The CSSF launched other specific surveys on compliance of particular requirements, such as the survey on the implementation of variation margin applicable as of 1st March 2017. The main conclusions of this survey were communicated to the market participants via a press release (CSSF press release 15/36). Following this survey, the CSSF contacted in writing, on a risk based approach, individual market participants that did not meet the EMIR requirements satisfactorily as of end of 2015. In the case of banks, this survey was included in a more general EMIR questionnaire

²⁷ In Croatia this surveys were launched in 2013, 2014 and 2015. The survey gathered data from around 80 NFCs and also from FCs. The survey focused on 7 different segments: (1) data on outstanding exposures on OTC derivatives; (2) same data but for ETDs; (3) data on chosen TRs and on delegation agreements; (4) TR reporting (access problems, delegation problems, quality controls, success in reporting, reporting delays and any non-compliance issues); (5) data on the clearing threshold for NFCs; (6) data on their group structures; (7) Risk mitigation techniques (although collateral exchange was not covered at the time).

²⁸ Mainly addressed to companies listed in the Italian stock Exchange and the largest energy companies registered in Italy.

29. In the United Kingdom, the PRA requested selected firms to undertake a self-assessment against the requirements of Article 11 of EMIR and the RTS on exchange of collateral²⁹. Similarly, in France, the AMF requested in May 2016 a selection of 20 investment management companies to make a self-assessment against the exchange of collateral requirements.

Annual surveys:

30. In France and in Poland the NCAs have established questionnaires, which market participants have to submit on a yearly basis. In France, the questionnaire is addressed to investments firms and covers aspects related to clearing, reporting and risk mitigation techniques. In Poland, as part of the Polish Supervisory Review and Evaluation Process, financial counterparties are requested to submit a Self-Assessment Questionnaire that covers EMIR and the relevant delegated acts' implementation³⁰.
31. Other NCAs, such as the FCA in the United Kingdom, mentioned other ways used to receive feedback, such as periodical roundtables or bilateral conversations/meetings/calls with key stakeholders ahead of implementation of EMIR requirements to gather information and decipher any issues that may arise because of the implementation.
32. In addition, other countries such as Finland or Portugal, referred to the exercise launched by ESMA to gather information for the Annual Data Quality Report, as a mean to receive feedback through regular sets of questions sent to market participants regarding the reporting obligation.
33. Another channel used by NCAs to interact with market participants in relation to the requirements in Articles 4, 9 and 11 of EMIR, is to prepare and conduct **trainings**. In average, 15 out of 26 countries³¹ held specific trainings in relation to Articles 4, 9 and/or 11 of EMIR.
34. In Croatia³², France³³, Poland, Portugal, Slovenia³⁴ and in Norway, the NCAs prepared general presentations for introducing the new EMIR requirements. In the United Kingdom, the FCA jointly with the PRA prepared market seminars, including reporting, clearing, and margining requirements, and webinars that were available on the FCA webpage³⁵. In Denmark, especially when EMIR entered into force, the NCA held seminars and invited market participants, with a special effort to reach out to

²⁹ Commission Delegated Regulation (EU) 2016/2251.

³⁰ The survey was conducted for the first time in 2016.

³¹ In relation to Art. 4, 14 countries; in relation to Art. 9, 16 countries and in relation to Art. 11, 15 countries.

³² In Croatia, the HANFA prepared presentations to ensure NFCs awareness.

³³ In France, the NCAs held conferences and meetings to introduce the new EMIR requirements towards market participants and professional associations. On an on-going basis, periodic presentations are held for compliance managers.

³⁴ In 2013, the SMA prepared an open meeting and a round table to present and discuss with the industry on EMIR requirements.

³⁵ In particular, on the implementation of the margin requirements and intragroup exemptions from the margin requirements.

organisations representing non-financial counterparties, as they were not necessarily familiar with financial regulation. In Bulgaria, the FSC organised seminars on EMIR requirements for investment firms.

35. More specifically, regarding the clearing obligation (Article 4 of EMIR), in Austria, Germany and Italy³⁶, NCAs held trainings on intragroup transactions exemptions and the corresponding notifications. In Malta, three training sessions were organised³⁷ for market participants (one with the participation of ESMA staff), focused on the clearing obligation, the intragroup exemptions regime and clearing obligation as applicable to financial and non-financial counterparties³⁸.
36. In some countries, such as Belgium³⁹, trainings were addressed to independent auditors, who under the national law are responsible for checking the compliance of some entities with the provisions in Articles 4, 9 and 10 of EMIR.
37. In relation to reporting, specific trainings were organised by several NCAs: Austria, Finland⁴⁰ and Italy⁴¹.
38. Regarding risk mitigation techniques, specific trainings were also organised by some NCAs, such as Bdl and Consob in Italy⁴² and the FCA and the PRA in the United Kingdom⁴³.
39. Another method used by some NCAs to interact with market participants is to establish **working groups** with representatives of market participants. In total, around 35% of the NCAs set up working groups in relation to Articles 4, 9 and 11 of EMIR⁴⁴.

³⁶ In Italy, Bdl organised this trainings and issued instructions addressed to all financial counterparties.

³⁷ In 2013, 2014 and 2015.

³⁸ A copy of these presentations can be obtained by following this link: <https://mfsa.com.mt/pages/viewcontent.aspx?id=541>

³⁹ Belgium presents a particular case in relation to the implementation of clearing, reporting and risk mitigation techniques by non-financial counterparties. According to Belgian regulation, NFC with a notional amount of outstanding OTC derivatives contracts up to 100 million euros, are to be supervised by independent auditors. The findings of the audit are reported to the NCA, FSMA. FSMA has prepared specific formation for the auditors together with the Belgian institute for auditors, channels for feedback and working groups. The first experience in this regards took place in 2017. In Germany, the system is similar. Non-financial counterparties, have to present a yearly audit from a certified auditor that checks the compliance with EMIR duties. The standards for this audit are discussed and informally agreed between BaFin and the certified auditors. Financial counterparties subject to BaFin's supervision, also go through a yearly audit by an external auditor, in which auditors check whether there are systems and processes in place to guarantee the compliance with the obligations stemming from EMIR.

⁴⁰ In Finland, they organised trainings on EMIR reporting rules addressed to financial counterparties and in a later stage they organised a training on the EMIR & MiFID II reporting regime.

⁴¹ In Italy, Consob organised a special event in 2014 on the use of the LEI and the reporting obligation under EMIR where more than 200 entities participated.

⁴² In Italy, Bdl organised bilateral meetings with the largest financial counterparties and Consob has participated in a number of events organised by banking and market associations, focused on compliance with the timely confirmation, dispute resolution, reconciliation requirements and reporting obligations.

⁴³ The PRA presented alongside FCA to market participants on key aspects of the bilateral margin requirements for non-cleared derivatives (Art. 11 and associated RTS).

⁴⁴ Finland created *ad hoc* working groups with representatives of the market and the Finnish patents and Registration Office. In Czech Republic, the banking association has a special working group on financial markets and the NCA had several of meetings with them. In Belgium a working group of auditors and FSMA representatives that carries out regular meetings. In France, the AMF set up a working group jointly with asset managers. In Bulgaria, the FSC has a working group with market participants' representatives' that meets monthly to discuss different topics, including EMIR requirements.

40. In Germany, the BaFin has established on-going working groups comprised of market associations, the major regulated entities and external auditors. One of the groups focuses on matters related to Articles 4 and 11 of EMIR and another focuses on topics related to Article 9 of EMIR (e.g. UTI/UIP, LEI, application of TR validation rules, and treatment of FX spot vs. FX forward transactions)⁴⁵.
41. NCAs also mentioned **other practices** used to interact with market participants and to raise awareness on the different EMIR requirements.
42. It is an extended practice to answer queries from market participants via email⁴⁶. In some countries, such as in Ireland, Latvia or Sweden, NCAs created dedicated email addresses for this purpose. In Norway, support on EMIR related topics was also provided over the telephone.
43. In terms of online tools, the FCA in the United Kingdom prepared materials to help market participants get ready for the EMIR implementation in the form of dedicated web pages and a web portal with specific guidance and tools available for market participants⁴⁷. Likewise, in the Czech Republic, the Czech National Bank created as well a dedicated website for EMIR purposes⁴⁸. Another group of countries also used their website and their e-newsletter to make specific notifications, announcements⁴⁹ or reminders⁵⁰; and some others used circulars⁵¹ for the same purpose. Additionally, some NCAs referred to meetings and conferences⁵² organised with market representatives⁵³, that served the supervised entities to exchange views with the regulators and, the NCAs to be aware of the challenges faced when implementing provisions on clearing, reporting or risk mitigation techniques.

⁴⁵ In the Netherlands, AFM and the Royal Netherlands Institute of Chartered Accountants (the NBA) have collaborated in order to prepare non-financial entities. In addition, regarding the reporting obligation, the authorities have been in intense contact with banks (prior to the entry into force of the reporting requirement) as the reporting is mostly done by them on behalf of their clients.

⁴⁶ In the case of Germany, BaFin published several Q&As on their website regarding topics related to clearing, reporting and risk mitigation techniques (e.g. such as clarification on the treatment of municipals). In Slovenia, the SMA has also produced Q&As.

⁴⁷ An EMIR Web Portal with guidance and tools to enable firms to meet requirements in relation to notifications on the clearing threshold, notifications on disputes and application forms in relation to intragroup exemptions from clearing.

⁴⁸ It can be visited on: http://www.cnb.cz/en/supervision_financial_market/legislation/otc_derivatives/index.html

⁴⁹ EL, ES, FI, FR, HR, SI, UK. The AMF in France and CNMV in Spain published a calendar to remind about the EMIR phasing-in implementation on their website.

⁵⁰ Reminders: AT, ES, FR, HR, LU, PO, PT. In Austria, the FMA sent reminders and information via email to entities under their supervision (and, in cases concerning NFC, in collaboration with auditors as well). In Poland, the NCA sent to investment firms, banks operating in Poland, insurance companies and investment firms three letters as reminders (on 22/03/2013, 07/11/2014 and 02/02/2017 respectively). In Luxemburg, the CSSF issued two reminders addressed to their supervised entities: the "Reminder on EMIR 13/26", on 24 June 2013; and the "Reminder on EMIR - Reporting obligation starts today", on 12 February 2014. In Portugal, CMVM sent a reminders letter before the entry into force of the new reporting rules, applying since 1 November 2017 (RTS 2017/104).

