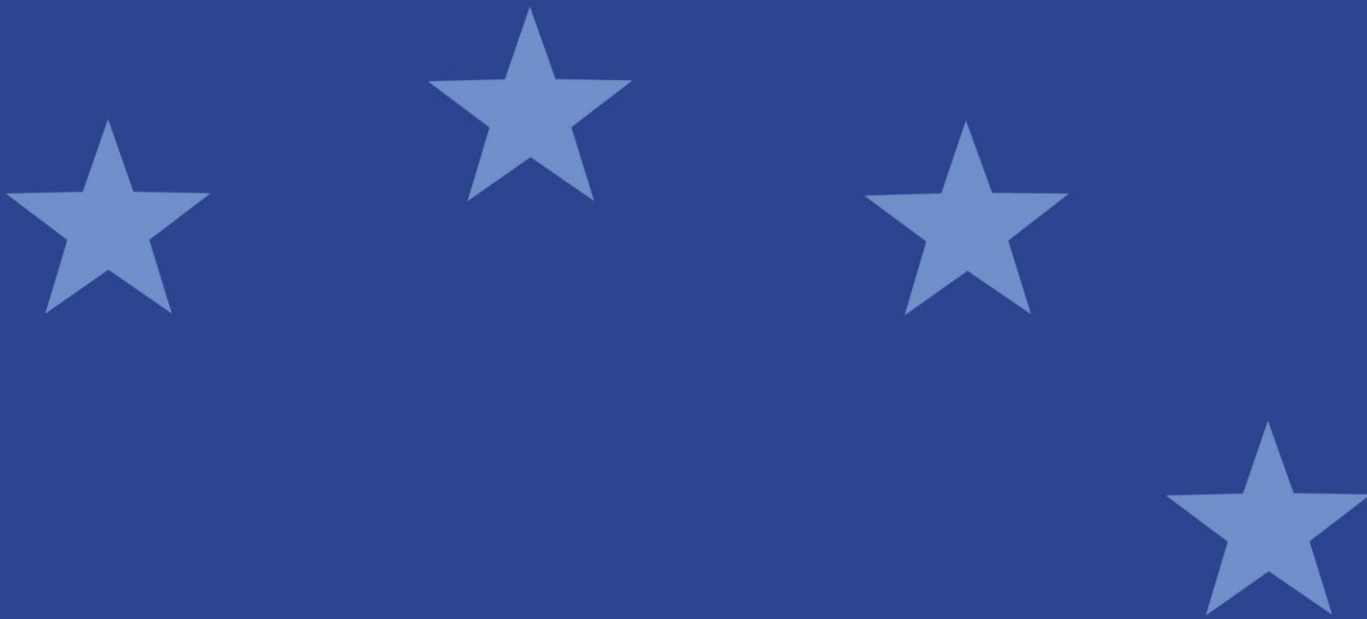




European Securities and
Markets Authority

Report

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





Acronyms

Countries:

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

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

NCAs that contributed to the Report

AFM	Dutch Authority for Financial Markets (NL)
AMF	Autorité des marchés financiers (FR)
BaFin	Federal Financial Supervisory Authority (DE)
BdI	Banca d'Italia (IT)
BdP	Banco de Portugal (PT)
BNB	Bulgarian National Bank (BU)
BoE	Bank of England (UK)
BoG	Bank of Greece (EL)
CBol	Central Bank of Ireland (IE)
CAA	Commissariat aux Assurances (LU)
CNB	Czech National Bank (CZ)
CMVM	Comissão do Mercado de Valores Mobiliários (PT)
CNMV	Comisión Nacional del Mercado de Valores (ES)
Consob	Commissione Nazionale per le Società e la Borsa (IT)

Covip	Commissione di vigilanza sui fondi pensione (IT)
CSSF	Commission de Surveillance du Secteur Financier (LU)
CySEC	Cyprus Securities and Exchange Commission (CY)
DFSA	Danish Finanstilsynet (DK)
DNB	Dutch Central Bank (NL)
FCA	Financial Conduct Authority (UK)
EF	Estonian Finantsinspektsioon (EE)
FCMC	Financial and Capital Market Commission (LV)
FFSA	Finanssivalvonta (FI)
FMA	Financial Market Authority (AT)
FMAL	Financial Market Authority Liechtenstein (LI)
FME	Financial Supervisory Authority (IS)
FSC	Financial Supervision Commission (BU)
FSAS	Finansinspektionen (SE)
FSMA	Financial Services and Markets Authority (BE)
FSAN	Finanstilsynet (NO)
HANFA	Croatian Financial Services Supervisory Agency (HR)
HCMC	Hellenic Capital Market Commission (EL)
HNB	Croatian National Bank (HR)
IVASS	Istituto per la vigilanza sulle assicurazioni (IT)
KNF	Komisja Nadzoru Finansowego (PL)
MFSA	Malta Financial Services Authority (MT)
MNB	Central Bank of Hungary (HU)
NBB	National Bank of Belgium (BE)
NBoS	National Bank of Slovakia (SK)



OeNB	National Bank of Austria (AT)
PRA	Prudential Regulation Authority (UK)
SMA	Securities Market Agency (SI)

Other acronyms:

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

Legislation:

CRR	Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012
EMIR	Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories
EMIR Refit	Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) 648/2012
MIFID II	Directive 2014/65/EU on Markets in Financial Instruments

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Executive Summary

Reasons for publication

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

EMIR entered into force in 2012 and its obligations, as further defined in several subsequent Commission Delegated Regulations, have since gradually become applicable and enforced. This is the second report on supervisory measures and penalties under EMIR that ESMA submits to the European Parliament, the Council and the Commission.

