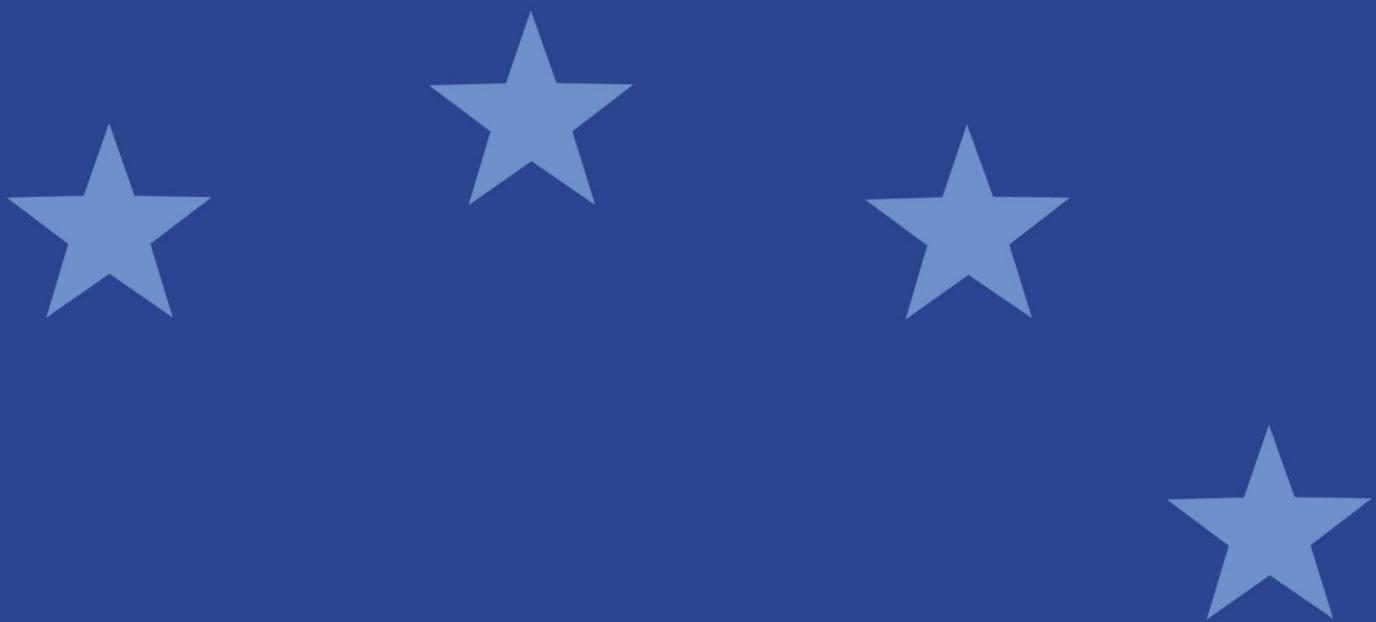


## **Follow-up Report to the Peer Review on MiFID Suitability Requirements**



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## Acronyms used

MiFID – Directive on markets in financial instruments (Directive 2004/39/EC)

MiFID2/MiFIR - Directive on markets in financial instruments (Directive 2014/65/EU, repealing Directive 2004/39/EC) and the Regulation on markets in financial instruments (MiFIR, Regulation 600/2014)

NCA – National Competent Authority

### Table with the 16 NCAs involved in the follow-up

BG	Financial Supervision Commission	FSC
CY	Cyprus Securities and Exchanges Commission	CySEC
CZ	Czech National Bank	CNB
DE	Bundesanstalt für Finanzdienstleistungsaufsicht	BaFIN
EE	Estonian Financial Supervision Authority	EFSA
EL	Hellenic Capital Market Commission	HCMC
FI	Financial Supervisory Authority	FIN-FSA
HR	Croatian Financial Services Supervisory Agency	HANFA
HU	Magyar Nemzeti Bank	MNB
IE	Central Bank of Ireland	CBol
IS	Fjármálaeftirlitið	FME
LU	Commission de Surveillance du Secteur Financier	CSSF
LV	Finanšu un kapitāla tirgus komisija	FKTK
MT	Malta Financial Services Authority	MFSA
SK	National Bank of Slovakia	NBS
UK	Financial Conduct Authority	FCA

## 1 Executive Summary

1. This report provides an update on the actions National Competent Authorities (NCAs) have undertaken further to the 2016 peer review report ("Report") on compliance with the MiFID suitability requirements (ESMA/2016/584)<sup>1</sup>.
2. MiFID requires investment firms to assess the suitability of investment services and financial instruments, taking into account clients' profiles, when providing investment advice or portfolio management. The requirements form a key element of the MiFID investor protection requirements and apply to both retail and professional clients. Investment firms' compliance with the MiFID suitability requirements is paramount to the overall protection of investors. Therefore, it is important that NCAs are effectively overseeing and enforcing the conduct of firms and therefore converging around the key aspects of the MiFID suitability provisions.
3. Peer reviews are an important part of ESMA's regulatory toolkit. The objective of any peer review is to assess the degree of convergence within an existing supervisory framework and suggest actions for NCAs to take where more convergence is required. Follow-ups aim to monitor developments and provide an update on how NCAs have taken on board ESMA's findings.

### 2016 Peer Review

4. The 2016 Report found that amongst NCAs there was generally a good understanding of the types of distribution methods used in their jurisdictions with most able to identify the most common distribution method (predominantly face-to-face advice); and regularly review the distribution methods and business models of the investment firms operating in their jurisdictions.
5. The Report also found consistent and good theoretical understanding of where the boundary between investment advice and information lies and therefore when the suitability requirements apply. Furthermore, many NCAs appeared to have carried out some general work to clarify the boundary between information and advice, although much of this work seems to be in the form of publication of ESMA material without an additional interaction with stakeholders to ascertain the effective understanding of the situations where advice is provided.
6. The 2016 Report found that the majority of NCAs adopt a "holistic" approach to supervision, meaning that they typically supervise compliance with respect to the suitability requirements as part of their general supervision of firms' compliance with conduct rules. The peer review also found that as regards specific supervisory activities on suitability, limited work had been undertaken by NCAs in verifying whether clients receive or have the perception of receiving investment

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<sup>1</sup> [https://www.esma.europa.eu/sites/default/files/library/2016-584\\_suitability\\_peer\\_review\\_-final\\_report.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-584_suitability_peer_review_-final_report.pdf)

advice.<sup>2</sup> The Report also made findings in its assessment of the level and nature of enforcement activity, identifying divergent practices across the NCAs.