⁵¹ Circulars: BE, CY and MT. In Belgium, FSMA and NBB has sent different circular letters to the entities under supervision, as the case may be in close collaboration with the auditors of the NFC. CY mentioned that circulars are the only means they use to raise awareness among market participants regarding Arts. 4, 9, 11 of EMIR. All circulars issued by the MFSA in Malta can be accessed through the MFSA website under a section dedicated to EMIR (<https://mfsa.com.mt/pas/announcements.aspx?id=26>).

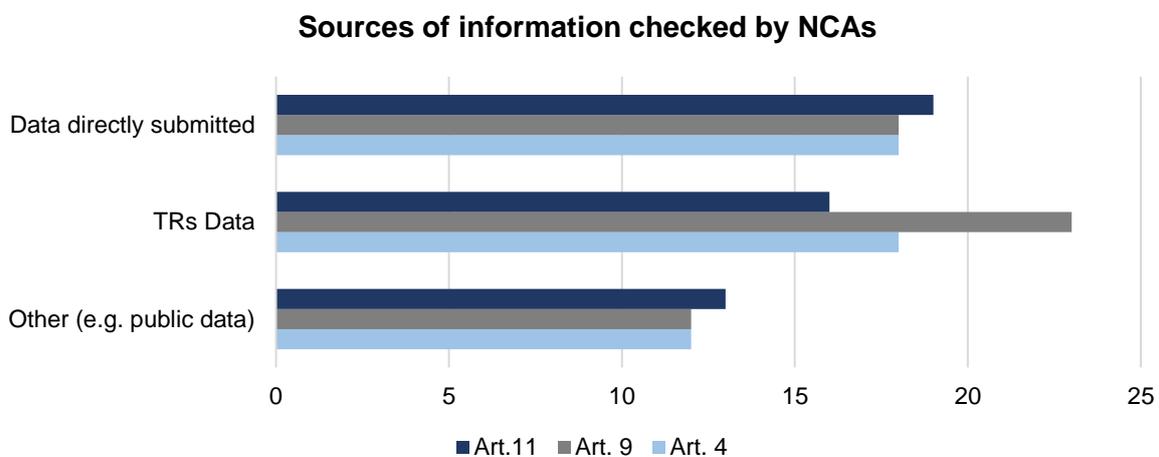
⁵² In Spain CNMV and in Italy Consob mentioned that their staff participated in multiple conferences. Along 2015-2017, Consob staff has participated as speaker to a number of events organized by Banking and Industry Associations focused on the EMIR reporting obligation (in particular, who are the entities obliged to report, the content of the reports to be sent to Trade Repositories, the validation rules applied by Trade Repositories).

⁵³ CZ, DK, FR, DE, SE.

4.3 Sources of information checked by NCAs and its uses

44. When considering the sources of information used by NCAs in order to perform their supervisory duties in relation to Articles 4, 9 and 11, the NCAs reported that the main sources of information are data from TRs together with data regularly submitted by market participants to the NCA. In addition, it was also apparent that the majority of the countries combine both sources to cross check the information reported. Figure 3 shows the results considering 25 countries⁵⁴.

Figure 3⁵⁵: Sources of information checked by NCAs



45. In a comparative analysis, distinguishing between the different requirements provided for in Articles 4, 9 and 11, we observe that depending on the provision one source is more used than another is.
46. In relation to the clearing obligation (Article 4 of EMIR), 72% of the NCAs use data directly submitted by market participants and, simultaneously 72% of the respondents use data from Trade Repositories. On the contrary, for assessing compliance with the obligation to report (Article 9), 92% of the NCAs use TR data while 72% of the respondents use data directly submitted by the market participants. Finally, for provisions regarding risk mitigation techniques (Article 11), 64% of the NCAs use TR data while 76% use data directly submitted by the supervised entities.
47. There are some exceptions to the prevailing trend described above. In Denmark, the NCA relies exclusively on the information and documentation requested at on-site inspections, which might happen according to a risk-based supervisory approach. In Latvia, the NCA also relies exclusively on the data provided by entities and only monitors compliance with the EMIR provisions when granting an intragroup exemption. The Swedish NCA commented that they expect to use progressively

⁵⁴ Hungary did not provide information on this point.

⁵⁵ More detailed information per country can be found in the detailed Table for Figure 3 in Annex II.

more data from TRs as its quality has also increased thanks to the new reporting requirements in place since November 2017.

48. Regarding the data reported to TRs, ESMA has worked closely with NCAs in order to improve the quality of the data and to increase its possible uses. According to the information gathered, data from TRs is used by NCAs for assessing and monitoring: data about the counterparty (ID, type of counterparty)⁵⁶, the clearing threshold⁵⁷, the volume of cleared transactions⁵⁸, the volume of intragroup transactions⁵⁹, volume of non-cleared transactions⁶⁰, the venue of execution⁶¹, the quality and accuracy of data reported⁶², whether the reporting is made timely⁶³, compliance with risk mitigation techniques⁶⁴ (and in particular, the timely confirmation⁶⁵, the valuation reports for outstanding contracts⁶⁶, the number of rejected transactions⁶⁷, the reconciliations⁶⁸, and the practices in relation to the exchange of collateral⁶⁹).
49. In the United Kingdom, the FCA mentioned that the data from TRs is also used to influence policy decisions. For instance, the FCA performed analyses (which was shared with ESMA) on the delay in the implementation of the clearing obligation for small financial counterparties, to assess its impact on those delayed firms and the market as a whole.
50. In Luxemburg, the use of TR data for monitoring compliance with Article 4 of EMIR is planned for 2019 due to the fact that the majority of their supervised entities will only be subject to the clearing obligation by then. Similarly, the FSC in Bulgaria also mentioned that the market participants in their jurisdiction do not exceed the clearing threshold.
51. The NCAs that use information submitted directly by the supervised entities, use it to check compliance with EMIR requirements and, more specifically, for the following purposes: to check counterparties category and whether they are subject to the

⁵⁶ HR, PT.

⁵⁷ HR, PT. In Portugal, CMVM mentioned they analyse TR data to check compliance with the clearing obligation by identifying trades that should be cleared by a CCP due to their type, trading venue and/or the nature of the counterparties.

⁵⁸ DE, FR, HR, IT, MT, ES. MT, indicated that the use of TR data to monitor compliance with the clearing obligation is only useful from an off-site perspective to lay groundwork for a more in-depth analysis particularly when conducting onsite inspections. ES indicated that from this first analysis of the number of cleared contracts they identify the entities in which they should focus more supervisory effort. France mentioned that they also check, when necessary, specific information such as the volumes traded on a specific class of product.

⁵⁹ AT, IE, NO.

⁶⁰ NO, to check if a NFC is above the clearing threshold and should be subject to the clearing obligation.

⁶¹ PT.

⁶² AT, ES, FR, MT, NO, PT, SI. ES indicated that this is a preliminary step to identify potential breaches of reporting rules.

⁶³ FR, PT.

⁶⁴ AT, HR, IT, MT, NO, PT. In Italy, Bdl is not yet using the trade repository's data to monitor compliance with risk mitigation techniques requirements but they are planning to do. MT indicated that checking data from TRs on risk mitigation techniques is only useful from an off-site perspective to lay groundwork for a more in depth analysis particularly when conducting onsite inspections.

⁶⁵ FR.

⁶⁶ FR, SI.

⁶⁷ CY, DE, EL, IT, MT, SI.

⁶⁸ CY, DE, IT, PT, SI.

⁶⁹ ES, HR, PT.

clearing obligation⁷⁰, verify that entities have arrangements in place to report their transactions to TRs⁷¹, check the confirmation arrangements signed by the supervised entities⁷², be aware of delays in confirmation⁷³, check exposures of certain banks⁷⁴, get information about positions from the entities' books⁷⁵, to cross-check data reported to TRs⁷⁶, confirm that entities have procedures in place to comply with the obligation to exchange collateral⁷⁷.

52. In countries where more than one NCA gets information submitted by the supervised entities, it appears important to have the relevant procedures in place for the exchange of information and cooperation where necessary. In the United Kingdom, for instance, the PRA makes use of the FCA's findings on firms' key conduct risks, including money laundering⁷⁸. Similarly, in Croatia, the HANFA has cooperation agreements in place with the Croatian Central Bank to exchange information on the banking sector.
53. Although the majority of countries indicated that they can request extra information on a case-by-case basis, following the principle of proportionality and a risk-based approach, some NCAs mentioned particular tools that they have developed for this purpose:
54. Some NCAs check other sources of information, such as financial statements⁷⁹ or information published by entities (press-releases, annual reports, website and media coverage)⁸⁰.
55. Information gathered from questionnaires is also useful for crosschecking data from other sources. In Poland, the NCA receives periodic information from banks through the annual Self-Assessment Questionnaire, which consists in questions regarding

⁷⁰ CY, FR, HR, LU. In Luxembourg, the insurance entities have to submit information on derivatives transactions through the Solvency II reporting templates, and this data is used by the CAA during on-site inspections in order to assess the compliance with article 4 of EMIR.

⁷¹ CY, FR, HR, IT, PT. In Italy, Consob may require a copy of the procedures in place for reporting and documentation related to the delegation agreement. On the contrary, Germany mentioned that for the risk mitigation techniques the NCA relays exclusively on TRs data.

⁷² FR, IT, PT.

⁷³ IT, PT.

⁷⁴ DE.

⁷⁵ ES.

⁷⁶ BU, ES, HR, SK.

⁷⁷ CY, ES, IT, PT, SI. In Italy, the insurance supervisor (IVASS) can also ask directly for information regarding the risk mitigation techniques. In Portugal, the CMVM on a risk-based approach asks information on the risk management procedures to ensure timely, accurate and appropriately segregated exchange of collateral, timely confirmation of the terms in OTC contracts, the processes for portfolio compression and on the procedures in place for the portfolio reconciliation and the frequency in which such reconciliations are performed. Concerning dispute resolution, CMVM inquires on the procedures implemented in relation to identification, registration, monitoring and resolution of the disputes and what is the dispute settlement method established between the parties.

⁷⁸ However, the PRA is not a 'fraud' regulator; this role is filled by other authorities. The PRA's onsite inspections are not therefore designed to uncover all instances of malpractice. Rather, the PRA aims to assess the adequacy of a firm's control framework in preventing operational risk (including serious fraud) that could threaten its safety and soundness, drawing to the attention of the relevant authorities any suspicion or information that may be of material interest to them.