Content

The present report is structured in 5 Sections and 2 Annexes.

Section 1 describes the background for this exercise.

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

Section 3 details the source of information used for the analysis in the report.

Section 4 covers the findings of this report, divided in 9 subsections dedicated to:

(i) Entities under the EMIR scope divided per country; (ii) NCAs structure and allocation of competences; (iii) NCAs' interaction with market participants; (iv) Sources of information checked by the NCAs; (v) Supervisory tools; (vi) Supervisory activity; (vii) Investigations conducted; (viii) Supervisory and enforcement competences and uses; and (ix) Sanctions and penalties.

Finally, Section 5 presents the Conclusion. Then, Annex I includes the questions in the survey used as the baseline for the preparation of this report; and Annex II provides tables with detailed information on the answers provided by NCAs.

This report sheds some light on different aspects related to the supervision and enforcement of EMIR provisions (Articles 4, 9, 10 and 11). According to the report findings, in most EEA countries (65%), the competences to supervise and to impose penalties in relation to Articles 4, 9, 10 and 11 of EMIR is centralised in a single competent authority. During the analysed period (from January to December 2018), around 90% of the National Competent Authorities (NCAs) actively interacted with their supervised firms through different means and with slightly more interactions in relation to the reporting obligation.

The information gathered for the preparation of this report shows that some supervisory areas are highly harmonised, such as the sources of information used by NCAs to check compliance with EMIR requirements, the NCAs' competences, and the supervisory and the enforcement tools available to NCAs. In addition, the report also shows high levels of harmonisation on

some of the checks performed by NCAs using data from trade repositories, for instance, more than 80% of the countries perform checks on the accuracy of the data reported, the number of rejected transactions and counterparty's information.

Based on the findings in the report, it is apparent that data from trade repositories is a very useful and rich information source for the supervisory activity undertaken by NCAs. At the same time, there are still aspects that seem to remain a supervisory challenge to NCAs, such as examining trading patterns to identify strategies designed to exploit regulatory arbitrage and that could result in circumvention of the clearing obligation. Likewise, supervision of counterparties below the clearing threshold and of third country entities trading in OTC derivatives with significant impact in the EU, are areas that might benefit from a closer analysis and further cooperation between authorities.

Concerning the number of investigations conducted during 2018: eighteen countries reported investigations regarding reporting requirements; eight countries in relation to risk-mitigation techniques; six countries related to the clearing obligation; and four regarding non-financial counterparties. Additionally, around 10% of the NCAs either issued recommendations or sent warning letters to market participants. In terms of sanctions, no new sanctions or penalties were imposed to supervised entities in the period covered. Overall, the amounts of administrative fines remain the area that appears to be less convergent and fines' amounts can range from the low € hundreds up to € 100,000,000.

Finally, it can be noted that a few questions on reporting were included in the survey and the outcome of this part of the survey is also summarised and covered in the report. This is in consistency with the first report and to help look at trends across the whole range of derivative requirements over the years, i.e. in these first two reports and going forward in subsequent versions of the annual report. However, it is important to note that ESMA has recently published the results of the Peer Review into supervisory actions aiming at enhancing the quality of data reported under EMIR ¹. Following ESMA's peer review methodology, it goes into much more depth into the analysis of this particular topic. The two reports, the peer review report and the annual report, have thus different granularity, scope, time periods, sources of information, and in summary different objectives. Their findings are thus not meant to be comparable or repetitive.

¹ https://www.esma.europa.eu/sites/default/files/library/esma42-111-4895_emir_data_quality_peer_review.pdf

1 Background

1. Under article 85(5) of EMIR, ESMA has to submit to the European Parliament, the Council and the Commission an annual report on the supervisory measures and the penalties imposed by competent authorities, including supervisory measures, fines and periodic penalty payments.
2. Due to EMIR's phased process of implementation, ESMA considered it more insightful to perform the first annual exercise once the key requirements had all become applicable for the most part and therefore, the first annual report was published last year. This report, i.e. the second on the supervisory measures and penalties, builds on some of the findings contained in the previous report and digs further in some other respects, such as the supervision of risk management procedures under Article 11 of EMIR, or the means used by NCAs to treat information received from trade repositories.
3. In preparation for this report, ESMA developed and launched a survey that was fulfilled by NCAs in thirty-one countries (the EEA countries). The responses to the survey are the source of information that fed this report and any conclusions drawn stem from NCAs contributions. Due to the different time periods (in particular length) analysed in the previous and in the current report (the first one focused on the period since the entry into force of EMIR until December 2017 while the current focuses only on 2018), some of the results are thus not exactly comparable. As a result, the main aim of the report is to highlight certain findings more than running a comparison exercise versus the previous report.

2 Scope

4. This Report on supervisory measures and penalties focuses on the provisions related to:
 - the clearing obligation (Article 4 of EMIR);
 - the reporting obligation (Article 9);
 - non-financial counterparties (Article 10); and
 - the risk mitigation techniques (Article 11).
5. Other EMIR requirements are not covered in this report because they are addressed in different exercises conducted by ESMA, specifically:
 - the Peer Review under Article 21 of EMIR for CCPs, which indeed already covers the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs;
 - the direct supervision of trade repositories under EMIR; as indeed the penalties and supervisory measures imposed on trade repositories, such as the fine imposed by ESMA in 2016 do not fall in the scope of the report as defined in Article 85(5) of EMIR; and
 - the ESMA Annual Statistical Report on EU Derivatives Markets, which provides information complementary to this report on some EMIR implementation aspects, such as statistics on clearing rates.
6. With regards to the three exercises mentioned in paragraph 5, the related documents are published on ESMA's website².
7. Lastly, as mentioned in the Executive Summary, it can be noted that ESMA has recently published the results of the Peer Review into supervisory actions aiming at enhancing the quality of data reported under EMIR³. It follows the ESMA peer review methodology and thus this topic is covered with a different granularity, scope, time period, sources of information, and in summary with a different objective, than possible related reporting questions in this report. Their findings are thus not meant to be comparable or repetitive.

