

## ESMA REVIEW PANEL METHODOLOGY

### Introduction

1. According to Article 30 of the ESMA Regulation, ESMA shall periodically organize and conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. To that end, ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed.
2. According to Article 6 of the Decision of ESMA establishing its Review Panel, the Review Panel shall develop methods to allow for objective assessment and comparison between the authorities reviewed, as quoted above, and shall elaborate and review as appropriate tools to conduct its work. ESMA's Board of Supervisors upon proposal by the Review Panel shall approve the tools. The Board of Supervisors or ESMA's Chair may ask the Review Panel to develop and use other specific tools when needed. Without prejudice to the methods referred to above, where appropriate and prior to each work stream, the Review Panel may further specify procedures, methodologies and tools, taking into account the nature of the issues under review.
3. This Methodology, which has to be read together with the ESMA Regulation ("the Regulation") and the Decision of ESMA establishing its Review Panel ("the Decision"), sets out the methods and tools to conduct peer reviews of National Competent Authorities.

### Section 1: Determining the topic for a Peer Review

4. The Board of Supervisors sets the strategy for determining in which areas National Competent Authorities are to be analysed and their activities subjected to a Peer Review in order to foster regulatory and supervisory convergence and a common supervisory culture, through consistent, efficient and effective application of sector legislation, thus preventing regulatory arbitrage and achieving a uniformly high level of supervisory outcomes and investor protection.
5. The Board of Supervisors implements its strategy for regulatory and supervisory convergence by including in ESMA's annual work program a catalogue of areas to be subjected to Peer Reviews. In order to set up that catalogue, the Board of Supervisors seeks input from the Joint Committee, the Securities and Markets Stakeholder Group as well as from the relevant Standing Committees and ESMA Groups, including the Review Panel. Being responsible for preparing the work of the Board of Supervisors, ESMA Chair may also contribute to the catalogue.
6. If events so justify, the Board of Supervisors may adapt the work program for the Review Panel during the course of the year.

7. In setting up the annual work program for the Review Panel as well as in determining the scope of each Peer Review, the Board of Supervisors takes due account of the limited availability of resources, both human and financial, required for its implementation. Therefore the subject matter of a chosen topic for a Peer Review has to concentrate on the aspects most relevant for supervisory convergence.
8. The focus of each Peer Review, as defined by the Board of Supervisors, while respecting the need for both objectivity and proportionality, can be differentiated:
  - on the one hand, if the focus is on the legal framework, the singleness of the rulebook requires the Review Panel to ascertain that throughout the EEA Union law, including regulatory and implementing technical standards, is uniformly implemented and enforceable, and that the implementation of guidelines and recommendations fully respects the “comply or explain” mechanism;
  - on the other hand, if the focus is on the actual supervision, on achieving an equally high level of supervisory outcomes and on promoting investor protection through convergence rather than full harmonisation of supervisory practices, requires the Review Panel to take the differences between jurisdictions and markets into account and may therefore justify the Board of Supervisors in restricting the Peer Review of supervisory activities to a limited number of National Competent Authorities or in targeting a limited scope of activities of certain National Competent Authorities.
9. Such differentiation may also apply to the review of the independence of National Competent Authorities and their capacity, through the adequacy of their resources and governance arrangements, to achieve high quality supervisory outcomes and to respond to market developments.
10. According to the focus of a Peer Review, the Board of Supervisors instructs the Review Panel as to whether the Peer Review has to be in whole or in part targeted to a defined set of jurisdictions chosen on the basis of objective criteria and whether the Review Panel has to conduct on-site visits to the National Competent Authorities of some or all of those jurisdictions.
11. Although for practical and resource reasons, the number of on-site visits needs to be restricted to a limited number of jurisdictions for a given Peer Review, the Board of Supervisors endeavours to ensure that over several Peer Reviews all National Competent Authorities are subject to on-site visits. Since markets across Europe are different in size and type, the choice of National Competent Authorities to be visited during a given Peer Review is made on the basis of objective criteria, notably the relevance for those jurisdictions of the supervisory practices to be reviewed.