⁷⁹ FI, HR, MT.

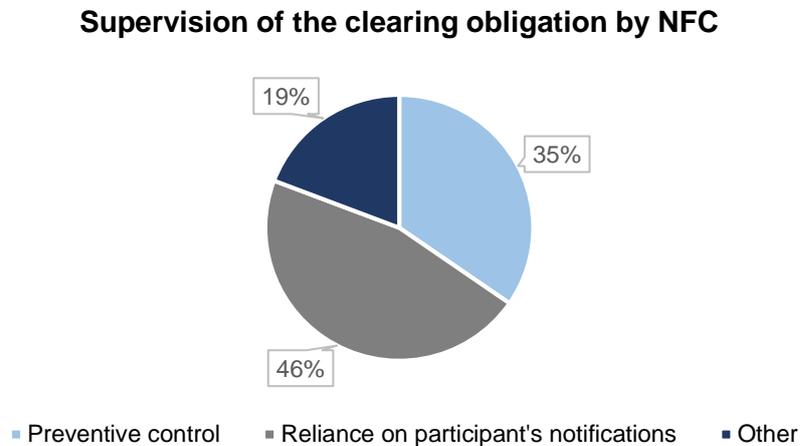
⁸⁰ CY, HR, NL, NO, SK, UK. In the UK, the PRA may ask for firm-specific data, e.g. management information or forecasts. To support its information gathering and analysis, the PRA requires firms to participate in meetings with supervisors. In NL, in addition to cross-checking data from Trade Repositories with information available from the entities, with regards to reporting the authorities also contact the bank who has reported on behalf of the entity.

the implementation of EMIR and the delegated acts⁸¹. In Spain, CNMV uses data in reports that are considered prudentially relevant as per pillar III in the CRR together with the balance sheet to crosscheck data from TRs.

56. In Belgium, the FSMA and the NBB also received data from some of the entities under their supervision through a questionnaire that was used to compare the information against data from: (i) TRs; (ii) the entities' annual reports; (iii) specific reports related to the use of derivatives with a hedging purpose. After this preliminary cross-check, the NCAs followed-up directly with the entities that presented data discrepancies. In Germany, the NCA uses as well the information from the yearly reports from the entities' external audit. In Croatia, the HANFA has the authority to appoint an external auditor to check compliance with EMIR for FCs and NFCs with materially significant derivatives' positions and, for those cases, the audit report would also be taken into consideration when checking compliance.
57. In the United Kingdom, auditors and the PRA have a similar system: The PRA maintains rules setting out the duties of external auditors and the way to co-operate with the PRA in connection with its supervision of PRA-authorized firms and has published a Code of Practice detailing the arrangements it will maintain with entities' external auditors. The PRA has to meet at least once a year with the auditors of each deposit-taker and investment firm that is, in the opinion of the PRA, important to the stability of the United Kingdom financial system. The PRA expects auditors to disclose emerging concerns within firms.
58. In connection with the obligations in Article 10 of EMIR for **non-financial counterparties**, Figure 4 represents the different approaches shared by the NCAs when monitoring NFCs activity in relation with the clearing obligation.

⁸¹ In the 2017 Self-Assessment Questionnaire there were 7 questions related to EMIR compliance, assessing: (i) Keeping the record of the contracts as specified in art.9(2) of EMIR; (ii) Reporting contracts to trade repository as specified in art.9(1) of EMIR, (iii) Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP as specified in art. 11 of EMIR; (iv) Work carried out by the bank in order to prepare for settlement, via the CCP, classes of derivatives indicated in the Delegated Act 2015/2205; (v) Work carried out by the bank in order to prepare for settlement, via the CCP, classes of derivatives indicated in the Delegated Act 2016/1178; (vi) OTC interest rate derivatives transactions, which the bank does not settle through an authorized CCP; (vii) Work carried out by the bank in order to prepare for bringing in a variation margin and exchange of initial margins in connection with the requirements of the Delegated Act 2016/2251.

Figure 4: Supervision of the clearing obligation by NFCs



59. With a focus on the clearing obligation, in nine countries (out of 26)⁸², the NCAs do perform a preventive supervisory control to check the clearing threshold⁸³ and a potential evasion from the clearing obligation. It should be noted that in some countries the domestic NCAs argue that in small markets there are no NFC expected to be above the clearing threshold⁸⁴.
60. Going back to those NCAs performing a preventive control, in Austria, Italy⁸⁵, Portugal, Spain⁸⁶ and Sweden, the compliance of NFCs with EMIR is assessed using data from TRs. In France, although the authority mainly relies on the participants' notifications, the AMF has also implemented a tool to estimate whether NFCs are exceeding clearing threshold, based on data from TRs⁸⁷.
61. In Malta, data from TRs is used in combination with the notifications received from market participants and with the information gathered on regular onsite compliance meetings held with non-financial counterparties. During such onsite meetings, the MFSA conducts interviews with the respective employees of the company and obtains relevant documentation in relation to compliance with EMIR requirements (including the clearing obligation). The MFSA also requests the calculations made by

⁸² AT, ES, FI, FR, IE, IT, MT, PT, SE.

⁸³ Art. 11 of the Commission Delegated Regulation (EU) no 149/2013: The clearing thresholds values for the purpose of the clearing obligation shall be: (a) EUR 1 billion in gross notional value for OTC credit derivative contracts; (b) EUR 1 billion in gross notional value for OTC equity derivative contracts; (c) EUR 3 billion in gross notional value for OTC interest rate derivative contracts; (d) EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts; (e) EUR 3 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for under points (a) to (d).

⁸⁴ This fact was mentioned in the survey by BU, CZ, LV, SK.

⁸⁵ In Italy, Consob periodically analyses the TR data to check the total volume of activity of an NFC. If it appears that that the clearing threshold has been reached but no notification has been sent by the entity, the authority will asks for further information and will check the procedure adopted by that counterparty in order to assess the purpose of the derivative contract (hedging/non hedging purpose).

⁸⁶ In Spain, TR information is cross-checked with the information publically available from the entity.

⁸⁷ However, it should be noted that this tool shows some limitations: (a) Groups may not be accurately identified and reported trades may not be exhaustive for multinationals; (b) The tool is based on data of variable quality stemming from trade repositories, including intragroup flags, hedging/no hedging flag, etc.

supervised NFC entities in order to determine whether they exceed the clearing threshold. In IE, NFCs with significant derivative positions are required to report annually to the authority (through the EMIR Regulatory Return⁸⁸).

62. On the contrary, the NCAs of the other twelve countries rely exclusively on market participants' notifications⁸⁹ and five other NCAs⁹⁰, indicated that they were neither performing supervisory checks nor relying exclusively on the notifications with regards to monitoring the compliance of NFCs.
63. In Belgium, in Germany and in the Netherlands⁹¹, NCAs monitor indirectly the compliance of NFCs with EMIR provisions through the collaboration with the external and certified auditors responsible for these assessments according to their national regulation. Greece, instead, uses data periodically submitted in relation to NFCs by credit institutions and investment firms to the HCMC for checking NFCs' activity. In Croatia, the HANFA has checked whether there were non-financial counterparties above the clearing threshold in their jurisdiction through questionnaires in 2014 and 2015. At the same time, they have enacted a new Capital Markets Act that starting from the third quarter of 2018 will require external auditors' reports from NFC with significant positions in OTC derivative contracts together with annual self-assessment questionnaires⁹².

4.4 Supervisory activities

64. Figure 5 presents the different supervisory activities available to the NCAs, when complying with their duty to assess compliance with the EMIR provisions (Articles 4, 9 and 11)⁹³.

⁸⁸ The CBol, may require counterparties with significant derivative positions to complete an EMIR Regulatory Return (ERR) More information on the ERR can be found following this link: <https://www.centralbank.ie/regulation/industry-market-sectors/securities-markets/emir-regulation/emir-regulatory-return>

⁸⁹ BU, CY, CZ, DK, LV, HU, LU, NO, PL, SI, SK, UK. LU specified that although they rely on the notifications, they perform consistency checks using TRs data. In UK, the FCA has created a portal where NFC can register their details and use the relevant sections to notify the FCA when they are above the clearing threshold (as well as if they subsequently go below it).

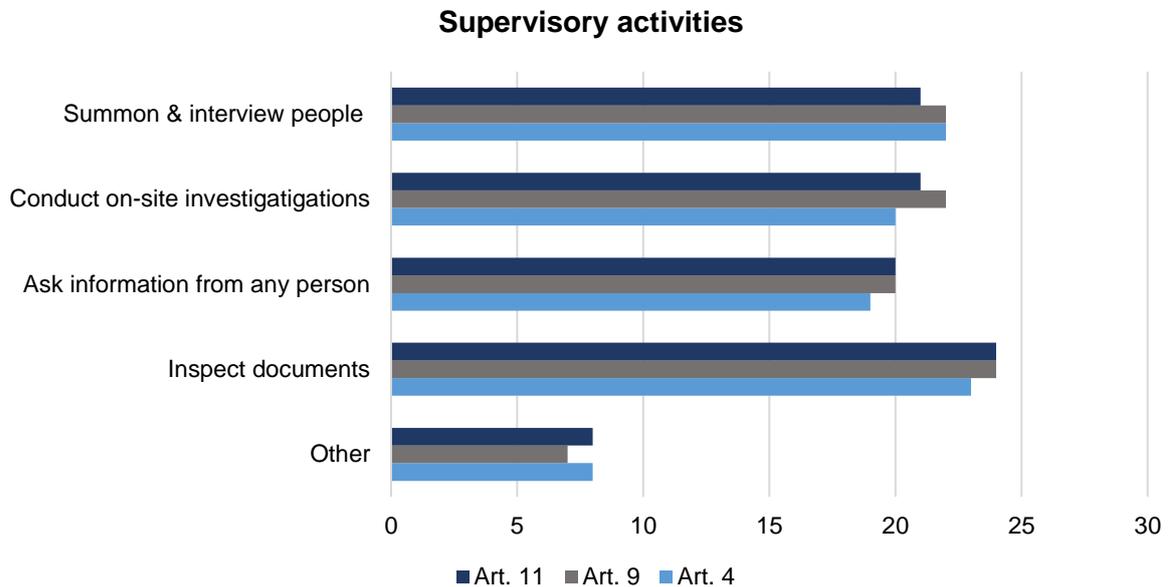
⁹⁰ Belgium, Croatia, Germany, Greece and the Netherlands.