² ESMA's last peer review report on CCP supervisory activities of NCAs is accessible at the following address:
<https://www.esma.europa.eu/press-news/esma-news/esma-review-finds-good-supervision-ccps%E2%80%99-default-management>

ESMA's communication on the first fine imposed on a trade repository is accessible at the following address:
<https://www.esma.europa.eu/press-news/esma-news/esma-fines-dtcc-derivatives-repository-limited-%E2%82%AC64000-data-access-failures>

³ ESMA's Final Report Peer review into supervisory actions aiming at enhancing the quality of data reported under EMIR:
https://www.esma.europa.eu/sites/default/files/library/esma42-111-4895_emir_data_quality_peer_review.pdf

3 Source of the information

8. Similarly, to the approach followed for the first report on supervisory measures and penalties, in order to have greater transparency on the supervisory activities of NCAs in their enforcement practices of counterparties compliance with the EMIR requirements and thus to draw more informed conclusions in this report, ESMA also developed and ran a survey for this second exercise. The answers to this survey then served as the basis for the development of the second report on supervisory measures and penalties.
9. The survey contained twenty-eight questions with different items that allowed for multiple answers. The respondent NCAs could further detail or explain any specific circumstances relevant for the jurisdiction of their NCAs. The questions can be found in Annex I of this report.
10. In addition, it is to be mentioned that concerning the supervisory measures related to the reporting obligation, the report also leverages on the on-going work undertaken jointly by NCAs and ESMA which aims at improving the quality and usability of data that is reported to trade repositories (although, please refer to the comments in the Executive Summary and in the section on the scope with respect to the recent peer review report which is part of this overall effort on data quality).
11. Note: percentages presented in this report have been rounded and all sections present numbers which add up to thirty-one countries (all EEA countries that contributed to the survey).

4 Findings

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

4.1 Entities under EMIR scope by country

13. The survey included questions on the scope of the supervision and in particular on the number of supervised entities per country, considering in particular whether they were financial (FC) or non-financial counterparties above the clearing threshold (NFC+).
14. Based on the answers received, only half of the countries⁴ have NFCs+. Among the countries that have NFCs+, five countries supervise less than five NFCs+⁵ and eight countries⁶ have five or more NFCs+. Within this group, France and the United Kingdom, have ten or more NFCs+. Other fourteen states⁷ indicated that they do not have NFCs above the clearing thresholds in their jurisdiction.
15. Regarding the number of FCs subject to EMIR per country, numbers vary significantly depending on the country and range from five FCs in Estonia to around fifty-eight thousand in the United Kingdom. More detailed information on the results per countries and the approximate figures can be found in Table 1 Annex II.

4.2 NCAs structure and allocation of competences

16. The thirty-one countries in scope (EEA countries) have organised the way in which they supervise and enforce EMIR in different ways. In some countries, supervision and enforcement are undertaken by the same authority while in some others, the supervisory powers are shared by different national authorities. Likewise, some countries have split the competences to supervise and enforce EMIR depending on the specific provisions (e.g. in a given country, one NCA can be responsible for the supervision and enforcement of the clearing obligation and another NCA responsible for supervising non-financial counterparties).
17. Regarding how the EEA countries are organised and how the competences to supervise and to impose penalties under EMIR are allocated, Figure 1 illustrates whether these competences (to supervise and to impose penalties) are centralised in one single authority or allocated to several (decentralised), with competences shared between different national authorities. The chart refers to the allocation of competences regarding the clearing requirements in Article 4, the reporting requirements in Article 9,

⁴ For this particular question, 28 countries provided an answer.

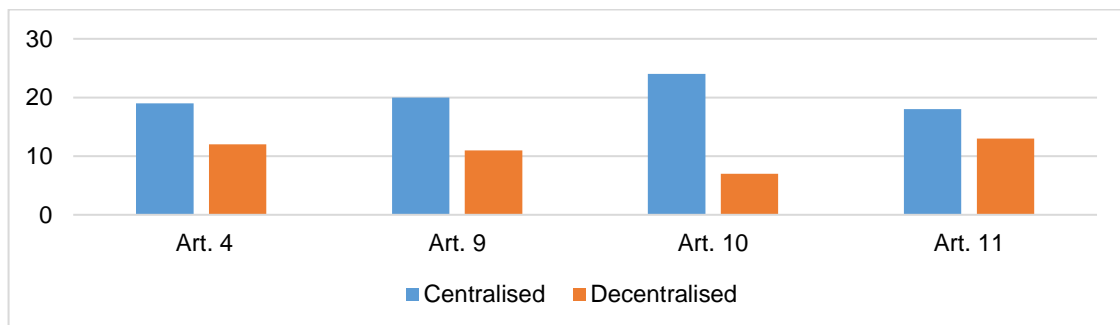
⁵ DK (1); FI (1); NO (2); DE (4); SE (less than 5).

⁶ IE (5); LI (5); CZ (7); ES (8); IT (8); FR (10); LU (18); UK (around 40).

⁷ AT; BE; BU; EE; GR; HR; HU; LV; MT; PT; SI; SK GR; HR.

the requirements for non-financial counterparties in Article 10 and the risk mitigation techniques in Article 11 of EMIR.

18. Figure 1: Allocation of competences for the supervision and the imposition of penalties between NCAs in relation to provisions in Articles 4, 9, 10 and 11 of EMIR⁸.