## **Section 2: Setting up an Assessment Group led by a Coordinator**

12. For each Peer Review, decided by the Board of Supervisors and entrusted to the Review Panel, the Board of Supervisors, upon a proposal by the Review Panel, sets up an Assessment Group, names its Coordinator and decides on its composition.
13. An Assessment Group is chaired by a Coordinator with sufficient seniority who as a rule is a member of the Review Panel or another senior representative of a National Competent Authority or an ESMA staff member. The Chair of the Review Panel invites candidates for Coordinator to come forward and makes a proposal for naming the Coordinator.



14. An ESMA staff member from the Unit in charge of peer reviews acts as Rapporteur of the Assessment Group. Besides the Rapporteur, ESMA staff with relevant expertise may participate in the work of the Assessment Group and give support to the Coordinator.
15. The Chair of the Review Panel requests interested Review Panel members to nominate representatives of their National Competent Authorities with the necessary technical knowledge to participate in the work of the Assessment Group. National Competent Authorities' representatives in the Assessment Group may be Review Panel members or experts in the field to be reviewed. All Review Panel members are expected to contribute regularly over time to Assessment Group staffing, taking due account of their respective resource capacities. National Competent Authorities endeavour to keep the same representatives in an Assessment Group during the whole process of a Peer Review.
16. The Review Panel may decide to consult external experts. Such experts have to be obliged by professional secrecy and as such need to be bound by a suitable confidentiality agreement.
17. The Review Panel may consult the European Commission on specific provisions of Union law.
18. The Coordinator of the Assessment Group reports regularly to the Review Panel, highlighting any issues or problems that may arise during the course of the work, and at the discretion of the Review Panel, informs and consults relevant ESMA Groups on the on-going work.

### **Section 3: The mandate**

19. Once an Assessment Group for a Peer Review is set up, its first task is to draft its mandate, in line with the instructions received from the Board of Supervisors and in consultation with the relevant Standing Committees. The mandate is approved by the Review Panel first and the Board of Supervisors thereafter.
20. The mandate, covering the topic determined by the Board of Supervisors and focussed as defined by the Board of Supervisors, indicates the proposed stages and timeline for the work to be undertaken.
21. Within that framework and as appropriate, the mandate covers the assessment of the following areas as foreseen by the Regulation:
  - the independence of National Competent Authorities and their capacity to achieve high quality supervisory outcomes, including the adequacy of their resources and governance arrangements, with particular regard to the effective application of the RTS and ITS and of the legal texts falling within the remit of ESMA, and the capacity of National Competent Authorities to respond to market developments;
  - the degree of convergence reached in the application of Union law and in supervisory practice, including RTS and ITS, guidelines and recommendations, and the extent to which the supervisory practice achieves the objectives set out in Union law, including the determination of good practices developed by some National Competent Authorities which might be of benefit for other National Competent Authorities to adopt;
  - the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law, including the administrative measures and sanctions imposed against persons responsible where those provisions have not been complied with.

22. In order to allow the assessment of each area defined above to be made in an objective, transparent and comparative manner, the mandate specifies for each assessment area which issues are key for its assessment and according to which objective criteria these key issues will be assessed. The definition of those criteria takes into account, as appropriate, the objectives of the topic under review and the need to strengthen the consistency and equivalence of supervisory outcomes through a uniformly high level of supervisory practices and the promotion of investor protection.

#### **Section 4: The questionnaire**

23. In order to achieve the assessments required by its mandate, the Assessment Group drafts a questionnaire to be filled in by each participating National Competent Authority. The Assessment Group adopts the questionnaire, after having consulted the Review Panel.

24. The questionnaire needs to provide the Assessment Group with a full description by each National Competent Authority of its regulations, supervisory activities and practices regarding the topic under review, in a format that allows an objective comparison of all the national submissions. The description has to be factual and must give a frank self-assessment by the national authority of its perceived weak or strong points. Narrative text is to be used as appropriate.

25. The questionnaire has to give guidance to both the National Competent Authorities and the Assessment Group in order to allow the assessments required by the mandate to be made in an objective, transparent and comparative manner. It must therefore respect the key issues and objective criteria specified in the mandate.

26. The assessment of each area of the mandate has to take into account not only the situation of each National Competent Authority on a stand-alone basis, but also of the National Competent Authorities in comparison to each other and taken as a whole.