⁹¹ In the Netherlands, the AFM has instructed the Royal Netherlands Institute of Chartered Accountants with guidance on how to check compliance with the clearing obligation. This instruction has not the status of a legal requirement but it should be followed by accountants and in case it was not, any deviation would need to be justified.

⁹² On the HANFA website there are forms prepared for NFCs to notify clearing thresholds and to apply for intragroup exemptions, In addition, the HANFA has specific powers to impose administrative fines to NFCs when they fail to (i) notify that they exceed the clearing threshold; (ii) clear contracts once they become subject to the clearing obligation; (iii) include in the calculation of OTC contracts all the contracts entered into within the group; (iv) notify HANFA its intention to apply the intragroup exemption.

⁹³ For this question, only 24 NCAs are taken into consideration because Hungary and Slovenia did not provide the corresponding information.

Figure 5⁹⁴: Supervisory activities



65. In terms of supervisory activities, based on information submitted by NCAs through the survey, it is apparent that the vast majority of NCAs have powers for undertaking the following four different types of supervisory activities:

- (a) **Ask for any kind of documentation from the counterparties** related to the obligations steaming from Articles 4, 9 and 11 of EMIR

This is the most used supervisory action among the NCAs. On average, 99%⁹⁵ of the NCAs can use this tool for the exercise of their supervisory duties in relation to Articles 4, 9 and/or 11, which means that all NCAs can ask for any documentation from the counterparties in relation to obligations provided for in Articles 4, 9 and 11, with Portugal being the exception and only for Article 4.

- (b) **Conduct on-site investigations**

On average, 95% of the NCAs⁹⁶ can undertake on-site investigations. As indicated by the respondents, this power is used following a risk-based approach and, usually, focusing on one particular aspect⁹⁷. The only exceptions in relation to the possibility of carrying out on-

⁹⁴ More detailed information on the specific countries can be found in Annex II.

⁹⁵ In relation to Art. 4, 96% of the countries; in relation to Art. 9 and Art. 11, 100% of the countries.

⁹⁶ With 87% of the countries for Art. 4 and 11 and 92% for Art. 9.

⁹⁷ In Germany, BaFin specified that they have the right to enter the premises of *any* person who is subject to the obligation to deliver information to BaFin (not only the counterparties), with some restrictions that would apply if those inspections were to take place outside business hours. In the UK, the PRA also, as appropriate, conducts detailed onsite testing or inspections of a particular area. In-depth, focused reviews, for example of a firm's proprietary trading desk or its approach to valuations or risk weightings, involve discussions with staff, reviews of internal documents and some testing.

site inspections are Latvia (regarding Article 4 of EMIR), Bulgaria (regarding Articles 4 and 11), Portugal (regarding Articles 9 and 11) and Sweden (regarding Articles 4, 9 and 11 of EMIR).

(c) **Summon and interview people**

On average, 88% of the NCAs⁹⁸ can summon and interview people when assessing the compliance with provisions in Articles 4, 9 and 11 of EMIR⁹⁹. The exceptions in this respect are Bulgaria and Portugal¹⁰⁰.

(d) **Ask information from any person (including third parties)** in relation to EMIR provisions on clearing, reporting or risk mitigation techniques

On average, 83%¹⁰¹ of the NCAs can ask information regarding EMIR compliance to any related person, without limiting this power to the supervised entity. The exceptions are: Belgium, Luxemburg, Portugal and the Slovak Republic with respect to Article 4; and Belgium, Denmark, Luxemburg and the Slovak Republic for Articles 9 and 11 of EMIR.

Concerning the use of this power, Denmark and Poland¹⁰² mentioned that it is restricted to cases where a potential infringement is suspected. On the contrary, in Germany and Cyprus¹⁰³, the authorities can ask for information without being restricted to the pair of counterparties and can require copies of documentation without constraints related to a specific suspicion.

In Norway, if the FSA does not receive the requested information from a supervised entity, the NCA can interview the employees. Similarly, in Sweden, the authority can ask for information from any person that presumably has access to it, with the only exception of information that would be in contravention with an attorney's legally mandated professional secrecy obligation. In Finland, Belgium, Germany, Luxemburg¹⁰⁴ and the

⁹⁸ With 87% for Arts. 4 and 9; and 83% of NCAs for Art. 11 of EMIR.

⁹⁹ In the UK, the PRA does have power to require people to attend interviews, but when there are circumstances to suggest that a person may have contravened the relevant provisions of EMIR, the PRA may appoint one or more competent persons to conduct an investigation on its behalf. Investigators in this case have certain powers conferred, such as require the person under investigation or any person connected (a) to attend before the investigator at a specified time and place and answer questions; or (b) otherwise to provide such information as the investigator may require.

¹⁰⁰ In relation to Articles 4, 9 and 11 of EMIR.

¹⁰¹ With 83% of the countries in relation to Arts. 4, 9 and 11.

¹⁰² In relation to the persons to whom the PRA can ask information, its capacity to require information is limited and cannot be addressed to 'any person'.

¹⁰³ In Cyprus, the CySEC may request and collect information necessary or useful for the exercise of its responsibilities and demand the provision of information from entities under its supervision and from any other natural or legal person which is subject to CySEC's inspection competence, as well as from any other person which CySEC considers, at its absolute discretion, that it is in a position to provide such information. CySEC can also request information from a CCP, for instance, in order to verify that a market participant is complying with EMIR.

¹⁰⁴ According to Art. 2(1) of the Law of March 15th 2016 implementing Regulation 648/2012, the CSSF and the CAA in their respective areas of competence can apply this measure.

United Kingdom¹⁰⁵ ¹⁰⁶, NCAs can ask for information from the external auditors responsible for auditing supervised entities as per their respective national regulation.

66. Regarding the powers to ask for information, Italy mentioned that, so far, Consob has exercised the power to ask information and to interview people in relation to the reporting obligation and to the adoption of the risk mitigation techniques.

Supervisory activity in relation to third country entities and the potential evasion from the clearing obligation

67. The survey also investigated any specific measures undertaken by NCAs in relation to third country entities trading contracts with substantial effect in the Union, which would be subject to the clearing obligation if established in the EU. The question was aimed at understanding how NCAs have put in place any strategy to detect potential clearing evasion, and thus maybe identify best practices. However, only a few comments were received¹⁰⁷ on the practices in this respect. It would appear that there might be a need to think more about the assessment of this aspect in relation to the clearing mandate.

Supervisory approach in relation to Article 11 of EMIR

68. More specifically, the information gathered from the survey and presented in Figure 6 shows that, concerning the regulatory requirements envisaged in Article 11 of EMIR for risk management procedures (i.e. the timely, accurate and appropriately segregated exchange of collateral), NCAs undertook the following approaches and actions:

¹⁰⁵ External auditors can and should play a role in supporting prudential supervision, given their ability to identify and flag to the PRA current and potential risks in a firm. The PRA maintains arrangements to provide a firm's external auditors with relevant data and information, for example, if it considers a firm's valuations of less liquid assets or its approach to provisioning to be significantly out of line with its peers, as well as exchanging opinions with those auditors on the implications of such information.

¹⁰⁶ In the UK, powers for asking for information in relation to Articles 4, 9 and 11 of EMIR are shared between different NCAs: between FCA, the BoE and the PRA (specific competences for Art. 11). The use of PRA's powers is presented in the PRA's enforcement guide:

<https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf>. In particular, regarding Art. 9, in forming supervisory judgements, the PRA draws on a broad set of quantitative and qualitative information and data. Supervisors require firms to submit sufficient data, of appropriate quality, to inform their judgements about key risks. Given the importance of this, the PRA periodically validates firms' data, through onsite inspection either by its own supervisory and specialist risk staff or by third parties.

¹⁰⁷ In the UK, the FCA indicated that they investigated issues encountered and raised by UK entities in relation with third country entities and, where necessary, they access TR data to better monitor trading patterns with third country entities. In Malta, the NCA mentioned that through on-site visits, they checked OTC derivative contracts entered into by branches located in third countries to check their compliance with EMIR rules.

Figure 6: Supervisory approach regarding risk mitigation techniques

Actions	Countries
a. Supervisory measures only following a risk-based approach	21: AT; BE; BU; CY; CZ; FI; FR; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; SK; ES; SE; UK
b. Random controls/inspections to monitor compliance	9: BE; CY; IT; LU; MT; NO; PT; SK; UK
c. Periodic requests for information/documentation to proof compliance	10: BE; CY; FR; DE; ES; HR; IT; PL; SI; UK
d. Other	6: BE; FR; DE; EL; NO; PL

69. The vast majority of NCAs, 81%, monitor compliance with risk management procedures requirements under Article 11 of EMIR following a risk based approach. This is combined in some cases with random controls and inspections (35% of the NCAs) and with periodic requests for information addressed to supervised entities (38% of the NCAs). In addition, six countries referred to different actions.
70. In France, for instance, the NCA was made aware by market participants of operational challenges for exchanging margin with smaller counterparties and they asked market participants to document the steps taken towards full compliance, in order to assess their degree of compliance on a case-by-case basis.
71. In Poland, requirements in Article 11 of EMIR are subject to periodically scheduled inspections for investment firms and, in addition, the KNF has implemented a periodic examination that covers the requirements under Article 11 addressed to monitor compliance of insurance and reinsurance companies, known as “BION process”.
72. In Belgium and in Germany, as mentioned, the NCAs check the reports produced by the external auditors to confirm that their supervised entities comply with the requirements in Article 11 of EMIR. In Norway, the FSAN pointed out that they are considering the possibility of introducing the obligation to present a report from external auditors confirming the entities’ compliance with Article 11.

4.5 Investigations conducted

73. From the information gathered in the survey, Figure 7 presents the number of investigations undertaken by each country during 2017.