19. According to the information received, in most EEA countries (65%), the competence to supervise and the capacity to impose penalties in relation to Articles 4, 9, 10 and 11 of EMIR, is centralised in a single competent authority. The level of centralisation appears to be higher regarding non-financial counterparties' requirements (77,5% of the countries⁹); followed by the reporting requirements (64,5% of the countries¹⁰); the clearing requirements (61% of the countries¹¹) and the risk mitigation techniques (58% of the countries¹²).
20. On the contrary, in 35% of the EEA countries, competences for the supervision and the imposition of penalties in relation to Articles 4, 9, 10 and 11 are decentralised and shared by two or more NCAs. In the countries where competences are split, in order to respond accurately to the ESMA survey, the NCA that is member of the ESMA Board of Supervisors has reached out to the other relevant NCA(s) in their country to include their contributions for this report¹³.

4.3 NCAs' interaction with market participants

21. This report investigates the different ways in which NCAs interact with and assist market participants regarding the implementation and application of EMIR provisions (Articles 4, 9, 10 and 11).
22. From the information gathered, 90% of the countries (twenty six out of the thirty-one

⁸ For detailed information on the countries, see Table 2 in Annex II.

⁹ 24: AT; BG; CZ; DE; DK; EE; ES; FI; FR; GB; GR; HR; HU; IE; IS; LI; LT; LU; MT; NO; PL; SE; SI; SK.

¹⁰ 20: AT; BG; CZ; DE; DK; EE; ES; FI; FR; HU; IE; IS; LI; LT; MT; NO; PL; SE; SI; SK.

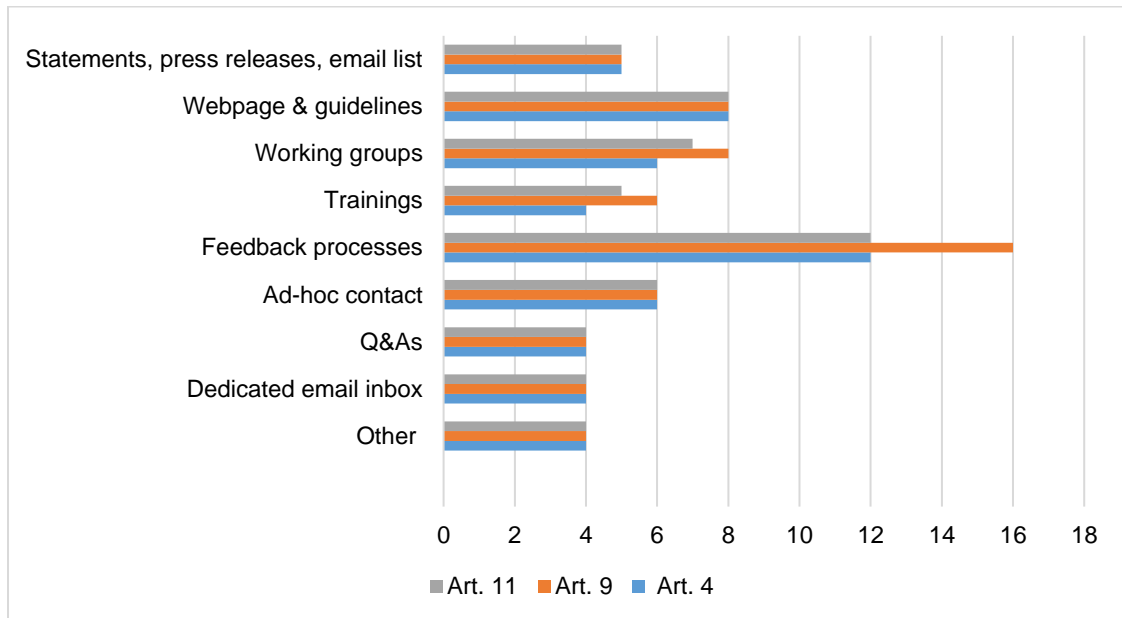
¹¹ 19: AT; CZ; DE; DK; EE; ES; FI; FR; HU; IE; IS; LI; LT; MT; NO; PL; SE; SI; SK.

¹² 18: AT; CZ; DE; DK; EE; ES; FI; HU; IE; IS; LI; LT; MT; NO; PL; SE; SI; SK.

¹³ In particular, the following NCAs were asked to contribute as they share some of the competencies are relevant to this report: OeNB (AT); the NBB (BE), BNB (BG), BoG (EL), the HNB (HR), CAA (LU), Bdl, Covip and IVASS (IT), the DNB (NL), BdP (PT), the BS and AZN (SI), BoE and PRA (UK).

EEA countries) conducted interactions with entities in their respective jurisdictions during the analysed period (from January to December 2018)¹⁴. Moreover, the survey shows that some practices are common for a large percentage of NCAs.

23. Figure 2: NCAs interaction with market participants (from January to December 2018)¹⁵.



24. Among the different means used by NCAs to interact with market participants, the most frequent ones are: establishing **feedback processes** or channels (43% of NCAs use it on average for Articles 4, 9 and 11); **webpage** updates¹⁶ and public guidelines (25.8% on average); setting-up joint **working groups** for providing support and guidance to market participants (22.5% on average); and ad-hoc bilateral contacts¹⁷ (19% on average) for instance with market associations, ahead of regulatory implementation deadlines.

25. The responses to the survey indicated that overall, there are slightly more interactions in relation to the reporting obligation (Article 9 of EMIR) than for the clearing obligation or the risk mitigations techniques. NCAs engaged more actively with market participants in relation to the reporting requirements by: setting-up working groups, preparing specialised trainings and launching processes to get feedback from supervised entities (e.g. using surveys or questionnaires).

