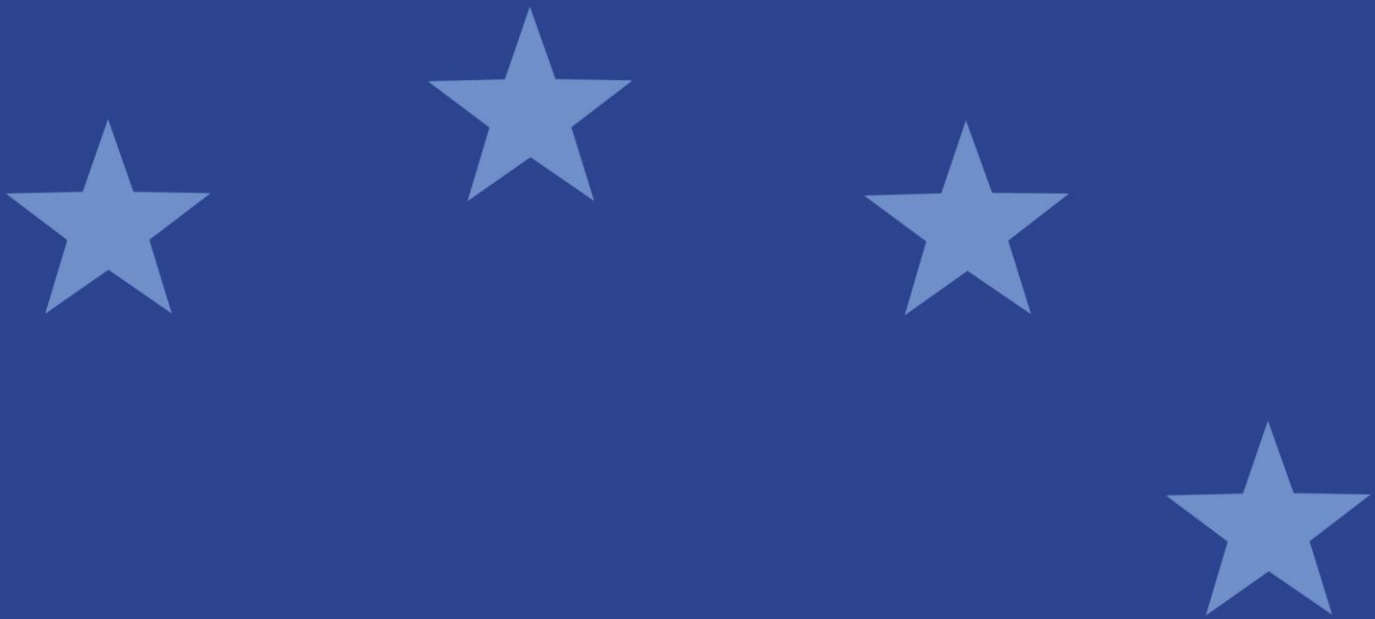




European Securities and
Markets Authority

Methodology for Mandatory Peer Reviews in relation to CCPs' authorisation and supervision under EMIR



1. Introduction

1. The European Regulation No 648/2011¹ on OTC derivatives, central counterparties and trade repositories (EMIR) requires ESMA to undertake peer reviews analysing supervisory activities of all competent authorities in relation to the authorisation and supervision of CCPs². Based on the experience of a first peer review undertaken in 2016 in the context of EMIR, ESMA's Board of Supervisors decided that a Methodology for this new type of peer reviews to be conducted at least annually should be prepared, building on the existing methodology.
2. Indeed, ESMA has a long experience in running peer reviews that are key tools for supervisory convergence, as recognised under Article 30 of Regulation (EU) No 1095/2010 (hereafter "ESMA Regulation") mandating ESMA to periodically organize and conduct peer reviews of some or all activities of national competent authorities ("NCAs") to further strengthen consistency in supervisory outcomes. The procedures for such peer reviews are laid down in the ESMA Review Panel Methodology (ESMA/2013/1709)³.
3. In addition to EMIR, several sectoral legislations put in place in the aftermath of the financial crisis also explicitly require ESMA to undertake peer reviews and specify the scope and the frequency of these reviews. These so-called "mandatory peer reviews" have therefore different characteristics from the peer reviews that ESMA has conducted so far under Article 30 of the ESMA Regulation (referred to as "discretionary peer reviews" in the present Methodology), where ESMA has the discretion to select the scope, topic and duration of the reviews. Under EMIR, ESMA has been entrusted with a specific role to enhance supervisory convergence, the scope of peer reviews is defined and their frequency is annual. ESMA's 2016 Supervisory Convergence Work Programme (SCWP)⁴ also recognised that it may not be feasible or desirable to apply the full ESMA Review Panel Methodology for mandatory peer reviews.
4. Given that the only experience of mandatory peer reviews until now is related to EMIR, Article 21(6)(a), it seems appropriate to adopt a pragmatic approach and to restrict the application of this Methodology to peer reviews undertaken in application of Article 26 of EMIR. The scope might be reconsidered at a later stage when the mandatory peer reviews foreseen under other sectoral EU legislation will need to be launched. By now, the Alternative Investment Fund Managers Directive (AIFMD) requires ESMA to conduct, on an annual basis, a peer review analysis of the supervisory activities of NCAs in relation to the authorisation and the supervision of non-EU AIFMs. Similarly, the Regulation on improving securities settlement in the European Union and on Central Securities Depositories (CSDR) requires ESMA to organise and conduct, at least every three years, a peer review of the supervision of CSDs which make use of the freedom to provide services in another Member State or to participate in an interoperable link. Last, the upcoming