Figure 7¹⁰⁹: Number of investigations undertaken by the NCAs during 2017¹¹⁰

	Art. 4	Art. 9	Art. 10	Art. 11
None	16: BU; CZ; DK ; FI; FR; IE; EL ; IT ; LU; LV; PT ; MT; NL; SE; SI; UK	10: BU ¹⁰⁸ ; CZ; FI; HR; IE; LV; MT; NL; NO; SI	20: AT; BU; CY; CZ; DK; EL; FI; FR; HR; IE; IT; LU; LV; MT; NL; NO; PT; SE; SI; UK	13: BU; CZ; EL; FI; HR; IE; LV; MT; NL; PT; SE; SI; UK
From 1 to 5	6: AT; DE; ES; HR; NO; SK	4: FR; EL; SK; UK	3: DE; ES; SK	5: AT; FR; LU; SK; NO
From 6 to 10	0	4: AT; DK; PL; SE	0	3: DK; IT; PL
From 11 to 20	2: CY; DE	3: CY; ES; PT	1: PL	2: CY; ES
More than 20	1: BE	4: BE; DE; LU; IT	1: BE;	2: BE; DE

74. The percentage of NCAs that have conducted investigations during 2017 varies depending on the EMIR requirements assessed. In decreasing order, 60% of the NCAs conducted investigations in relation to the reporting obligation (Article 9); 48% of the NCAs conducted investigations in relation to risk mitigations techniques (Article 11); 36% conducted investigations on requirements related to the clearing obligation (Article 4); and only 21% of the NCAs initiated investigations on the requirements related to non-financial counterparties (Article 10).

75. However, these percentages also mean that 64% of the NCAs did not perform any investigation in relation to the clearing obligation and that in relation to the requirements for non-financials, the percentage of NCAs that did not conduct any investigation is of 79%.

¹⁰⁸ This Figure only takes into consideration the investigations conducted during 2017, however, during 2015-2016, in Bulgaria the FSC conducted 19 investigations in relation with the reporting obligation and in 15 other cases, conducted on-site investigations.

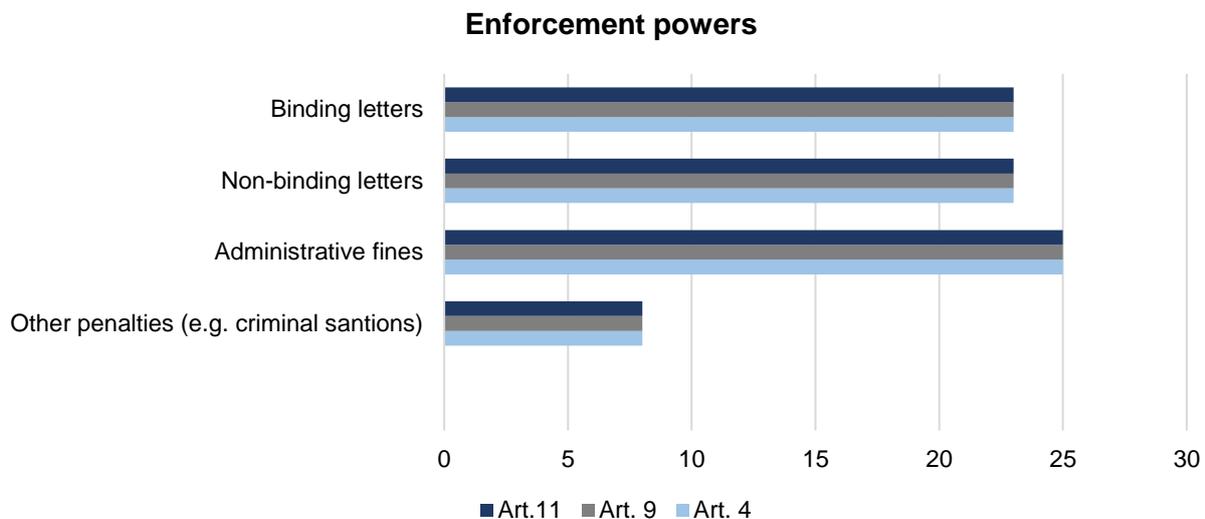
¹⁰⁹ Hungary did not provide information for this table and therefore the results only consider 25 countries.

¹¹⁰ In countries with more than one competent authority, all the investigations are counted as if it was one single NCA. That means that the numbers respond to the number of investigations undertaken per country.

4.6 Enforcement actions

76. The survey’s feedback shows that there are three main enforcement powers shared by a great majority of the NCAs, which are presented in Figure 8: (a) the power to impose administrative fines; (b) to issue binding letters; and (c) non-binding letters or recommendations. Around 31% of the countries also mentioned that they have criminal penalties in place for infringements of EMIR provisions.

Figure 8:¹¹¹ Enforcement actions



(a) Non-binding letters and recommendations

The vast majority of countries, 88% of the respondents, can issue non-binding letters and recommendations, with only Cyprus, Denmark and Slovenia being the exception. Some countries indicated that they use Q&As as a tool to issue recommendations or non-binding actions¹¹².

In Greece, the Hellenic Capital Markets Commission referred to non-binding recommendations issued as part of an exercise of thematic reviews, focused on the compliance with different aspects of EMIR. In Italy, Consob issued two communications recommending counterparties to adopt appropriate tools to monitor/control the quality of data reported to the Trade Repositories¹¹³.

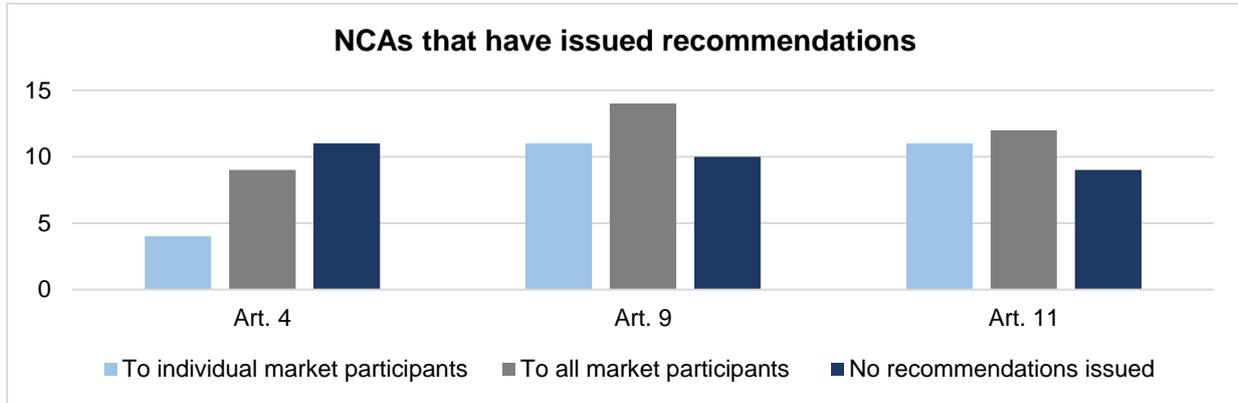
¹¹¹ For detailed information for each countries, see the table for Figure 8 in Annex II.

¹¹² CZ, DE, LV.

¹¹³ Communication n. 9517, dated 3rd of February 2016 and Communication n. 69306 dated 22nd of May 2017. In Italy the three NCAs can issue non-binding recommendations: Consob, Bdl and Covip.

Figure 9 shows which NCAs issued recommendations up to December 2017 and in relation to which articles of EMIR.

Figure 9¹¹⁴: NCAs that have issued recommendations



From the NCAs that answered only four provided the actual number of recommendations issued. However, in terms of the amount of recommendations issued, there is a wide range of numbers among the different NCAs; from none for certain NCAs, to more than 20 recommendations per year for others, up to December 2017.

From the data gathered in the survey it is observed that, overall, more NCAs have issued recommendations in relation to the obligation to report (Article 9) and the risk mitigation provisions (Article 11) than for the clearing obligation (Art. 4). This figure also demonstrates a preference for recommendations addressed to all market participants rather than addressed to individual market participants.

(b) **Binding** letters and binding recommendations

As happens with the non-binding letters, 88% of the respondents do also have the power to issue binding letters or binding recommendations. Only Austria, the Check Republic and Poland are the exception. Amongst the countries that can use this power, Cyprus, Germany, Italy, Malta and Spain expressly mentioned that these letters can be used as a first step when a breach has been detected to request a supervised entity to correct a particular situation and, if the conduct is not amended, the case might end up in a fine or other kind of penalty. In addition, in Germany, the authorities can enforce binding letters via daily penalties for each day the entity is late in correcting the case that motivated the letter. In Denmark, the Danish Financial Supervisory Authority issues binding recommendations and orders, however, the Danish FSA has no competence to impose fines directly¹¹⁵.

¹¹⁴ Detailed information on each country can be found in the detailed Table for Figure 7 in Annex II.

¹¹⁵ Breaches will be reported to the Police that will deal with the fines and, depending on the breach, would involve the Courts.

(c) Administrative fines

Almost the totality of the respondents to the survey have administrative fines in place for breaches related to EMIR requirements (specifically under Articles 4, 9, 10 and 11)¹¹⁶. The amounts range between a minimum of 125 euros in Luxemburg and a maximum of 100 million euros in France. Some other countries cannot provide an estimation of the amount of the fines because it is set on a case-by-case basis without a predefined range and, in some of the jurisdictions, it is determined by the Court¹¹⁷.

There are four groups of countries in terms of the criteria and the system used to quantify the administrative fines:

- Up to a maximum amount:

Listed in increasing order, the administrative fines can be up to 150.000 euros in Austria and in Malta¹¹⁸; up to 10 million CZK (approximately 400.000 euros) in the Czech Republic¹¹⁹; up to 2.5 million euros in Ireland; and up to 3 million euros in Greece.

- A range between a floor and a cap amount:

Administrative fines can range from around¹²⁰ 26,666 to 66,666 euros in Croatia¹²¹; from 50,000 to 500,000¹²² euros in Germany; and from 5,000 to 50 million SEK (approximately from 400 euros to 5 million euros) in Sweden and from 500,000 and up to 1,000,000 euros in the Netherlands¹²³. Bulgaria has a particular system where the amounts of the fine varies depending on whether the infringement occurs for the first time or if it is a repeated behaviour. According to this system, the amounts of the fine range from 5,000 to 20,000 euros for a first breach and from 10,000 to 40,000 euros in the event of repeated breaches¹²⁴.

¹¹⁶ Denmark is an exception as the NCA cannot impose fines and it is for the Police and/or the Courts can impose only criminal penalties in the form of a fine.

¹¹⁷ In Croatia, the HANFA cannot impose the fines directly but only through initiating a misdemeanour proceeding before the Courts.

¹¹⁸ Where a person acting as a central counterparty or trade repository and, or who is responsible for clearing and bilateral risk management requirements for OTC derivatives and, or who is responsible for reporting requirements for derivative contracts contravenes or fails to comply with any provisions of the EMIR Regulation.