7. In particular, the peer review identified findings, with different level of criticality, for 10 NCAs (BG, DE, EE, FI, HR, IS, LU, LV, SK, UK) in the application of the MiFID Suitability Guidelines<sup>3</sup>. The reasons for follow-up outlined in the Report are as follows:
  - A. Insufficient supervision of the suitability requirements during the review period<sup>4</sup>
  - B. Insufficient information on whether firms operating on a branch basis (where the NCA is the host supervisor) and on freedom to provide services (where the NCA is the home authority) were providing investment advice<sup>5</sup>
  - C. Insufficient overview of the distribution models in the NCAs jurisdiction during the review period<sup>6</sup>
  - D. No enforcement activity during the review period<sup>7</sup>
  - E. One NCA did not formally comply with the Guidelines on certain aspects of the MiFID suitability requirements.<sup>8</sup>
8. Separately, the Report and its Annex emphasised the lack of thematic reviews on suitability in particular, stating that eleven, i.e. one third of the NCAs (BG, CY, CZ, EL, HR, HU, IE, IS, MT, LU, LV) had not made use of a thematic review covering suitability related issues.<sup>9</sup> As the report highlighted that many NCAs did not have proactive and focused supervisory approaches regarding suitability requirements, the issue of thematic reviews was also followed up in light of the Report's assertions that the lack thereof did not allow NCAs to identify potentially significant issues in relation to suitability.
9. This particular issue is to be addressed separately. ESMA considers that NCAs may differ in the ways in which they conduct supervision of firms within their jurisdiction; however, it remains important that NCAs effectively oversee and enforce the conduct of firms, in compliance with Union law, and that this leads to similar supervisory outcomes. An update on NCAs' approaches as regards to thematic reviews will therefore be provided separately, at the end of the Follow-up Report at Section 6.

## Follow-Up

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<sup>2</sup> Please refer in particular to Paragraph 7 of the Report

<sup>3</sup> ESMA/2012/387.

<sup>4</sup> Please refer in particular to Paragraph 62 of the Report

<sup>5</sup> Please refer in particular to Paragraph 33 of the Report

<sup>6</sup> Please refer in particular to Paragraph 34 of the Report

<sup>7</sup> Please refer in particular to Paragraph 77 of the Report

<sup>8</sup> Please refer in particular to Paragraph 63 of the Report

10. The follow-up work was launched in December 2017 through letters by ESMA's Chair addressed to those NCAs for which findings have been identified in the 2016 Report.
11. The Follow-Up Report identifies that to various degrees NCAs have made improvements in how they supervise the suitability requirements. It would appear that NCAs are more attentive and proactive in their supervision of the requirements. This approach identified itself through the use of on-site and off-site inspections that also incorporated the general MiFID2/MiFIR supervisory approach of NCAs.

#### Findings

12. NCAs informed ESMA that they have taken action that should allow for a more effective supervision of certain aspects of the suitability requirements. Compared to the original peer review many NCAs were able to show some improvements, whilst some NCAs were able to show more tailored supervisory actions regarding suitability requirements. There has been at least partial progress in most cases.
13. The NCAs that lacked information on whether firms operate on a branch basis (where the NCA is the host supervisor) or on a freedom to provide services basis (where the NCA is the home authority) (DE, UK) made improvements to their supervisory model on this, rather technical, issue.
14. One NCA (IS) has yet to incorporate MiFID II into its national regulatory framework but has stated that it intends to do so and comply with its requirements.
15. Two NCAs (IS, LU) were found to have an insufficient overview of the distribution models used by firms in their jurisdictions during the review period. However, some progress has been made by only one NCA, LU in addressing those deficiencies identified by the peer review.
16. Regarding the levels of enforcement action during the review period, the findings from the follow-up were mixed. Three of the NCAs identified in the original peer review as being deficient in this particular area have taken effective measures and made progress through imposing pecuniary and/or non-pecuniary sanctions such as temporary prohibition of activity (HR, FI, LV) on investment firms. For these authorities, the deficiency is considered as addressed as they have made at least one enforcement action since the peer review. Four other NCAs showed some partial progress through taking strong supervisory actions such as conducting on-site visits and following up on findings so as to make sure that firms are compliant with the suitability rules (BG, EE, IS, SK).
17. Those four NCAs that were asked to provide follow-up on actions taken to improve their supervision on suitability requirements (BG, EE, HR, IS) undertook thematic work and/or on-site inspections mostly as a way of preparation to the entry into application of the MiFID2/MiFIR requirements. NCAs continue to point

to the fact that assessing suitability is not done on a standalone basis but as part of an overall approach to risk based supervision or taking in consideration the number and types of firms with large number of clients or assets under management or the level of consumer complaints. For some of these four NCAs the question remains on how far the supervision of suitability requirements has become part of the NCA's *regular* supervisory approach going forward.

18. In addition, ESMA asked those eleven NCAs that had not made use of a thematic review covering suitability related issues during the 2016 peer review assessment period whether a review had been conducted since then, and if so, what the outcome was.<sup>10</sup> As indicated in the Report, the use of a thematic review can be an important tool in the effective oversight and enforcement of the conduct of firms around the aspects of the MiFID suitability provisions. Responses indicate that out of 11 NCAs two (HR, IE) have already conducted a thematic review, others undertook thematic on-site inspections with sometimes having a broader focus than the application of suitability requirements (BG, CY, EL, HU, IS, LU, LV, MT) and one NCA is planning to do so (CZ).