26. At the same time, the information reflects that each country tends to use the same

¹⁴ BG, GR, HU, LT and RO did not report interactions for the period analysed.

¹⁵ Detail of the countries can be found in Table 3 in Annex II.

¹⁶ In the UK, the FCA, has dedicated EMIR webpages for Arts. 4, 9, 11. The EMIR Web Portal provides guidance and tools to enable firms to meet requirements in relation to notifications on the clearing threshold, notifications on disputes and application forms in relation to intragroup exemptions from clearing.

¹⁷ In IT, Covip sent monthly notifications to pension funds referred to late confirmations of derivative contracts and also sent notification of disputes addressed directly to the people responsible of submitting the notifications.

means to update or assist supervised entities for all different EMIR requirements. That explains why in relation to most of the means used by NCAs, the figures for Article 4, 9 and 11 are almost identical.

27. According to the responses to the survey, for the purpose of receiving **feedback**, NCAs opened different feedback channels or processes; some NCAs, contacting market associations and having bilateral discussions with regulated entities while some other NCAs, launching questionnaires¹⁸.
28. To name a few, regarding **trainings**, in Germany, Bafin organised a workshop on EMIR implementation and intragroup exemptions for market participants. In France, the AMF hosted regular training sessions for compliance officers. Finland also provides regular trainings that cover EMIR compliance as part of the broker certificate preparatory programme. Similarly, in Belgium, the FSMA provides a training on a regular basis to independent auditors that collaborate in monitoring compliance of large non-financial counterparties with the EMIR requirements¹⁹. In the United Kingdom, the FCA jointly with BoE and PRA, prepared industry seminars in relation to the implementation of the EMIR requirements (including reporting, clearing and margining). Likewise, in Italy, Consob prepared presentations for events organised by industry associations.
29. Some NCAs also mentioned other ways in which they interact with market participants, such as sending newsletters²⁰, posting articles in business news publications²¹ and through on-site visits²².
30. In addition, although not a focus of the report, it can be mentioned that several NCAs indicated that they had interacted with supervised entities during the revised period to discuss about EMIR issues in relation to the withdrawal of the UK from the European Union. We also assume that many of those who did not mention it because there was not particular question on this aspect in the survey would also make this comment if specifically asked.

4.4 Sources of information checked by the NCAs

31. The data gathered from the survey sheds some light on the sources of information used by NCAs to monitor and supervise compliance with EMIR requirements and on the specific tools to treat compliance data. Figure 3 shows the main sources of information that NCAs monitor with a split regarding the clearing, reporting and risk mitigation

¹⁸ ES, FR (addressed to specific types of counterparties rather than general questionnaires), HR, LU (a specific survey with focus on the implementation of variation margin rules and a general survey addressed to investment fund managers).

¹⁹ During the period covered in the report, FSMA provided a specific training on the review and assessment of the procedures jointly agreed between the authority and the auditors for supervising EMIR compliance by NFCs.

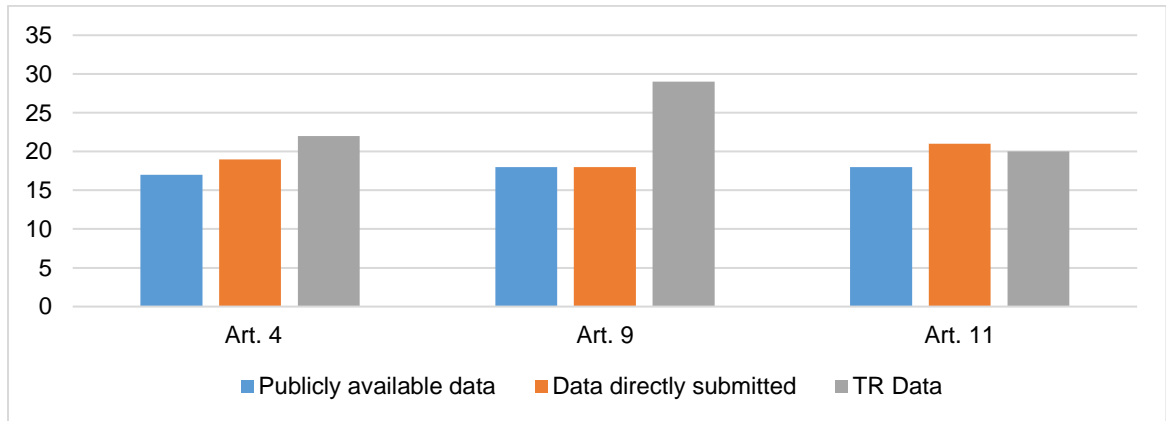
²⁰ AT.

²¹ IS.

²² MT.

techniques' requirements.

32. Figure 3: Sources of information checked by NCAs²³



33. Based on the available information, it appears that as it might be expected, the main two sources of information are:

- Data from trade repositories, which is used on average for the supervision of clearing, reporting and risk mitigation techniques' requirements by 76% of the EEA countries²⁴.
- Data directly submitted by market participants to the NCA, which is used on average for the supervision of the clearing, reporting and risk mitigation techniques' requirements by 19% of the EEA countries.

34. In addition, other NCAs also reported using other types of sources for supervisory purposes, such as Publicly available data such as financial statements, information published on entities' websites¹ and any other sources of public information such as public registers¹, which is used on average for the supervision of clearing, reporting and risk mitigation techniques' requirements by 17.5% of the EEA countries.