¹¹⁹ For entities "failing to fulfil any of the duties or by failing to cease from violating any of the prohibitions set out in the EMIR".

¹²⁰ This is an approximation based on the fines' amounts in HRK.

¹²¹ In Croatia, the person responsible in the entity where the infringement took place, will also be fined with an amount that ranges between 4,000 and 6,666 euros.

¹²² E.g. for breaching the obligation to clear.

¹²³ 500,000 euros is the "base amount", meaning that this should be the minimum fine unless it is lowered according to the principle of proportionality, a bad financial situation of the entity or other special circumstances. The amount could be lower up to zero euros if it is duly justified.

¹²⁴ In Bulgaria the FSC issued in three occasions an act establishing an administrative violation but those were appealed and finally no fines were imposed.

- A fix amount + a variable amount consisting of up to 10% of the annual turnover of the entity or a coefficient of the profit gained by the infringement:

In Luxemburg, the CAA and the CSSF can impose administrative fines between 125 euros and 1.5 million euros. If the offense provided a financial benefit, directly or indirectly, the fine shall be not less than the amount of the profit gained and no more than five times the gain. In Cyprus, the CySEC can impose administrative fines of up to 350,000 or 700,000 euros in case of a repeated violation of EMIR provisions. Alternatively, the CySEC can impose administrative fines up to twice the amount of the gain, which the person responsible proved to obtain illicitly.

In Poland, fines can be between PLN 1 million and PLN 10 million (approximately between 240,000 and 2.5 million euros) and the fine cannot exceed either 10% of the last audited financial statements' turnover, or 10% of the revenue shown in the last approved financial statement¹²⁵. Similarly, the National Bank of Belgium can also impose fines up to 5 million euros or up to 10% of the entities' turnover; while the Belgian FSMA can impose fines up to 2.5 million euros and this amount can be increased if the breach led the entity to an extra gain or to the avoidance of a loss (in which case, the amount can be three times the extra gain or the avoided loss).

In France, the amount shall not exceed 100 million euros or more than 10 times the amount of the benefit derived from the breach.

- Distinction between a natural and a legal person:

In Latvia, administrative fines range up to 142,300 euros for legal persons and up to 57,000 euros for natural persons. In Italy, for infringements related to articles 4, 9 and 11, the fines are between 5,000 and 5 million euros for natural persons; and between 30,000 and 5 million euros, or up to 10% percent of turnover, if a legal person commits the infringement¹²⁶.

In Finland, in relation to infringements of Articles 9 and 11, the administrative fines can be between 5,000 and 100,000 euros for a legal person and between 500 and 10,000 euros for natural persons. In case of infringement of Articles 4 and 10, the amount of the fine is up to 10% of the annual turnover of a legal person (with a maximum amount of 10,000,000 euros) or up to 10% of the annual income of a natural person (with a maximum amount of 100,000 euros).

Slovenia is a particular case where administrative fines range between 12,000 and 150,000 euros for small legal entities; 25,000 and 250,000 euros for medium and large legal entities and 6,000 and 100,000 euros for natural persons. Furthermore, an

¹²⁵ The amounts will depend on the kind of entity, According to art. 173a(1)-(3). of the Act on trading in financial instruments (Journal of Laws 2005.183.1538 as amended).

¹²⁶ This happens when and if the turnover figure is available and can be determined pursuant to article 195(1bis) of the Legislative Decree 58/98.

additional fine shall be imposed on the person responsible of the legal entity or on the natural person that committed the infringement in relation to EMIR requirements.

In other countries, such as in Spain or the United Kingdom¹²⁷, the range and amount of the penalties in relation to a breach of EMIR will vary for each individual case^{128 129}.

Other enforcement tools

77. Some countries indicated in the survey that they have in place other enforcement tools for breaches in connection with Articles 4, 9, 10 and 11 of EMIR: in France, like in the United Kingdom, Luxemburg, the Slovak Republic and the Netherlands, authorities can impose a temporary or even permanent ban on the provision of a service.
78. In Malta, the MFSA can ask for any telephonic records and, when considered necessary, it could issue an order for the freezing of funds and bank accounts pertaining to the supervised entity or other third parties. The order may also prohibit a license holder from transferring, disposing or losing possession of any such funds or assets. These orders could be issued at the request of a foreign enforcement or supervisory authority.
79. In the United Kingdom, the PRA has a variety of formal powers, which it can use in the course of its supervision, if deemed necessary to reduce risk. The PRA can intervene directly in a firm's business in different ways, for example, it may amend a firm's permission or impose a requirement to prevent or curtail a firm undertaking certain regulated activities, which may require a change to a firm's business model or future strategy. In addition, the PRA may use its powers to approve or allow certain changes requested by firms, (for example, a change in a firm's controller or in its permissions to perform regulated activities). Where those changes could adversely affect the safety and soundness of the firm, the PRA could refuse such requests. The PRA may also prohibit any individuals, not just those who currently hold a Senior Management Function, from performing functions in relation to a regulated activity carried out by one of their supervised entities, where it appears that an individual is not fit to perform such functions. In addition, the PRA and the BoE have the power to

¹²⁷ The FCA, the PRA and BoE can impose administrative fines related to infringements of EMIR.

¹²⁸ In Spain, as per Arts. 302, 303, 305, 306 and 307 of the Spanish Securities and Markets Act, the fine may be determined as a multiple of the profit obtained due to the infringement, as a percentage of a balance sheet figure or on the basis of fixed quantities representing a floor.

¹²⁹ Depending on the type of the breach, the length of the breach, if the firm have had any other fines imposed on them for similar breaches, did the breach affect other market participants, the way in which the breach was notified to the FCA, as well as other factors. The PRA has established a five step approach:

(a) Step 1: where relevant, the disgorgement of any economic benefits derived from the breach;

(b) Step 2: in addition to any disgorgement under step 1, the determination of a figure which properly reflects: (i) the seriousness of the breach; and (ii) the financial strength of the relevant body;

(c) Step 3: where appropriate, and adjustment to the figure determined under step 2 to take account of any aggravating, mitigating or other relevant circumstances;

(d) Step 4: where appropriate, an upwards adjustment to the figure determined following steps 2 and 3, to ensure that the penalty has an appropriate and effective deterrent effect on the body in question and on other relevant bodies;

(e) Step 5: if applicable, an adjustment based on any serious financial hardship that the Bank considers payment of the penalty would cause to the relevant body.

gather information and to commission reports by “Skilled Persons” (an external expert) in order to undertake further analysis and seek additional assessment.

4.7 Enforcement procedures

80. The survey inquired on the different approaches followed by NCAs in the case of breaches of EMIR requirements. NCAs were asked to provide the actions foreseen in their jurisdiction for the case when an infringement is identified. Figure 8 illustrates the different procedures foreseen for NCAs in different countries.

Figure 8: Enforcement procedures

	AT	BU	BE	CY	CZ	DK	DE	ES	EL	FI	FR	HR	HU	IE	IT	LV	LU	MT	NL	NO	PL	PT	SK	SE	SI	UK	
Written warning ¹³⁰	X		X	X	X		X	X			X	X					X	X		X							
Investigation procedure		X	X	X		X	X	X	X	X	X ¹³¹	X	X	X	X			X		X	X	X	X	X	X	X	X
Other										X	X			X ¹³²		X		X	X	X						X	

81. This table reflects the different systems with which NCAs react when they suspect an infringement or they have identified an infringement of EMIR compliance. According to the information submitted through the survey, 42% of the NCAs (11 out of 26), send an initial written warning to the correspondent supervised entity, without taking further actions. From this group of 11, nine NCAs also initiate simultaneously a formal investigation procedure. Finally, 46% of the NCAs (12 out of 26) initiate the investigation without sending a first written warning.
82. In relation to the use of written warnings and the estimation of how many could be used before starting a formal procedure, all countries answered that there is no specific rule in this regards and that this would vary subject to a case-by-case analysis. It would depend, among other factors, on the severity of the breach and on the willingness shown by the market participant to cooperate.
83. Regarding the procedure followed by NCAs from the moment where a breach is identified to the moment in which a sanction is applied, NCAs made the following remarks:

¹³⁰ It refers to written warnings without the NCA taking further actions.

¹³¹ In France, AMF monitors regularly the quality of reporting and of implementation of risk mitigation techniques. Anomalies are firstly dealt via direct contact with the counterparties involved. Recurrent anomalies or suspected breaches may lead to the start of an investigation and if proved materially severe to a fine and a public statement.

¹³² In Ireland, the investigation procedure could occur at the same time as the direct engagement with the counterparties.

84. In Finland, the Finanssivalvonta mentioned that after an initial assessment, they launch a formal investigation unless the breach is minor, in which case, a letter is issued or the need for corrective action is communicated to the entity. After the investigation a sanctioning procedure might be initiated, however, the market participant is always heard before taking any disciplinary actions or issuing sanctions. In Latvia, the FCMC applies a similar procedural approach: if a breach is identified, depending on the matter, the FCMC can (i) issue an initial warning and ask to address the deficiency by providing a deadline; or (ii) start an investigation procedure in order to gather data on the materiality of the infringement to assess which supervisory/enforcement action is preferable to address the issue.
85. In the United Kingdom, the PRA mentioned that not all breaches or suspected breaches are automatically referred for investigation; in some instances, they are dealt with through normal supervisory contact with the supervised entity, in which the PRA uses its supervisory powers to ask the entity to provide information and specified documents in order to check the level of compliance. In Malta and in the United Kingdom¹³³, the authorities follow a three-step process where, typically, after an investigation, if the NCA considers necessary to take disciplinary measures, they will issue a warning, a decision and a final notice containing a sanction. Similarly, in Norway, an order to rectify may follow the warning letter before imposing a fine.
86. Regarding Article 11 of EMIR, if following an investigation the PRA considers that an entity has breached that provision, the PRA can: (i) publish a statement declaring that the entity has contravened the relevant requirement; (ii) issue a financial penalty; and (iii) suspend any permission held by the entity to carry on a regulated activity; or impose other restrictions in relation to regulated activities. In addition, for Articles 4, 9, 10 and 11 of EMIR, the FCA has also enforcement competences¹³⁴.
87. Austria, France¹³⁵, Ireland and the Netherlands¹³⁶ also mentioned that their NCAs engage directly with the relevant counterparties before considering enforcement actions. In the Netherlands, the AFM, has engaged in informal discussions after identifying breaches in EMIR compliance, asking the relevant entities to correct the situation as soon as practicable without taking further steps.
88. In Germany¹³⁷, besides the authority's capacity to send formal letters requesting the fulfilment of legal duties, if the request addressed and the behaviour is not amended, the authority can follow the general procedures in administrative law that could end-up in a fine.