### *Conclusions*

19. In conclusion, MiFID2/MiFIR remains one of the priority areas for ESMA's supervisory convergence work programme. ESMA reiterates the importance of continued and meaningful supervisory efforts to reach a high level of compliance with MiFID suitability requirements, as only regular and pro-active supervision can ensure the proper application of Union Law.
20. ESMA is committed to continue fostering supervisory dialogue within different fora on the application of the rules and trust that all NCAs will make or continue to make every effort to comply fully with the suitability requirements enshrined in MiFID and its recast version MiFID2-MiFIR.
21. Finally, ESMA notes that on 28 May 2018 it published Guidelines on certain aspects of the MiFID2 suitability requirements<sup>11</sup>. These Guidelines serve as an update to the 2012 Guidelines issued under MiFID1 and, in particular, reflect the evolution of the legislative framework and take into considerations elements such as (i) the results of supervisory activities by NCAs; (ii) the outcome of studies in the area of behavioural finance; and (iii) recent technological developments of the advisory market (for example the development of the so called 'robo-advice').

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<sup>10</sup> Please refer in particular to Paragraph 64 of the Report and Paragraph 180 of the Annex  
<sup>11</sup> ESMA35-43-869

## 2 Introduction

22. This Follow-up Report focuses on the actions selected NCAs have taken further to the 2016 Peer Review Report on the MiFID Suitability Requirements (ESMA/2016/584) that were found insufficiently applying certain criteria established for the peer review, in the review period fixed for 1<sup>st</sup> January 2013 – 31<sup>st</sup> December 2014. All ESMA Members and Observers contributed to the peer review which allowed a first assessment on how EEA NCAs approach the supervision of firms to ensure compliance with the MiFID suitability requirements when investment advice is provided with respect to retail clients. The work was also intended to identify areas that could benefit from greater supervisory convergence. The value of the 2016 Report was increased by the fact that a number of authorities were visited onsite (BE, BG, ES, FI, FR, HR, UK), four of which are subject to this Follow-up Report (BG, FI, HR, UK).
23. Adherence to suitability requirements is deemed especially important in the light of serious concerns arising from aggressive marketing techniques used by certain investment firms offering complex financial product to retail investors through on-line services: this particular issue has been addressed separately via product intervention measures adopted in May 2018. These measures focus on the offer of CFDs and binary options to retail clients; further to the restrictions introduced, supervisors should remain vigilant to avoid similar techniques are applied to sell other complex products to retail clients.
24. In the past, ESMA has undertaken follow-up peer reviews on the Peer Review on Supervisory Practices against Market Abuse, on the Peer Review on the Money Market Funds Guidelines.
25. In the run-up to the entry into application of MiFID2/MiFIR, checks on progress made by NCAs in following recommendations of earlier peer reviews on MiFID were undertaken in the more expedient form of follow-up letters from ESMA Chair, as foreseen in the Review Panel Methodology. ESMA Chair followed-up on the Peer Reviews relating to the MiFID Best Execution (2016) and Fair, clear and not misleading information conduct of business requirements (2017). Following this same approach, the ESMA Chair sent letters on 21 December 2017 to 16 NCAs (BG, CY, CZ, DE, EE, EL, FI, HU, HR, IE, IS, LU, LV, MT, SK, UK) asking to update ESMA on any follow-up undertaken to address the findings from the 2016 Report.<sup>12</sup> The ESMA Chair received responses from all 16 NCAs to which letters had been sent.

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<sup>12</sup> ESMA Chair asked NCAs both to update him in relation to the findings on the application of the MiFID Suitability Guidelines (10 NCAs: BG, DE, EE, FI, HR, IS, LU, LV, SK, UK) and on the question of thematic reviews (11 NCAs: BG, CY, CZ, EL, HR, HU, IE, IS, MT, LU, LV).

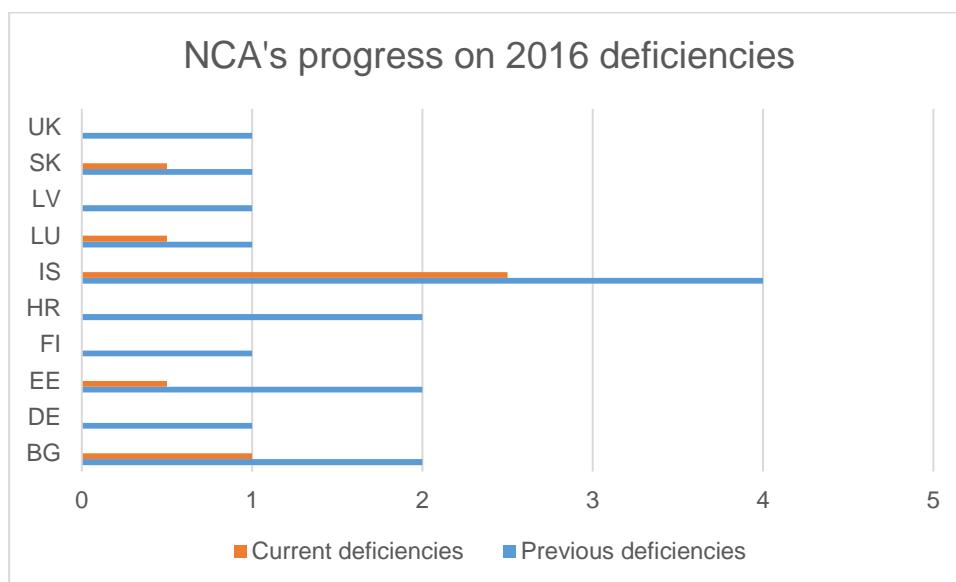
### 3 Assessment Method

26. The assessment remains within the assessment framework set by the original peer review and has been a pure desk-based information gathering exercise which sought to determine progress in addressing the deficiencies identified in the 2016 peer review.
27. To recall, the findings of the 2016 peer review were organised around the Key Issues identified at Paragraph 4 of this Report, and set out in the table below:

<b>A</b>	Supervision of the suitability requirements during the review period
<b>B</b>	Information on whether firms operating on a branch basis (where the CA is the host supervisor) and on freedom to provide services (where the CA is the home authority) were providing investment advice.
<b>C</b>	Overview of the distribution models in the NCAs jurisdiction during the review period
<b>D</b>	Enforcement activity during the review period
<b>E</b>	Formal compliance with the Guidelines on certain aspects of the MiFID suitability requirements

## 4 Overview of the Progress made

28. The following chart is intended to provide an overview of the progress made by 10 NCAs (BG, DE, EE, FI, HR, IS, LU, LV, SK, UK), as described later on in this section. Progress by NCAs on thematic work has not been assessed, but an update of NCAs' actions in this field is provided separately at section 6.
29. The subsequent graph and summary table sets out in further detail the items for which each of the 10 NCAs has been followed up.