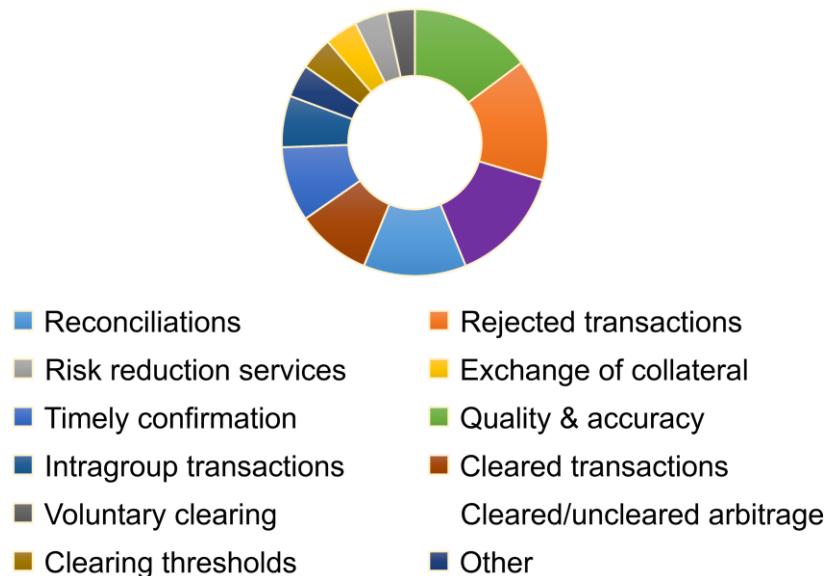
4.4.1 Data from Trade Repositories

35. A more granular analysis of the uses of the data gathered from the reports to trade repositories indicates that NCAs perform multiple checks based on this information and that some are common in most of the EEA countries. Figure 4 presents different applications of TR data for EMIR supervisory purposes (in relation to Articles 4, 9 and 11).

²³ More detailed information per country can be found in the detailed Table 4 in Annex II.

²⁴ The use of data from trade repositories is especially higher in relation to supervisory activity related to reporting requirements in Article 9, with 93.5% of NCAs making use of it.

36. Figure 4: Checks performed using TR data²⁵.



37. A clear majority of countries performs checks on the accuracy of the data reported to TRs²⁶ and regarding the number of rejected transactions²⁷ (84% respectively). Above 80% of the countries also perform specific checks on the information reported referred to information about the entity reporting, such as the counterparty type (e.g. FC, NFC) or the LEI²⁸. Likewise, a high percentage of countries supervise the number of derivatives reconciliations of the entities (71%). Around 52% of the countries monitor the volumes of cleared transactions reported and the timely confirmation requirement²⁹, and 35% perform checks on the volumes reported as intragroup transactions.
38. In addition, 19% of the countries check the data reported in relation to: the clearing thresholds and the status of counterparties³⁰ (i.e. FCs and NFCs above or below the clearing thresholds); rates of voluntarily cleared transactions; compliance with the exchange of collateral requirements for non-centrally cleared transactions³¹; and the

²⁵ More detailed information per country can be found in the detailed Table 5 in Annex II.

²⁶ On data accuracy, a great number of NCAs referred to the ESMA EMIR Data Quality Review (DQR), an annual exercise conducted by ESMA in collaboration with national authorities in the EU members states that aims at monitoring the level of accuracy of data reported and at finding ways to enhance its quality.

²⁷ NCAs also referred to the ESMA EMIR Data Quality Review as part of their exercise to check rejected transactions.

²⁸ In PT, the CMVM indicated that they regularly send questionnaires to their supervised entities and they compare the information with the data reported to TRs. In ES, the NCA identifies entities within a certain range of activity in OTC derivatives and then they check whether the level of hedging positions is plausible. In LU similar checks are applied to confirm counterparties' status.

²⁹ For instance, in PT, the CMVM highlighted the validation of the following reporting fields: reporting timestamp, execution timestamp, reporting counterparty ID, ID of the other counterparty and Action Type, in order to assess whether the counterparties are reporting the trade to a TR in due time.

³⁰ In DK the NCA conducted specific checks to assess whether certain NFCs were above the clearing threshold.

³¹ In IT, the NCA performed checks to confirm whether in relation to collateralised transactions, the reporting of margins posted and received was accurate. In MT, the MFSA intends to conduct a thematic review of collateral rates on a selected sample of entities to go through the collateral calculation.

use of risk reduction services such as trade compressions³².

39. Lastly, 22.5% of the countries reported that they conduct other types of checks making use of data from trade repositories, for instance, cross-checking different aspects mentioned above to ensure that the data reported is consistent and to spot potential flaws (e.g. check consistency between reconciliation reports and trade state report; or between information regarding the valuation and the notional reported).
40. From the information received through the survey responses, it is apparent that data from trade repositories is a very useful and rich information source for the supervisory activity undertaken by NCAs. At the same time, there are still aspects that are challenging to monitor on an on-going basis and that might benefit from closer analyses, such as the examination of trading strategies designed to exploit regulatory arbitrage that can result in circumvention of EMIR requirements such as the clearing obligation. In this respect, the survey asked information on whether NCAs had undertaken any activities to monitor third country entities trading contracts with substantial effect in the Union, which would be subject to the clearing obligation if established in the EU, to detect clearing evasion. However, no practices in were reported in this direction.
41. Further to what is mentioned before (in the executive summary and in paragraph 7), the Peer Review into supervisory actions aiming at enhancing the quality of data reported under EMIR made a qualitative assessment of the adequacy and effectiveness of the supervisory practices of the NCAs against the expectations of the assessment group. Therefore, it is possible that, as represented in this report, an authority has undertaken certain actions for the supervision of data quality, while these actions were not deemed to be sufficient to meet the expectations for that authority.