¹³³ The PRA in relation to Art. 11 of EMIR and according to Section 207 and 208 of the FSMA.

¹³⁴ FCA has a competence to use the approaches as detailed in our Enforcement Guide (<https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf>)

¹³⁵ In France, AMF monitors regularly the quality of reporting and of implementation of risk mitigation techniques. Anomalies are firstly dealt via direct contact with the counterparties involved. Recurrent anomalies or suspected breaches may lead to the start of an investigation and if proved materially severe to a fine and a public statement.

¹³⁶

¹³⁷ cf. §§ 30 to 32 German Securities Trading Act (WpHG).

89. In Ireland, where an enforcement action is taken, the CBoI has the following actions available: (i) issue a private caution or reprimand; (ii) issue a public caution or reprimand; (iii) impose a penalty (not exceeding 2.5 million euros); (iv) where there is a continuing breach the CBoI can issue a direction ordering the person to cease and desist; and (v) the CBoI can issue a direction to the supervised entity to pay all or some of the costs incurred during the investigation.

4.8 Criminal sanctions¹³⁸

90. In Cyprus, Hungary, Ireland, Norway, Spain, the Slovak Republic and the United Kingdom there are criminal sanctions in place for the case of an infringement of EMIR provisions:
91. In Cyprus, a person who makes a false statement, fails to submit facts or in any way impedes the collection of information or investigation of the CySEC, can be subject to a criminal sanction with the possibility of a penalty up to five years of imprisonment, a fine up to 170,000 euros or both together.
92. In Ireland, there are criminal sanctions¹³⁹ for CCPs or trading venues that contravene EMIR provisions, which can, depending on the seriousness, lead to either a fine up to 5,000 euro and/or imprisonment up to 6 months; or to the imposition of a fine up to 500,000 euro and/or imprisonment up to 36 months¹⁴⁰. In the United Kingdom, the PRA has the power to institute regular criminal proceedings in respect of a small number of criminal offences related to EMIR provisions¹⁴¹.
93. In Norway, while administrative fines are decided by the NCA, the police and/or the Courts decide on the amount of criminal penalties. Neither a minimum nor a maximum amount are specified in the legislation. In addition, the national regulation envisages imprisonment up to one year for breaches of Articles. 4 to 13 of EMIR¹⁴².
94. In Denmark, the system is similar to the Norwegian one although the Danish FSA cannot impose fines. For breaches of Articles 4, 7, 8 to 11 of EMIR, the national legislation envisages criminal sanctions in the form of fines. Before a criminal offense,

¹³⁸ With respect to Arts. 4, 9, 10 and 11 of EMIR.

¹³⁹ As set out in S.I. No. 443/2014 European Union (European Markets Infrastructure) Regulations 2014 (as amended) - the 'EMIR S.I.'.

¹⁴⁰ There are two additional offences in Ireland for CCPs, a clearing member of a CCP, a counterparty to a derivative contract or a trading venue (1) obstruction or interference with the exercise of an authorized officer's powers and (2) the provision of false or misleading information to the CBoI in purported compliance with an EMIR requirement. For either offence, if found guilty, and could face the penalty is a fine of up to 5,000 euro, or imprisonment, not exceeding 12 months; or both..

¹⁴¹ When the PRA decides whether to bring criminal proceedings in England, Wales or Northern Ireland, the PRA will apply the basic principles set out in the Code for Crown Prosecutors.

¹⁴² As per Section 17-3 of the Securities Trading Act in Norway.

the FSA has to report to the police (and it is for the police and/or the Court to determine the amount of the penalty).

95. Similarly, in the Slovak Republic, if the National Bank of Slovakia considers that a criminal offense has been committed¹⁴³, it will issue a criminal complaint that will be reported to the competent authority in criminal proceedings.
96. In Spain, the CNMV can only apply administrative fines. However, on a case-by-case analysis and depending on the nature and the circumstances of the infringement, when the CNMV suspects that a criminal offence may have been committed it will report the facts to the prosecutorial and judicial authorities for them to determine if criminal proceedings should be initiated.

4.9 Penalties imposed in relation to Articles 4, 9, 10 and 11 of EMIR

97. Up to December 2017, out of the 26 respondents to the survey, two countries have imposed penalties in relation to infringements of the provisions provided for in Articles 4, 9, 10 or 11 of EMIR. Specifically, three fines were imposed: two in Italy and one in the United Kingdom.
98. In Italy, Covip, applied two sanctions to the same occupational pension fund for the infringements, in both cases, of Articles 9 and 11 of EMIR. The grounds of the infringements for both cases were very similar. In both situations, the pension fund purchased financial instruments qualifying as OTC derivatives under EMIR. Based on the erroneous assumption that such financial instruments were not in the scope of application of EMIR, the pension fund did neither comply with the reporting obligation of Article 9 nor with the risk mitigation techniques requirements of Article 11 of EMIR.
99. In the first case (decision of 21 June 2017), two sanctions were imposed: 2,500 euros to each member of the Board of Directors and the Board of Auditors and 5,000 to the General Director of the fund, amounting to a total of 105,000 euros. In the second case (decision of 26 July 2017), two other sanctions were imposed to the pension fund, each of 30,000, amounting to a total of 60,000 euros¹⁴⁴.
100. In the United Kingdom, the FCA concluded an investigation with Merrill Lynch International in relation to a breach of the reporting obligation of Article 9 of EMIR. The entity failed to report 69 million of ETD trades over the course of a two-year period. The firm had initially informed the FCA of the breach and following an

¹⁴³ E.g. suspicion of unauthorised handling of clients' assets or suspicions of fraud.

¹⁴⁴ Between the imposition of the sanctions for the first and the second case, the law in Italy changed. While first sanctions were to be imposed on the members of the Board of Directors and the Board of Auditors, due to a legislative amendment, sanctions have to be imposed directly to the pension fund.

investigation, the FCA decided to impose a fine to the firm. Merrill Lynch International was fined GBP 35 million for the breach in November 2017¹⁴⁵.

101. ESMA has launched a Sanctions Register¹⁴⁶ where NCAs shall report the sanctions imposed under EMIR.

5 Conclusions

102. From the information analysed, ESMA has identified a large range of practices being applied by NCAs. Overall, it appears that there has been initially an important focus on raising awareness on EMIR requirements, which has then gradually shifted to the monitoring and the enforcement of, first, the implementation of the requirements, and then, of the ongoing compliance.
103. Overall, some areas appear to be highly harmonised, such as the sources of information used by NCAs with the purpose of verifying the compliance with EMIR provisions; or the supervisory competences the different NCAs are entitled to, according to their respective national regulations. Other areas, such as the enforcement procedures, although following different systems, do show a common underlying pattern.
104. However, the aspect that appears less unified concerns the amounts of the fines, where the level of harmonisation is very low, with amounts ranging between a minimum of 125 euros and a maximum of 100 million euros. In addition, in terms of criminal sanctions related to EMIR infringements, seven countries envisage this possibility in their legislation. In terms of sanctions, three have been imposed. Covip in Italy imposed two sanctions fines in connection with both Articles 9 and 11 of EMIR (amounting to 105,000 and 60,000 euros respectively); and the FCA in the United Kingdom, imposed a sanction fine of 35 million pounds for an infringement of Article 9 of EMIR.
105. One of the areas where NCAs seem not to have prioritised specific supervisory actions, concerns third country entities trading contracts with substantial effect in the Union, which would be subject to the clearing obligation if established in the EU. This could be a point to be further considered. Another evidence, relates to the assessment reports on the effectiveness of the penalty rules being applied for the purposes of EMIR that Member States have to publish at regular intervals (Article 12(2) of EMIR). No Member State has published such report so far. This delay is partly justified by the phased implementation of some of the EMIR requirements (e.g.

¹⁴⁵ Further details can be found within the public notice available on the FCA website <https://www.fca.org.uk/news/press-releases/fca-fines-merrill-lynch-failing-report-transactions>.

¹⁴⁶ The Sanctions Register can be found in the following link: <https://registers.esma.europa.eu/publication/searchSanction>

clearing and bilateral margining rules¹⁴⁷). However, these assessment reports could become useful as NCAs and their supervised entities have assembled considerable information and experience on EMIR implementation¹⁴⁸ and the related compliance.

106. This report serves as a good basis for NCAs to share on their practices in their supervisory activities and more broadly, to raise awareness on the supervisory approaches followed in the different countries. It helps understand the information checked by NCAs (from TRs and in combination with information submitted by counterparties) and its use, for a range of supervisory measures. The report also shows that the majority of NCAs share similar competences in their supervision and enforcement of Articles 4, 9, 10 and 11 of EMIR. ESMA expects this first report to be the baseline for future reports on penalties and supervisory measures, which will help monitor compliance in the different member states and possibly identify areas where a higher level of harmonisation could be considered to ensure a level playing field.

¹⁴⁷ The requirements under Article 4 and 11 have only been in application for firms since 2016 (for clearing) and February 2017 (for margin).

¹⁴⁸ Norway, is a special case as EMIR only entered into force on 1 July 2017 and the reporting obligation was effective only from 1 January 2018.

6 Annexes

Annex I: Questions of the survey on supervisory measures and penalties

General Information

1. Choose your jurisdiction:
2. Please, provide the name of your NCA (the NCA submitting the survey).
3. Please, indicate the name of other NCAs which have contributed to your answers or which presented any challenges in the degree of cooperation, if any:.
4. Please, provide the contact details of the person answering this questionnaire (Name, position and email address).

Section I

5. In relation to articles 4, 9, 10, 11 of EMIR are the competences related to supervisory measures and imposition of penalties centralised in one single authority? a. Yes; b. No.
6. In order to have some background on the interactions between your NCA and market participants regarding the implementation of EMIR requirements, please fill in the following table according to the actions carried out by your NCA: a. Prepare/have prepared specific trainings for market participants; b. Launch processes to get feedback regarding the implementation of different regulatory requirements (e.g. launching surveys, preparing questionnaires, etc.); c. Create working groups for providing support/guidance with the collaboration of market participants; d. Other (e.g. sending reminders for phase in implementations).
7. Has your NCA started conducting or publishing the assessment reports mentioned in art. 12.2 of EMIR? a. Yes; b. No.