30. The table below provides an overview of the conclusions reached per NCA in the context of the follow-up work.

<b>NCA</b>	<b>Findings of the 2016 peer review</b>	<b>Findings of the follow-up</b>	<b>Conclusions of the follow-up</b>
BG	A. Insufficient supervision of the suitability requirements during the review period; and  D. No enforcement activity during the review period	A. Partial progress made.  D. Partial progress made.	A. Partial progress has been made on deficiency. The FSC in 2016 introduced a new methodology for on-site inspections to assess conduct of business risks, which includes a dedicated section to assess firms against the suitability requirements. The FSC has undertaken five on-site inspections to assess firms' compliance with the suitability requirements. However, none of the five firms are reported to provide investment advice to clients. ESMA encourages FSC to further inquire into how suitability requirements are followed by other investment firms.  D. Partial progress has been made. The FSC has not launched any enforcement activity per se, but undertook five on-site inspections.
DE	B. Insufficient provision of information on whether firms operating on a branch basis (where the NCA is the host supervisor) and on freedom to provide services (where the NCA is the home authority) were providing investment advice.	B. Progress made.	B. BaFIN is currently implementing an IT-Tool to have at hand <i>consolidated</i> figures on the number of firms operating on a branch basis as well as on the number of firms that have notified to provide investment advice in Germany under freedom to provide services. The IT-Tool is expected to be implemented in Q4 2018.

NCA	Findings of the 2016 peer review	Findings of the follow-up	Conclusions of the follow-up
EE	A. Insufficient supervision of the suitability requirements during the review period; and  D. No enforcement activity during the review period	A. Deficiency addressed.  D. Partial progress made	A. Finantsinspeksiōn conducted several on-site inspections asking firms to describe/simulate sales process of the investment products to gauge how well firms explain the products and risk to investors. EFSA conducted off site inspections to monitor compliance as a part of its general supervisory approach. Action was taken to make sure firms recommend only suitable investment products.  D. EFSA has not demonstrated enforcement activity per se but requested activity plans from firms found to be non-compliant, on which the NCA followed up with firms, indicating strong supervisory measures implemented.
FI	D. No enforcement activity during the review period	D. Deficiency addressed.	D. Penalty payments and public warnings issued to four firms in March 2017 for non-compliance with the suitability assessments and non-compliance with the obligation to obtain information. Four financial penalties were imposed for omissions regarding documentation requirements and failures to take adequate action for identification and prevention of conflicts of interest. This is considered as sufficient addressing of the finding made in the 2016 Report.
HR	A. Insufficient supervision of the suitability requirements during the review period;  D. No enforcement activity during the review period.	A. Progress made.  D. Deficiency addressed.	A. Progress has been made. The use of a thematic review with the specific objective of assessing the level of compliance of supervised entities with the MiFID suitability requirements during 2016 shows enhanced supervisory attention to the suitability requirements.  D. Following the findings of an inspection, Hanfa has temporarily (for two years) prohibited a firm from providing investments services.
IS	A. Insufficient supervision of the suitability requirements during the review period;	A. Progress made.	A. Progress has been made through the thematic review and on-site inspections. The use of a thematic review with the specific objective of assessing the level of compliance with the MiFID suitability requirements during 2016 shows increased supervisory attention to the requirements

	<p>C. Insufficient overview of the distribution models in the NCAs jurisdiction during the review period;</p> <p>D. No enforcement activity during the review period;</p> <p>E. Compliance with the Guidelines on certain aspects of the MiFID Suitability Requirements</p>	<p>C. No progress made.</p> <p>D. Partial progress made.</p> <p>E. No progress made.</p>	<p>themselves. The FME stated that the supervision of suitability requirements will not become part of its regular supervisory approach going forward. Indeed, findings from the 2016-2017 thematic work show that although the level of complaints may be low, the compliance level is perfectible and therefore it is important that these requirements are duly integrated in the general supervisory framework and that compliance checks be performed, although at a frequency to be determined by the NCA.</p> <p>C. Not conducted work specifically focusing on distribution models and suitability requirements after the publication of ESMA's peer review Report.</p> <p>D. The FME has not demonstrated enforcement activity in terms of sanctions pronounced, but published the results of its on-site inspections which has a deterrent effect to the market. The FME followed up with firms making sure that findings have been addressed.</p> <p>E. The FME does not formally comply with the MiFID Suitability Guidelines. While ESMA Founding Regulation is applicable in Iceland since May 2017, the incorporation of MiFID2 in the EFTA Agreement is pending, but in process. The FME intends to comply with these Guidelines.</p>
LU	<p>C. Insufficient overview of the distribution models in the NCAs jurisdiction during the review period</p>	<p>C. Partial progress made.</p>	<p>C. The CSSF introduced specific questions related to suitability requirements in the introductory interviews with authorized firms. This is a positive step in raising awareness and identifying entity specific information, which may be useful in assessing the distribution models in the local market, but does not provide with a full overview.</p>

<b>NCA</b>	<b>Findings of the 2016 peer review</b>	<b>Findings of the follow-up</b>	<b>Conclusions of the follow-up</b>
LV	D. No enforcement activity during the review period	D. Deficiency addressed.	D. The FTK has demonstrated enforcement activity and referred to the prohibition of the provision of investment services as well as pecuniary sanctioning as a result of its on-site inspections, which identified deficiencies pertaining to compliance with the suitability requirements at those firms inspected. For this reason and in keeping with the original Report, the deficiency can be said to have been addressed.
SK	D. No enforcement activity during the review period	D. Partial progress made.	D. NBS has not demonstrated enforcement activity per se but refers to action plans requested from firms found to be non-compliant, indicating strong supervisory measures implemented (i.e. drawing up an action plan with an agreed timeline for completion and checking the completion of findings).
UK	B. Insufficient provision of information on whether firms operating on a branch basis (where the CA is the host supervisor) and on freedom to provide services (where the CA is the home authority) were providing investment advice.	B. Deficiency addressed.	B. The FCA now has the information readily available and has provided this information during the follow-up.