¹ OJ L 201, 27.07.2012, p.1

² EMIR Article 21(6)(a)

³ It has to be noted that since the adoption of the ESMA Review Panel Methodology, the Review Panel has been transformed into the Supervisory Convergence Standing Committee, in line with ESMA's Strategic Orientation 2016-2020.

⁴ Para 81b, how to accommodate and carry out the various mandatory peer reviews written into various pieces of legislation (EMIR, AIFMD, CSDR), of which the EMIR requirement in relation to CCPs is already in force and others will be activated in the coming years; it may not be feasible or desirable to apply the full methodology used for other peer reviews in such cases but if not an appropriate alternative needs to be identified;



regulation relating to prospectuses may require ESMA to conduct mandatory peer reviews in the future.

5. Peer reviews should always be undertaken with a solid methodological background to allow for objective assessments and balanced comparisons. There is a need to ensure, to the extent possible, methodological consistency among the “discretionary” and the “mandatory” peer reviews. In this context, it has to be recalled that the Supervisory Convergence Standing Committee’s (SCSC) responsibilities and tasks regarding peer reviews are to ensure consistent methodologies and rules of procedure for the various mandatory peer reviews under the responsibility of ESMA as outlined in the Terms of References of the Committee⁵.

⁵ B. 7th indent (ESMA/2016/229)



2. Legal Basis and Scope

6. According to Article 21(6) of EMIR, ESMA shall fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes.
7. In particular, according to Article 21(6)(a) ESMA shall, at least annually conduct a peer review analysis of the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs in accordance with Article 30(2) of ESMA Regulation⁶.
8. In line with Article 30(2) of the ESMA Regulation, the peer review will cover:
 - (a) the adequacy of resources and governance arrangements of the competent authority, with particular regard to the effective application of the regulatory technical standards and implementing technical standards referred to in Articles 10 to 15 of the ESMA Regulation and of the acts referred to in Article 1(2) of the ESMA Regulation and the capacity to respond to market developments;
 - (b) the degree of convergence reached in the application of Union law and in supervisory practice, including regulatory technical standards and implementing technical standards, guidelines and recommendations adopted under Articles 10 to 16 of the ESMA Regulation, and the extent to which the supervisory practice achieves the objectives set out in Union law;
 - (c) best practices developed by some competent authorities which might be of benefit for other competent authorities to adopt;
 - (d) 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.
9. This Methodology is without prejudice to the specific tasks of ESMA as established by EMIR and the ESMA Regulation.

⁶ OJ L331, 15.12.2010, p.84



3. Topic for a peer review

10. Each peer review will assess the overall functioning of CCP colleges and provide an in-depth analysis of a specific topic, which is determined within the scope set by EMIR, as described in the previous section. Given the technicality of the topics, the Post-Trading Standing Committee (PTSC) will submit, on proposal of ESMA staff, a topic for review for approval by the Board of Supervisors (BoS).
11. The topic for the upcoming mandatory peer review will figure in the SCWP that is adopted by the BoS at the beginning of each year. The SCSC will have an opportunity to comment on the draft SCWP, including the proposed topics for the mandatory peer review under EMIR.



4. The assessment specifications

12. Each mandatory peer review will be launched by a document containing the assessment specifications. This document will indicate the specification of the technical standards on which basis the review will be undertaken as well as the proposed stages and timeline for the work. The definition of standards to be reviewed takes into account 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. This should allow the assessment to be made in an objective, transparent and comparative manner.
13. The assessment specifications will be agreed by the PTSC. The SCSC will receive it for information.
14. Given the specificities described above and the recurrence and time constraints faced with, ESMA staff will conduct these mandatory peer reviews under EMIR. Recognising the importance of NCAs' expertise the PTSC will receive regular updates of the state of play of the assessment.