4.4.1.1 IT tools to treat TR Data

42. The survey solicited information on how NCAs treat the reports received from trade repositories and on which IT tools are used for the purpose of treating TR data. From the answers received, the tools used by NCAs to analyse reported data vary significantly: besides the use of ESMA's TRACE hub³³; six authorities³⁴ have developed internal IT tools to process TR data and to produce statistical reports; three authorities are currently in the process of designing specific IT tools³⁵ to enhance their supervisory systems; and other authorities use available IT tools in the market (NCAs reported a

³² In DE, Bafin compares information reported at trade level against information reported at position level. In ES, the CNMV identifies the number of contracts resulting from compression activities and assesses whether it is consistent with the profile and activity level of the relevant entity.

³³ Four countries mentioned it expressly: ES, EE, IT, LI, SI.

³⁴ CY, ES, LU SK, IT (Consob has a specific tool and Banca d'Italia is in the process of developing it) and LI.

³⁵ BE, CZ, RO.

variety of IT tools³⁶).

4.4.2 Data directly submitted by counterparties

43. In relation to the data used by NCAs in their supervisory duties to monitor compliance with EMIR (in relation to Articles 4, 9 and 11), the survey investigated on which are the most common types of information that are directly submitted by counterparties and what are the supervisory checks performed. Figure 5 presents different uses of that data for the supervision of EMIR compliance.
44. The information received from NCAs shows that the majority of countries (58%) use the data submitted by counterparties to perform cross-checks with data reported to TRs. Regarding the documentation used for such purpose, financial statements seem to be broadly used³⁷. Around 45% of the countries check financial statements for the purpose of supervising compliance with certain EMIR requirements; and 35% of the countries responded that their respective authorities use information directly reported by the supervised entities to monitor exposures and to check information on the positions held by market participants from the entity's books. Some authorities reported some other specific checks, such as Italy, where banks are asked to submit information on the risk management requirements and on the intragroup exemptions for OTC derivative transactions.

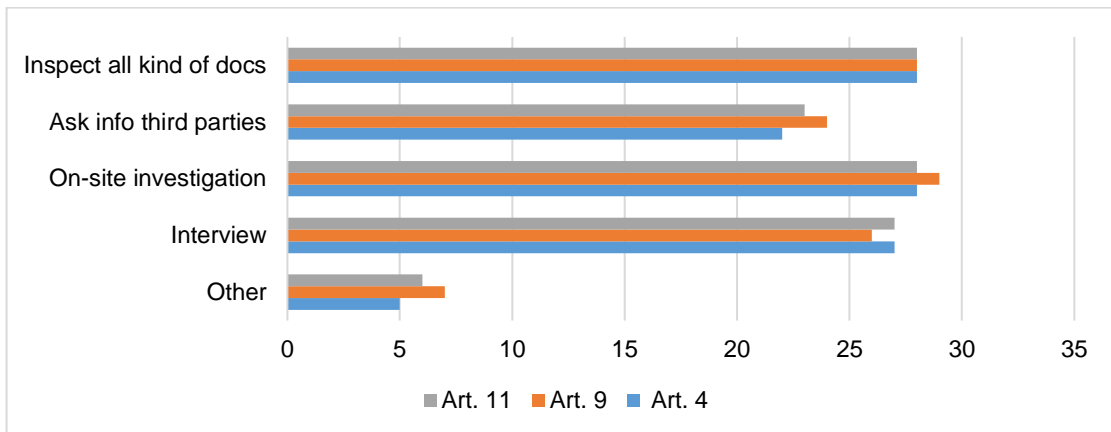
4.5 Supervisory tools

45. Based on the responses to the survey with regards to the supervisory competences and tools available for the different NCAs, Figure 5 shows the four most common supervisory tools used by NCAs to check compliance with EMIR requirements under Articles 4, 9 and 11.
46. Figure 5: Information on supervisory tools per country³⁸

³⁶ DE: SQL tools such as Squirrel, Aqua Data Studio, SAS and MS-Excel; DK: Microsoft Power BI; FI: SSIS package to load data to an internal database and SQL tools to treat the data; FR: Data processed daily with R scripts; HR: DWH, Power Query; HU: SAS, SQL; IE: XSD2Code to auto-generate c# classes from the XML schema document. The NCA introduces these auto-generated classes in a SQL Server Integration Services (SSIS) custom c# script. When they process an XML file, it enters the SSIS script, c# objects are instantiated with the xml values and are then mapped to dictionaries (key – value pairs). The records are then written to SSIS buffers and loaded into SQL server tables using an SSIS data flow; LI: Internal tool to receive TRACE data from ESMA with Graphical displays (statistics) and analyses to support ongoing supervision are displayed in the BI Cockpit (Microsoft); LV: SAP BusinessObjects; MT: BI Tool (Qlik Sense) and spread sheets; NL: SQL Server for storage, SQL server en Knime for processing, Knime and Tableau for analyses and Tableau for visualisations; NO: Custom built loaders and QlikView and spread sheets; PT: Oracle SQL Developer and Caseware IDEA. The data visualization is made through Microsoft PowerBI. SE: SAS (Statistical Analysis System from SAS Institute); UK: FCA: Python, R, Scala, Spark and various databases. BoE: developing a new IT architecture for TR data analysis.

³⁷ In BE, where part of the supervision of compliance with EMIR requirements is monitored through the audits of independent auditors, such audit reports are also checked together with the information available from the entity, such as the financial statements.

³⁸ More detailed information per country can be found in the detailed Table 6 in Annex II.