## 5 Findings of the Follow-up

The following section presents the findings of the follow-up on an NCA per NCA basis.

### 5.1 FSC Bulgaria

31. The 2016 peer review Report noted **A**. Insufficient supervision of the suitability requirements during the review period; and **D**. No enforcement activity during the review period. It is noted that FSC was onsite visited during the original peer review.

The main points the FSC mentioned in response to the ESMA Chair letter are as follows:

32. The FSC have conducted five on-site thematic inspections on investment firms as a follow up of the Report recommendations which proposed to include an assessment of compliance with MiFID suitability requirements.
33. Key findings were identified, including that none of the investigated companies offers investment advice services. The FSC asserted that no advice is given by the firms inspected through cross-inspections of clients and the information they provide on the received services. To verify that investment advice was not provided to clients, the FSC sent letters to the clients who used the services of the investigated companies. The letters aimed to crosscheck whether the client had indeed received advice in the form of, for example: advice on particular financial instruments for trading, proposal for investment strategy, guidance on trading and if yes who offered such advice etc. The FSC cross-checked the responses with the investigated companies.
34. Two of the companies have portfolio management services and all companies offer services where information required is collected. Key instructions were made by the FSC to investment firms about the collection of information.
35. The FSC commit to including Mystery Shopping as a tool since amendments were prepared and introduced in the national legislation. This will be used in the process of supervising compliance with MiFID2.
36. A new methodology for risk assessment and determining the risk weighting of investment firms was developed. This new methodology includes assessing firms against the suitability requirements. FSC assess this requirement by reviewing the written notification to the client on whether a service is suitable or unsuitable and the template used by firms to assess clients' financial status, investment goals and knowledge.

37. The FSC response highlighted no enforcement activity had been carried out following any of its inspections.
38. After the introduction of the risk based supervision, the FSC asserts that it now takes into account the circumstances relating to the compliance of the rules by firms, and asserts that it can be concluded that the suitability requirements are part of the regular supervisory approach.

**The assessment concludes:**

39. **Partial progress has been made on deficiency A. Insufficient supervision of the suitability requirements during the review period.** The FSC has undertaken five on-site inspections to assess firms' compliance with the suitability requirements. However, none of the firms selected are reported to provide investment advice to clients. ESMA encourages FSC to further inquire into how suitability requirements are followed by other investment firms.
40. The FSC in 2016 introduced a new methodology for on-site inspections to assess conduct of business risks, which includes a dedicated section to assess firms against the suitability requirements.
41. **Partial progress has been made on deficiency D. No enforcement activity.** The FSC has not launched any enforcement activity per se, but undertook five on-site inspections.

## 5.2 BaFIN Germany

42. The 2016 peer review Report noted **B. Insufficient provision of information on whether firms operating on a branch basis (where the CA is the host supervisor) and on freedom to provide services (where the CA is the home authority) when providing investment advice.**

**The main points BaFin mentioned in response to the ESMA Chair letter are as follows:**

43. BaFin asserted that the finding was based on answers given to two initial questions, where they stated that figures on a consolidated basis on how many firms provide investment advice was not available, and an explanation that the IT tools at BaFIN were not able to deliver comprehensive statistics.
44. BaFin have clarified that it is notified by each incoming and outgoing investment firm that is providing advice operating on a branch basis, which are legally required to submit annual reports. These reports contain exact information on whether the firms provide advice.
45. BaFin does not compile the information with an overview, but asserts that the annual reports contain all information necessary to provide information on whether firms operation on a branch basis (where the NCA is the host supervisor)

were providing investment advice. Investment firms that consider providing cross-border investment advice (freedom to provide services – where the NCA is the home authority) are to inform BaFin. However, information on whether this advice is in fact rendered is not required.

46. The NCA asserts that consolidated figures on how many investment firms are providing investment advice on a branch basis are not necessary under the German supervisory approach, as well as that there is no formal obligation under German law for investment firms operating on freedom to provide services to give any information on whether investment advice is in fact provided in other Member States.
47. An IT-Tool to obtain consolidated figures on the number of firms operating on a branch basis as well as on the number of firms that are notified to provide investment advice under freedom to provide services is currently being developed, with Q4 2018 set as the targeted period for implementation.

**The assessment concludes:**

48. Progress made on deficiency **B**. Insufficient information on whether firms operating on a branch basis (where the NCA is the host supervisor) and on freedom to provide services (where the NCA is the home authority) were providing investment advice.
49. The implementation of an IT-Tool to obtain consolidated figures is considered as sufficient to address the finding made in the 2016 Report. The IT-Tool is expected to be implemented in Q4 2018.

### **5.3 Finantsinspeksiõon Estonia**

50. The 2016 peer review Report noted **A**. Insufficient supervision of the suitability requirements during the review period and **D**. No enforcement activity during the review period.

**The main points the Finantsinspeksiõon (“EFSA”) mentioned in response to the ESMA Chair’s letter were the following:**

51. On deficiency **A**, the NCA confirmed its use of a risk-based approach. The NCA has conducted several thorough on-site inspections to assess firm's activities in assessing the suitability of the relevant service and security to a client before the provision of investment services.
52. Firms were asked to describe or simulate the sales process of products, in order for EFSA to gauge how well firms are explaining the products and their risks to investors. EFSA identified findings in case of four firms. These findings concerned internal rules of these firms, their approval by management boards, compliance of the firms' actual practices with the internal rules. EFSA required activity plans to eliminate findings and followed-up with firms.