Section II

8. Please specify which are the sources of the information used by your NCA in order to monitor the compliance of market participants in relation to the following EMIR provisions: a. Data from Trade Repositories; b. Data directly submitted by market participants; c. Other (e.g. check market participant's public information, website, etc.).
9. Please, specify which of the following tools has your NCA in order to monitor the compliance in relation to the following EMIR provisions: a. Inspect all types of documents

and receive copies about documents related to the clearing/reporting/risk mitigation techniques obligations from the counterparties; b. Ask information in relation to the clearing / reporting / risk mitigation techniques obligations from any person (including the ones that are not counterparties in the transaction); c. Conduct investigations on-site; d. Summon and interview people; e. Other.

10. In relation to non-financial counterparties (art. 10 of EMIR), which is the approach adopted by your NCA for ensuring the compliance of the clearing obligation? a. Your NCA performs a preventive supervisory control to check if non-financial counterparties exceed clearing thresholds; b. Your NCA relies exclusively on market participants' notifications; c. Other.
11. In relation to the following EMIR provisions, your NCA has competence to: a. Issue non-binding letters / recommendations; b. Issue binding letters / recommendations; c. Impose administrative fines; d. Impose other kind of penalties (e.g. criminal sanctions); e. Other.

Section III

12. Has your NCA issued recommendations or warning letters regarding the implementation of the following provisions? a. Yes, letters addressed to all market participants; b. Yes, letters addressed to individual market participants; c. No, no letters have been issued.
13. Which is the foreseen procedure in your NCA in case of identifying a breach in compliance or infringements by a market participant? a. Initial written warning (without taking further actions); b. Initiation of an investigation procedure to resolve whether there is an actual breach/infringement of EMIR obligations; c. Other.
14. How many investigations, if any, has your NCA conducted in the last year? a. 0; b. 0-5; c. 6-10; d. 11-20; e. More than 20.
15. In relation to Arts. 4, 9, 10, 11 of EMIR, has your NCA imposed any penalty up to December 2017 (December included)? a. Yes; b. No.
16. In relation to the question above, please, specify if your jurisdiction provides for any other type of penalties besides administrative fines (e.g. criminal sanctions) in connection with requirements in art. 4, 9, 10 and 11.
17. Please, give a range of the amounts of the penalties that can be imposed in relation to infringements of requirements in art. 4, 9, 10 and 11 of EMIR.
18. Regarding the clearing obligation, has your NCA identified any particular circumstance preventing market participants to comply with the legal requirements of art. 4 of EMIR? a. Yes, technical, operational barriers or other kind of barriers; b. Yes, difficulties related to counterparties located in third countries; c. Market participants are facing difficulties to access clearing; d. Other.

19. Regarding third country entities trading contracts with substantial effect in the Union, which would be subject to the clearing obligation if established in the EU, does your NCA undertake any specific measures to detect clearing evasion?

20. In relation to the regulatory requirements envisaged in art. 11 of EMIR, in relation to risk management procedures (i.e. timely, accurate and appropriate segregated exchange of collateral), which kind of supervisory actions does your NCA undertake? a. Supervisory measures only following a risk-based approach; b. Random controls/inspections to monitor compliance; c. Periodic requests for information/documentation to proof compliance; d. Other.

Annex II: Tables with granular information on the different countries

1. Detailed table for Figure 2: NCAs' interaction with market participants

	Art. 4	Art. 9	Art. 11
a. Prepare/have prepared specific trainings for market participants	14: BE; BU; DE; DK; ES; FI; FR; HR; IT; MT; PL; PT; SI; UK	16 : AT; BE; BU; CZ; DE;DK; ES; FI; FR; HR; IT; MT; PL; PT; SI; UK	15: AT; BE; BU; DE; DK; ES; FI; FR; HR; IT; MT; PL; PT; SI; UK
b. Launch processes to get feedback regarding the implementation of different regulatory requirements (e.g. launching surveys, preparing questionnaires, etc.)	13: AT; BE; DE; ES; FR; HR; IT; LU; NL; NO; PL; SE; UK	16: AT; BE; DE; ES; FI; FR; HR; IT; LU; LV; NL; NO; PL; PT; SE; UK	13: AT; BE; DE; ES; FR; HR; IT; LU; NO; PL; PT; SE; UK
c. Create working groups for providing support/ guidance with the collaboration of market participants.	9: AT; BE; BU; DE; FR; LV; NL; SK; UK	10: AT; BE; BU; CZ; DE; FR; LV; NL; SK; UK	8: AT; BE; BU; DE; FR; LV; SK; UK
d. Other (e.g. sending reminders for phase in implementations)	16: AT; BE; CY; DE; DK; FI; FR; HR; HU; NO; PL; PT; SE; SI; SK; UK	20: AT; BE; CY; CZ; DE; DK; ES; FI; FR; HE; HR; HU; IT; MT; NO; PL; PT; SE; SI; SK; UK	18: AT; BE; CY; DE; DK; ES; FI; FR; HE; HR; HU; IT; NO; PL; SE; SI; SK; UK

2. Detailed table for Figure 3: Sources of information checked by NCAs

	Art. 4	Art. 9	Art. 11
Data from Trade Repositories	18: AT; BE; BU; CZ; DE; ES; FR; HR; IE; LU; MT; NO; PL; SE ; SI; SK; PT; UK	23: AT; BE; BU; CY; CZ; DE; ES; FI; FR; EL; HR; IE; IT; LU; MT; NL; NO; PL; PT; SE; SK; SI; UK	16: AT; BE; CZ; DE; ES; FR; HR; IE; IT; LU; MT; NO; PL; PT; SK; UK
Data directly submitted by market participants	18: AT; BE; CY; CZ; DE; ES; FI; FR; EL; HR; IE; LU; MT; NO; PL; SE; SK; UK	18: AT; BE; BU; CY; CZ; DE; ES; FI; FR; HR; IE; IT; LU; MT; NO; PL; SK; UK	19: AT; BE; BU; CY; CZ; ES; FI; FR; HR; IE; IT; LU; LV; MT; NO; PL; SK; SI; UK
Other (e.g. check market participants' public information, website, etc.)	12: BE; CY; DE; DK; ES; FI; HR; IE; LU; MT; NO; SK	12: BE; CY; DE; DK; FR; IE; LU; MT; NL; NO; PL; SK	13: AT; BE; CY; DE; DK; ES; FI; HR; IE; LU; MT; NO; SK

3. Detailed table for Table for Figure 5: Supervisory activities

	Art. 4	Art. 9	Art. 11
a. Inspect all types of documents and receive copies about documents related to the clearing/reporting/risk mitigation techniques obligations from the counterparties.	23: AT; BE; BU; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; SE; SK; UK	24: AT; BE; BU; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SK; UK	24: AT; BE; BU; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SK; UK
b. Ask information in relation to the clearing / reporting / risk mitigation techniques obligations from any person (including the ones that are not counterparties in the transaction)	20: AT; BU; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LV; MT; NL; NO; PL; SE; UK	20: AT; BU; CY; CZ; DE; ES; FI; FR; EL; HR; IE; IT; LV; MT; NL; NO; PL; PT; SE; UK	20: AT; BU; CY; CZ; DE; ES; FI; FR; EL; HR; IE; IT; LV; MT; NL; NO; PL; PT; SE; UK
c. Conduct investigations on-site	21: AT; BE; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; MT; NL; NO; PL; PT SK; UK	22: AT; BE; BU; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; SK; UK	21: AT; BE; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; SK; UK
d. Summon and interview people	22: AT; BE; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; SE; SK; UK	22: AT; BE; CY; CZ; DE; DK; ES; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; SE; SK; UK	21: AT; BE; CY; CZ; DE; DK; FI; FR; EL; HR; IE; IT; LU; LV; MT; NL; NO; PL; SE; SK; UK
e. Other	8: BE; DE; DK; HR; LU; MT; PL; UK	7: BE; DK; HR; LU; MT; PL; UK	8: BE; DK; HR; IT; LU; MT; PL; UK

4. Detailed table for Figure 8: Enforcement actions

	Art. 4	Art. 9	Art. 11
a. Issue non-binding letters / recommendations	23: AT; BE; BU; CZ; DE; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SK; UK	23: AT; BE; BU; CZ; DE; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SK; UK	23: AT; BE; BU; CZ; DE; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SK; UK
b. Issue binding letters / recommendations	23: BE; BU; DE; CY; DK; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PT; SE; SI; SK; UK	23: BE; BU; CY; DE; DK; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PT; SE; SI; SK; UK	23: BE; BU; CY; DE; DK; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PT; SE; SI; SK; UK
c. Impose administrative fines	25: AT; BE; BU; CY; CZ; DE; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SI; SK; UK	25: AT; BE; BU; CY; CZ; DE; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SI; SK; UK	25: AT; BE; BU; CY; CZ; DE; ES; FI; FR; EL; HR; HU; IE; IT; LU; LV; MT; NL; NO; PL; PT; SE; SI; SK; UK
d. Impose other kind of sanctions (e.g. criminal sanctions)	8: CY; ES; HU; IE; NL; NO; SK; UK	8: CY; ES; HU; IE; NL; NO; SK; UK	8: CY; ES; HU; IE; NL; NO; SK; UK
Other	5: CY; CZ; FR; LU; UK	5: CY; CZ; FR; LU; UK	5: CY; CZ; FR; LU; UK

5. Detailed table for Figure 9: NCAs that have issued recommendations

	Art. 4	Art.9	Art. 11
Yes, letters addressed to all market participants	9: AT; BE; ES; FI; HR; MT; NO; PL; SE	14: AT; BE; DE; EL;ES; FI; HR; IE; IT; MT; NO; PL; PT; SE	12: AT; BE; EL; ES; FI; HR; IT; MT; NO; PL; SE; UK
Yes, letters addressed to individual market participants	4: AT; DE; IE; LU	11: AT; CY; DE; DK; ES;; EL; IE; IT; LU; MT; UK	11: AT; CY; DE; DK; ES; FR; EL; IE; LU; MT; UK
No, no letters have been	11: BU; CY; CZ; DK; FR; HU; LU; LV; NL; SI; SK	10: BU; CZ; FR; HU; LU; LV; NL; PL; SI; SK	9: BU; CZ; HU; LU; LV; NL; SI; SK; UK