27. It is useful to make reference to or quote the provisions of the relevant EU legislation or ESMA measures in the questionnaire. Where statistics are required, the parameters for the statistics have to be consistent, transparent and clear.

28. The answers to the questionnaire have to be underpinned by acceptable evidence, as defined by the Review Panel for each questionnaire. The evidence is provided in English if available. When an English version of the evidence is not available, the answer has – to the extent practicable – to describe the relevant evidence in English.

29. The questionnaire has to be available for answering through an IT-tool. Before the launch of the questionnaire, it is tested in the IT-tool by a team consisting of ESMA staff, the Coordinator and a limited number of members of the Assessment Group.

30. In accordance with Article 4.1 of the Decision, National Competent Authorities are committed to participate in the work of the Review Panel, devoting appropriate human resources and providing their contributions within the agreed deadlines. Only if all National Competent Authorities provide complete, coherent and high-quality responses, does the Review Panel work result in a meaningful outcome, which appropriately describes supervisory powers, activities and practices as well as enforcement provisions or actions, and allows the Review Panel to draw the appropriate conclusions from its findings.



31. If a National Competent Authority does not provide its full contribution within the deadline and if a coordinated intervention by the Rapporteur, the Coordinator and the Chair of the Review Panel does not produce the required contribution, the situation is reported to the ESMA Chair for follow-up with that National Competent Authority. The lack of contributions by one or more National Competent Authorities must not however delay the Review Panel's work.
32. Once it has received the responses by National Competent Authorities to the questionnaire, the Assessment Group starts to analyse them with a view to drafting its report. The assessment is not a box-ticking exercise. It requires in-depth understanding of the national submissions and individual as well as collective analysis. This can only be achieved through an ongoing dialogue between the Assessment Group and the National Competent Authorities, during which the Assessment Group may ask for clarifications or for additional evidence. As foreseen by Article 30 of the Regulation, existing information and evaluations already made with regard to a National Competent Authority under review have to be taken into account.
33. All participating jurisdictions are assessed jointly and simultaneously according to the same criteria, in order to minimize the risk of uneven or biased results. The transparency, objectivity, accuracy and analytic quality of the work are essential to its effectiveness and credibility. The assessment relates to the key issues defined in the mandate, on the basis of the objective criteria also defined in the mandate. To undertake the assessment work, the Coordinator of the Assessment Group organizes teams and assigns each team a certain number of National Competent Authorities for assessment. No member of the Assessment Group is permitted to assess its own jurisdiction.

## **Section 5: On-site visits**

34. For a Peer Review that includes visits, the Board of Supervisors, upon a proposal by the Review Panel, designates the National Competent Authorities to be visited, specifies the areas or issues to be reviewed, determines dates and timelines as well as the leadership, size and composition of the visiting team, taking care to avoid conflicts of interest. The leader of the visiting team is the point of contact for the National Competent Authority to be visited and provides steering to the team.
35. A visiting team comprises a subset of Assessment Group members, namely persons from National Competent Authorities, other than those to be visited, as well as ESMA persons from the unit in charge of Peer Reviews and/or from the expert area with most relevance for the Peer Review. If needed, because of conflict of interest, the Coordinator, in liaison with the Review Panel Chair, may call upon Review Panel members to designate additional persons from non-conflicted National Competent Authorities for the composition of the visiting teams. Those persons will then also join the Assessment Group and contribute to the Assessment Report.
36. Visits are announced in advance and are prepared, involving the National Competent Authorities, on the basis of a questionnaire to be answered in advance of the visit. Visits are expected to last one to a maximum of three days.
37. Some of the tools that can be used in on-site visits include, but are not limited to, interviews with National Competent Authorities' staff, the demonstration of work carried out, and, if



necessary, access to supervisory files. If the National Competent Authority so requires, such supervisory files are anonymized.