53. In 2017, EFSA conducted an off-site inspection to monitor compliance with the MiFID provisions, which also included suitability requirements.
54. EFSA plans to conduct another off-site inspection in 2018 to inspect compliance with the MiFID2 requirements, including those related to suitability, and by doing so, asserts that the supervision is conducted routinely by using supervisory tools in a targeted manner.
55. On deficiency **D**. EFSA asserts that though some internal processes of firms were found to be non-compliant with suitability requirements, different methods have been assessed to ensure future compliance.
56. EFSA takes the view that considering the specific circumstances of the proceedings conducted by the EFSA, non-pecuniary methods such as temporary or permanent prohibition of activities, enforcement action against individuals etc. are not appropriate, necessary and proportionate to the objective pursued. EFSA has requested activity plans from firms that incorporate methods for the elimination of these non-compliant factors, and the cooperation of firms is seen as sufficient in achieving the desired objective.

**The assessment concludes:**

57. On deficiency **A**. Insufficient supervision of the suitability requirements this can be considered as addressed. Several on-site inspections were conducted, asking firms to describe/simulate sales process of the investment products to gauge how well firms explain the products and risk to investors. The EFSA conducted off site inspections to monitor compliance as a part of its general supervisory approach. Action was taken to make sure firms recommend only suitable investment products.
58. Partial progress has been made on deficiency **D**. No enforcement activity. EFSA has not demonstrated enforcement activity per se but refers to activity plans requested from firms found to be non-compliant, indicating strong supervisory measures implemented.

## 5.4 Finanssivalvonta Finland

59. The 2016 peer review Report noted **D**. No enforcement activity during the review period. It is noted that Finanssivalvonta ("FIN-FSA") was onsite visited during the original peer review.

**The main points the FIN-FSA mentioned in response to the ESMA Chair's letter were the following:**

60. Following the findings of the peer review, FIN-FSA conducted inspections covering MiFID suitability requirements in relation to investment advice.
61. In 2015 and 2016, four firms were inspected and because of the findings, penalty payments and public warnings were issued to all four companies in March 2017.
62. The public warnings were issued for non-compliance with the obligation to obtain information and non-compliance with the suitability assessments. The penalty payments were imposed for omissions regarding documentation requirements and for failure to identify and prevent conflicts of interest. Penalties ranged from EUR 20,000 to EUR 1,000,000.

**The assessment concludes:**

63. Deficiency D., the previous finding "No enforcement activity", can be considered as addressed as far as four public warnings were issued for non-compliance with the suitability requirements and non-compliance with the obligation to obtain information. Four financial penalties were imposed for omissions regarding documentation requirements and failures to take adequate action for identification and prevention of conflicts of interest.

## 5.5 Hanfa Croatia

64. The 2016 peer review Report noted A. Insufficient supervision of the suitability requirements during the review period; and D. No enforcement activity during the review period. It is noted that Hanfa was onsite visited during the original peer review.

**The main points Hanfa mentioned in response to the ESMA Chair's letter were the following:**

65. Hanfa has developed a supervisory tool that can track client numbers and AUM by investment firms who provide discretionary portfolio management service. The data provided by this tool identifies firms for potential on-site, off-site or thematic reviews including firms' compliance with the MiFID suitability requirements. The tool appears adequate based on the size of their market.
66. Hanfa supervises a number of investment firms who provide discretionary portfolio management and investment advice services to clients. During 2016, Hanfa undertook a specific thematic review to assess the level of compliance by investment firms with the MiFID suitability requirements. Assessing suitability is an integral part of Hanfa's procedures for on-site supervision and it predominately uses this tool for checking firms' compliance with the requirements.

67. The review included nine firms which provided investment service of portfolio management to their clients.
68. The conclusions of the review was that the entities inspected were mostly in line with the Guidelines. Hanfa noted that some aspects of the suitability assessment process could be improved such as the determining the extent to which information to be collected from clients in light of the features of portfolio management services to be provided to certain clients, and, ensuring that all tools employed are appropriately designed.
69. The conclusions gleaned from the review were not deemed significant enough to require further action.
70. However, concerning an on-site inspection related to the offering and sale of CFDs, it was established that the firm in question also provided the service of investment advice to its clients while officially, this service was not provided to the clients. Almost all of the clients were unaware that such a service was being provided to them. This practice led to openly advising clients on which CFD to trade, on which price and when, whilst transferring all of the responsibility of the outcomes of such advised trades onto clients.
71. As a result, Hanfa temporarily prohibited the firm from providing investment services related to the reception and transmission of orders in relation to one or more financial instruments, as well as the execution of orders on behalf of clients.

**The assessment concludes:**

72. Progress has been made on **A**. Insufficient supervision of the suitability requirements during the review period through the thematic review and on-site inspections. The use of a thematic review with the specific objective of assessing the level of compliance of supervised entities with the MiFID suitability requirements during 2016 shows enhanced supervisory attention to the suitability requirements.
73. Deficiency **D**., the previous finding “No enforcement activity”, can be considered as addressed. Following the findings of an inspection, Hanfa has temporarily (for two years) prohibited a firm from providing investments services. It identified that employees at the firm provided investment advice to clients on CFDs but failed to assess whether these products were indeed suitable.