5. The questionnaire

15. In order to gather the reviewed NCAs' input to the assessment, ESMA staff drafts a questionnaire filled in by each participating NCA. The PTSC is consulted on the questionnaire before it is finalised.
16. The questionnaire has to give guidance to NCAs on how to provide their answers in order to allow the assessments to be made in an objective, transparent and comparative manner. It must therefore clearly respect the specified technical standards from the assessment specifications on which the assessments will be made.
17. The questionnaire needs to be constructed in a way to achieve a full description of the NCAs' regulations, supervisory activities and practices regarding the topic under review, in a format that allows an objective comparison of all the national submissions.
18. The answers to the questionnaire have to be supported by acceptable evidence in English. If an English version is not available, a short summary has to be provided with the relevant information in English.
19. The questionnaire will be made available by ESMA in an electronic tool.
20. NCAs should provide complete, coherent and high-quality responses, so that the peer review results in a meaningful outcome, which appropriately describes supervisory powers, activities and practices as well as enforcement provisions or actions, and allows to draw the appropriate conclusions from its findings. The description has to be factual to allow a frank self-assessment of the NCA's perceived weak or strong points. NCAs will provide their responses within the agreed deadline (minimum 4 weeks from the receipt of the questionnaire).
21. ESMA staff will follow up with the relevant NCAs where answers are incomplete or unclear. The NCAs shall timely provide any missing information or requested clarification (within two weeks from the receipt of the follow-up request).
22. Furthermore, ESMA staff may request follow-up bilateral conference calls or physical meetings with NCAs under review to discuss remaining unclear, inconsistent or incomplete answers.

6. The Report

23. Based on ESMA staff's analysis of the replies to the questionnaire, ESMA staff prepares a draft report.
24. The report has to cover all the issues falling under the chosen topic as defined by the assessment specifications and, at least, the elements detailed section IV. In addition, the peer review will also assess the overall functioning of CCP colleges.
25. The Report will:
 - signal the extent to which competent authorities achieve convergence in supervisory practices and apply specific supervisory practices
 - 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;
 - express views on specific problems encountered by individual NCAs and recommend ways for achieving full implementation by the relevant jurisdictions, where necessary;
 - include an assessment of the level of convergence achieved;
 - signal inconsistencies, differences in interpretation, or general problems in the implementation or potential breaches of Union law and identify the reasons;
 - 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;
 - describe possible good practices developed by some NCAs, which might be of benefit for other NCAs to adopt.
26. The review report shall include an executive summary and clearly set out its conclusions on each of the points listed above. 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 BoS.
27. NCAs should have sufficient time for accuracy checks, before the report is finalised.
28. The Report is discussed by the PTSC before it is submitted to the BoS for approval. ESMA staff also consults the SCSC on the draft report on matters of supervisory convergence before the draft report is submitted for approval to the BoS.
29. As follows from the ESMA Regulation, a peer review may lead to a variety of results, such as:
 - Identification of existing good practices,
 - Findings of incomplete implementation of non-binding "soft" law,
 - Findings that may lead ESMA to issue guidelines or recommendations,
 - Findings of potential breaches of Union Law, to be dealt with according to the provisions of the ESMA Regulation,
 - Findings that may lead ESMA to recommend changes to Union Law.

7. Implementation and Follow-up

30. The PTSC will ensure that the conclusions are followed by appropriate actions, as specified in the report. The SCSC should be kept updated by ESMA staff on follow-up actions that the PTSC takes and that are relevant from a supervisory convergence perspective. In addition, should recommendations of a peer review report not be followed by remedial action, the PTSC may propose that a discretionary peer review be undertaken under the remit of the SCSC to address the matter.
31. In case of a lack of remedial actions by participating NCAs, the issue can be reported to the Chair of ESMA who, as contributor to the catalogue of areas to be subject to a peer review, can recommend to the BoS to launch a discretionary peer review of the NCAs where remedial actions are lacking, under the remit of the SCSC.
32. Without prejudice to other actions, whenever the assessment of an NCA detects serious deficiencies the ESMA Chair may send individual letters to the respective NCA Chairs pointing out the deficiency(ies) as reflected in the findings of the peer review report, in order to check on progress made and to report to the BoS. NCAs will report on the actions taken further to the findings of the peer review and explain the underlying reasons in case remedial action has not yet been put in place. Would such action become necessary, and before reporting to the BoS, the PTSC will be consulted and the SCSC informed on whether satisfactory progress towards convergence can be achieved through the action taken by the NCAs to correct the deficiency(ies) and on the proposed way forward.



8. Publication

33. The BoS decides on publication of the results of the peer review.
34. A peer review report as well as the decisions taken by the BoS 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 NCA concerned. An NCA that does not give its agreement to publication is expected to state the reasons for this to ESMA. The version of the peer review report to be submitted for publication shall exclude confidential supervisory information as well as any sensitive information relating to individual entities or information that could lead to the identification of individual entities.
35. Good practices, identified through peer reviews, in line with paragraph 8(c), are also to be made publicly available.
36. The individual responses to the assessment questionnaire are not published.