## **Section 6: The Report by the Assessment Group**

38. The Assessment Group produces a report, based on the analysis of the questionnaires and the findings from the on-site visits. The drafting of the report must be subject to a process of interaction with the National Competent Authorities concerned.
39. The report has to cover all the issues to be addressed under the mandate and, at least, the elements detailed in Article 30 (2) of the Regulation, as quoted in paragraph 21 above. It has moreover to respond to all the points indicated in Article 11(2) of the Decision setting up the Review Panel, namely to:
  - (a) signal the extent to which competent authorities achieve convergence in supervisory practices and apply specific supervisory provisions;
  - (b) present the measures that competent authorities not applying specific supervisory provisions intend to take to correct the situation or to adopt a more convergent supervisory practice;
  - (c) express views on specific problems encountered by individual competent authorities and recommend ways for achieving full implementation by the relevant jurisdictions, where necessary;
  - (d) include an assessment of the level of convergence (generally and provision by provision) achieved;
  - (e) signal inconsistencies, differences in interpretation, or general problems in the implementation or potential breaches of Union law, ESMA technical standards, guidelines or recommendations in the conduct of commonly agreed supervisory practices and identify the reasons;
  - (f) recommend that work is undertaken to amend a specific provision or practice that raises significant problems in relation to the operation of the Single Market or to clarify provisions which are interpreted differently;
  - (g) describe possible good practices developed by some competent authorities, which might be of benefit for other competent authorities to adopt.
40. Before submitting its report to the Review Panel, the Assessment Group has to allow sufficient time for accuracy checks by National Competent Authorities.
41. The report must clearly state the start and end date of the information gathering as well as the relevant periods of data collection if appropriate. It must be as accurate and up-to-date as materially possible, taking into account all known developments up to its discussion at the Board of Supervisors.

## **Section 7: The Peer Review report to the Board of Supervisors**

42. The report by the Assessment Group, comprising an executive summary and clearly setting out its conclusions on each of the points listed in Art. 11.2. of the Decision setting up the Review Panel, as quoted above in paragraph 37, is submitted for consultation to the Review Panel before being sent to the Board of Supervisors for its approval.





43. The Review Panel may provide comments and proposals for policy discussion to the Board of Supervisors.
44. As follows from the Regulation and the Decision, a Peer Review may lead to a variety of results, such as:
  - findings of potential breaches of Union law, to be dealt with according to the provisions of the Regulation,
  - findings that may lead ESMA to recommend changes to Union law,
  - findings of incomplete implementation of non-binding “soft” law,
  - findings that may lead ESMA to issue guidelines or recommendations,
  - identification of existing good practices.

### **Section 8: Decisions by the Board of Supervisors and publication**

45. Good practices, identified by the Review Panel in cooperation with the relevant Standing Committees, are made publicly available. Good practices in this context describe regulatory or supervisory practices that have been elaborated by one or more National Competent Authorities and which are considered to be particularly effective, well targeted, or broadly applied. In no way are good practices intended to disqualify other practices, or forms of implementation, that may be more suitable for a specific jurisdiction. Good practices do not have any normative or binding character; not being “soft law”, in terms of legal hierarchy, the “comply or explain” procedure does not apply to them. Nor are they ESMA guidelines or recommendations, although they may serve as the basis for developing such guidelines or recommendations.
46. The Board of Supervisors decides on publication of the results of the Peer Review. The Peer Review report as well as the decisions by the Board of Supervisors taken as a result of the Peer Review is, as a rule, published on ESMA’s website in full on a named basis, subject to the agreement of the National Competent Authority concerned. A competent authority that does not give its agreement to publication is expected to state the reasons for this to ESMA. If the Review Panel and the Board of Supervisors agree, such publication may exclude certain information for confidentiality or sensitivity reasons.
47. The individual responses to the assessment questionnaire or individual findings from the on-site visits are not published.

### **Section 9: Implementation and follow-up**

48. The Review Panel, if so instructed by the Board of Supervisors, may revisit the topic under review within a reasonable timeframe in order to check on progress made, to ascertain that the Board of Supervisors’ decisions are implemented and to report back to the Board of Supervisors.
49. Without prejudice to other actions, whenever the assessment of a National Competent Authority has shown a deficiency, the Chair of ESMA sends to the relevant member of the Board of Supervisors or head of the National Competent Authority an individual letter pointing out the deficiency as reflected in the findings of the Review Panel. The Review Panel thereafter analyses the answer received from the National Competent Authority in order to monitor the action taken by the National Competent Authority to correct the deficiency. It reports back to the Board of Supervisors and suggests suitable responses in case of possible delays in implementation.





50. ESMA and its Groups stand ready, if requested and as appropriate, to assist National Competent Authorities in correcting deficiencies and in achieving better convergence.