## 5.6 Financial Supervisory Authority Iceland

74. The 2016 peer review Report noted **A**. Insufficient supervision of the suitability requirements during the review period; **C**. Insufficient overview of the distribution models in the NCAs jurisdiction during the review period; **D**. No enforcement

activity during the review period; **E. Non-compliance with the Guidelines on certain aspects of the MiFID Suitability Requirements.**

**The main points the Financial Supervisory Authority (“FME”) mentioned in response to the ESMA Chair’s letter were the following:**

75. FME asserts that it remains risk based in its supervisory activities and that no consumer complaints on possible breaches of the suitability requirements has been received in the review period.
76. Though the FME did not conduct a thematic review or on-site inspection during the review period, in 2016 a review was initiated in the form of on-site investigation on three investment firms, focusing on suitability requirements – specifically the collection of information from clients, assessment of suitability of clients and recommendations of financial products.
77. The outcomes of the investigations were published in respective announcements on the FME website in September 2016, December 2016 and January 2017. The investigation concluding in September showed conformity with the requirements, whereas the other two investigations showed certain breaches.
78. FME is currently conducting an off-site examination on compliance with rules on suitability assessment regarding one investment firm covered by the on-site investigations aforementioned, identifying possible breaches.
79. FME has not conducted work specifically focusing on distributions models.
80. The outcomes of the investigations were published; however no financial penalties were imposed in any case regarding the suitability requirements.
81. FME states that it intends to comply with the ESMA Guidelines on certain aspects of the MiFID suitability requirements. Regulation No. 1095/2010 establishing ESMA, is applicable in Iceland as of May 2017 after its incorporation into the EEA Agreement in September 2016.
82. The response highlights that in FME’s supervisory activities, emphasis is placed on investor protection, and during the thematic reviews, it has identified possible breaches of certain aspects of the suitability requirements which has led to further examinations. The work on suitability requirements has covered three of the four largest investment firms in Iceland. The FME asserts that when also including two smaller investment firms, the work in 2016/17 has covered approximately 25% of supervised entities in the Icelandic market, despite FME’s resource constraints.
83. FME stated that in the two cases where corrective actions were required, one entity had already taken action by the time of the publication of results and informed the FME. This was mentioned in the public announcement. For the other

case, that entity was required to report to the FME about its corrective actions within three months from the date of the final report.

**The assessment concludes:**

84. Progress has been made on deficiency **A**. Insufficient supervision of the suitability requirements. Progress has been made through the thematic review and on-site inspections. The use of a thematic review with the specific objective of assessing the level of compliance of supervised entities with the MiFID suitability requirements during 2016 shows increased supervisory attention to the requirements themselves. Three firms received an on-site visit from a pool of c. 22 investment firms. The FME stated that the supervision of suitability requirements will not become part of its regular supervisory approach going forward. Indeed, findings from the 2016-2017 thematic work show that although the level of complaints may be low, the compliance level is perfectible and therefore it is important that these requirements are duly integrated in the general supervisory framework and that compliance checks be performed, although at a frequency to be determined by the authority.
85. No progress has been made on deficiency **C**. Overview of the distribution models in the NCAs jurisdiction. FME states directly that it has not conducted work specifically focusing on distributions models.
86. Partial progress has been made on deficiency **D**. No enforcement activity. The FME has not demonstrated enforcement activity in terms of sanctions pronounced, but published the results of its on-site inspections which has a deterrent effect to the market. The FME followed up with firms making sure that findings have been addressed.
87. No progress has been made on deficiency **E**. Non-compliance with the Guidelines on certain aspects of the MiFID Suitability Requirements at the moment of this Report. The FME does not formally comply with the MiFID Suitability Guidelines. While ESMA Founding Regulation is applicable in Iceland since May 2017, the incorporation of MiFID2 in the EFTA Agreement is pending, but in process. The FME intends to comply with these Guidelines.

## 5.7 CSSF Luxembourg

88. The 2016 peer review Report noted **C**. Insufficient overview of the distribution models in the NCAs jurisdiction.

**The main points the CSSF mentioned in response to the ESMA Chair's letter were the following:**

89. CSSF states that following the publication of the Report, the MiFID on-site inspection team at the NCA has introduced discussions with firms during the

introductory interview with the authorized management of the audited entity, which specifically focuses on the distribution models and the difference between advised and non-advised services.

90. The CSSF states that these are “systemically discussed”, and within the response to ESMA provided examples of questions which are addressed to the management of the entities in question.
91. The response notes that during two MiFID on-site inspections carried out subsequent to the publication of the original Report, failures concerning the distinction between advised and non-advised services were detected, based on sample-based testing of transactions, and that the two entities have been confronted with these findings.
92. The CSSF notes that though the interviews described in the response do not per se provide the NCA with an overview of the market, the overview is in fact obtained via the combination of the supervisory tools by the CSSF in its on-going supervisory work. That is to say, supervisors assess specific MiFID aspects, including the suitability requirements.
93. The response states that this is based on, *inter alia*, long form reports, compliance reports, internal audit reports and the analysis of complaints. The information collected is then shared between the relevant services of the CSSF to identify systemic or significant problems at the market level.

**The assessment concludes:**

94. Partial progress has been made on deficiency **C**, having an Overview of the distribution models in the NCAs jurisdiction, through the introduction of suitability related questions at the moment of on-site visits.
95. It is asserted however that, in line with the CSSF’s own admission, these interviews may allow for providing entity specific information over a fully sufficient overview of distribution methods in the market. The introductions of the interviews at the introductory staged as outlined may not fully address the identified deficiency.

## 5.8 FKTK Latvia

96. The 2016 peer review Report noted **D**. No enforcement activity during the review period.

**The main points the FTK mentioned in response to the ESMA Chair's letter were the following:**

97. The FTK supervisory team undertook five full scope MiFID on-site inspections, two limited scope MiFID on-site inspections and 16 full scope MiFID supervisory meetings between 2015 and 2017.
98. Only three of the five full scope inspections involved investment firms providing investment advice and/or discretionary portfolio management service where MiFID suitability requirements apply.
99. In all three cases, deficiencies were identified, followed by enforcement action:
  - In one case, an investment firm stopped providing portfolio management service and investment advice service after being ordered to improve suitability assessment process.
  - One firm received a pecuniary sanction.
  - In one case it was deemed sufficient to request processes were improved, as there was no evidence that it lead to an actual breach of the suitability requirements.
100. FTK asserts that the main reason for why no enforcement action was taken during the initial review period was that the inspected investment firms at the time did not provide investment advice or portfolio management services.

**The assessment concludes:**

101. Concerning the deficiency D. No enforcement activity, this can be said to have been addressed. FTK has demonstrated enforcement activity and refers to the prohibition of the provision of investment services as well as pecuniary sanctioning as a result of its on-site inspections, which identified deficiencies pertaining to compliance with the suitability requirements at those firms inspected.

## **5.9 NBS Slovakia**

102. The 2016 peer review Report noted D. No enforcement activity.

**The main points the NBS mentioned in response to the ESMA Chair's letter were the following:**

103. NBS has not initiated any enforcement proceedings per se since the review period.

104. NBS has imposed a supervisory measure on an investment firm as a result of a complex inspection. The firm has not gathered all relevant information regarding client knowledge, experience, financial situation or investment objectives. An action plan was required from the firm in order to address the deficiency.

**The assessment concludes:**

105. Partial progress has been made on deficiency **D**. No enforcement activity. NBS has not demonstrated enforcement activity per se but refers to action plans requested from firms found to be non-compliant, indicating strong supervisory measures implemented (i.e. drawing up an action plan with an agreed timeline for completion and checking the completion of findings).

## 5.10 FCA UK

106. The 2016 peer review Report noted **B**. Insufficient provision of information on whether firms operating on a branch basis (where the NCA is the host supervisor) and on freedom to provide services (where the NCA is the home authority) were providing investment advice.

**The main points FCA mentioned in response to the ESMA Chair letter are as follows:**

107. The FCA explained that at the time of the 2016 Report, the response given reflected the readily available information on investment advice from its data systems.

108. The information initially sought by ESMA during the Peer Review is now readily available in the FCA's systems.

109. So, for example, as of 10 January 2018, there were 113 investment firms operating in the UK on a branch basis under Article 32 of MiFID, 81 of which have notified their intention to provide investment advice. There are 2200 investment firms from the UK providing investment services in other jurisdictions under Article 31 MiFID, of which 1833 have notified their intention to provide investment advice.

**The assessment concludes:**

110. The deficiency **B**. Insufficient information on whether firms operating on a branch basis (where the NCA is the host supervisor) and on freedom to provide services (where the NCA is the home authority) were providing investment advice can be considered as addressed.

111. The figures sought by ESMA in order to demonstrate sufficient provision of information on whether firms operating on a branch basis and on freedom to provide services were providing investment advice have been made available, and therefore addresses the deficiency identified in the Report.

## 6 Thematic Reviews

112. The original Report indicated in its Annex that many NCAs did not have proactive and focused supervisory approaches regarding suitability requirements, which did not allow them to identify possibly significant issues in relation to suitability. The Report and its Annex emphasised the lack of thematic reviews on suitability in particular, stating that one third of the NCAs (BG, CY, CZ, EL, HR, HU, IE, IS, MT, LU, LV) had not made use of a thematic review covering suitability related issues.

113. As part of the follow up exercise, ESMA asked these NCAs whether thematic reviews related to compliance with the MiFID suitability requirements had been conducted, and if so, what their outcome was.<sup>13</sup>

114. As indicated in the Report, the use of a thematic review is an important tool in the effective oversight and enforcement of the conduct of firms around the aspects of the MiFID suitability provisions. Responses indicate that out of 11 NCAs three (HR, IE, MT) have already conducted a thematic review. For example HR and IE commenced a specific thematic review to determine the level of compliance with the MiFID suitability guidelines requirements. MT also launched a thematic review into the appropriateness and suitability of financial instruments and services to retail clients.

115. Other countries undertook thematic on-site inspections of the MiFID requirements which included suitability as one of the components (BG, CY, EL, HU, IS, LU, LV). One NCA (CZ) is planning to undertake a thematic review in 2018. ESMA encourages all NCAs, especially those who supervise investment firms with past high levels of consumer complaints to continue to undertake thematic reviews as a method of assessing firms' compliance with the suitability requirements.

- IE noted that it had carried out a thematic review on suitability, focused on assessing firm compliance with the ESMA guidelines on certain aspects of the MiFID suitability requirements. This review was deemed to be well timed as it assisted in assessing preparedness with MiFID2. 23 firms were included in a desk based review, and eight firms were selected for onsite inspection. The review highlighted to the NCA that firms need to improve the quality of information collected and how they utilise such information in the suitability

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<sup>13</sup> Please refer in particular to Paragraph 64 of the Report and Paragraph 180 of the Annex

process. A circular being published, which received press coverage, shows a method by which NCAs can increase the scrutiny and pressure on firms to comply with the guidelines on certain aspects of the suitability requirements, as well as inform investors that these principles and regulations are intended to protect them.

- MT has set up a “conduct supervisory unit” within the organisation. This unit, during the last quarter of 2016 and the year ending 2017, conducted focused onsite inspections at 25% of the total population of investment firms, of varying size, type and business mode in order to obtain a representative picture of the sector as a whole. In a similar fashion to other NCAs that have conducted thematic reviews, a circular was published subsequent to the findings of the review, with the objective of informing the industry about the common key findings. Firms were then requested to consider the key findings and undertake assessments of their positions and ensure any remedial action.
- HR included a broad range of firms within their thematic review by including 3 investment firms, 1 credit institution, and 5 UCITS management companies.

## 7. Annex – Statement from National Competent Authority

116. One NCA wished to make a statement to the follow-up assessment to the peer review on the MiFID suitability requirements.

### NBS Slovakia

117. The peer review identified, in case of NBS, one finding regarding no enforcement activity in the area of suitability requirements during the review period. As a matter of fact, NBS has not initiated any enforcement proceedings since the publication of the peer review final report. On the other hand, NBS imposed one supervisory measure on an investment firm as a result of complex inspection. In this particular case it was found that investment firm did not gather all relevant information about client's knowledge and experience, financial situation and investment objectives. NBS required the investment firm to draw up an action plan in order to address this deficiency.

118. NBS is sceptical towards choosing an Authority to be subject of follow-up solely on the basis of no enforcement activity. NBS believes that ESMA assessment does not take into account all relevant aspects and real situation of Slovak capital market where only limited number of firms operate and thus the volume of enforcement activity is naturally lower than in other developed EU markets. One can strongly argue whether putting so much emphasis on the enforcement is truly the right approach how to assess compliance with guidelines. Moreover, NBS believes that follow-ups should be more focused on partial or actual non-compliance of NCAs with specific parts of guidelines.