47. Following similar results as in last years' ESMA Report on Supervisory Measures and Penalties under EMIR³⁹, almost all countries responding to the survey⁴⁰ can conduct on-site investigations (91%); request from counterparties all types of documents related to clearing, reporting and risk mitigation techniques (90%); and summon and interview people (86%).
48. A high percentage of countries (74%) also claim to have powers to ask information regarding clearing, reporting and risk mitigation techniques from any person (including the ones that are not counterparties to the transaction). Notably, eight countries⁴¹ can use this power in all cases, as far as EMIR is concerned and regardless of concrete suspicions. Instead, four countries⁴² indicate the possibility of asking documents from third unrelated parties only in the context of a suspected infringement or an on-going investigation. In France for instance, the NCA can use this power any time a significant anomaly is detected with regards to compliance with the reporting requirements (e.g. high rejection volumes or fields reported wrongly). In addition, in Belgium⁴³ and in Luxembourg, NCAs can use the information collected by auditors on EMIR compliance. Similarly, in the United Kingdom, the PRA and the BoE have the power to gather information and to commission reports by "Skilled Persons" (an external expert) in order to undertake further analysis on a suspicious case.
49. Furthermore, around 20% of the countries pinpoint other supervisory tools such as the initiative to send questions to specific supervised entities asking information on the compliance of provisions under EMIR.

³⁹ https://www.esma.europa.eu/sites/default/files/library/esma70-151-1400_report_on_supervisory_measures_and_penalties_emir.pdf

⁴⁰ Calculated as the average percentage of supervisory tools for supervising Articles 4, 9 and 11 of EMIR. See more detailed information in Table 5 Annex II.

⁴¹ DE, ES, FI, HU, MT, NL, NO, PT.

⁴² FR, HU, PL, SE.

⁴³ In Belgium, auditors execute verifications on EMIR compliance by NFCs according to a framework pre-defined by the FSMA. Auditors report to the FSMA on the outcome of the procedures that they performed at the NFCs.

4.6 Supervisory activity

50. In this section, the report focuses on more specific supervisory initiatives addressed to check compliance with different EMIR aspects, namely the clearing obligation, the requirements for NFCs in relation to the clearing obligation and the risk mitigation techniques. The supervisory activity of NCAs related to the requirements under Article 9 of EMIR is covered in-depth by another exercise coordinated by ESMA, the Data Quality Review.

4.6.1 Clearing obligation

51. As part of the survey used to compile information to prepare this report, respondents were questioned about whether NCAs had identified or been made aware of any circumstances preventing or hampering compliance with the clearing obligation (Article 4 of EMIR).

52. Based on the answers received, three countries⁴⁴ acknowledged barriers or difficulties to access clearing, especially regarding small financial counterparties. In this respect, France mentioned that small financial counterparties face technical and operational barriers that can make access to clearing challenging. In the United Kingdom, the FCA engaged with some counterparties who have encountered difficulties in accessing clearing services. These firms are predominantly smaller financial counterparties and non-financial counterparties, for which in some cases, the high cost of accessing these services and meeting their regulatory requirements has proven to be a barrier. In addition, some entities also seem to experience difficulties in accessing clearing services because there is only a small population of clearing members offering client clearing services. Likewise, in the Netherlands, the NCA was aware of two different types of clients facing difficulties to access clearing services, those with too small positions and those with too big positions. In addition, Denmark expressed some concerns regarding the impact of the United Kingdom leaving the European Union on the provision of clearing services.

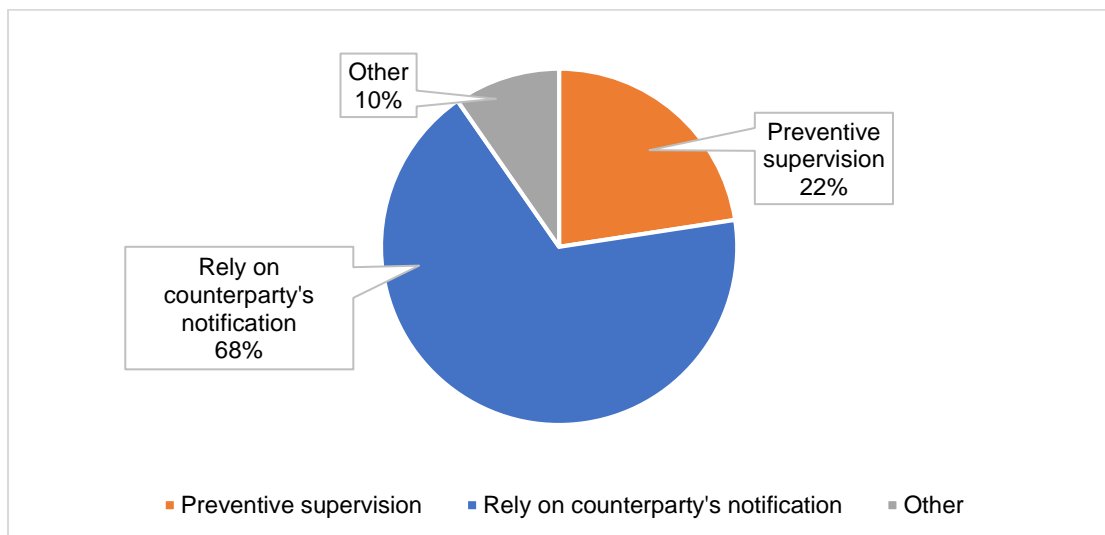
53. ESMA is aware of the challenges that some small financial counterparties may face when looking to access clearing services and has been working on it. These issues are mentioned in the report as they correspond to feedback based on NCAs supervisory work and provided through the survey. However, the problem of access to clearing is not the focus of this report, thus ESMA invites to read the other publications accessible on ESMA website that relates to the clearing obligation under EMIR. On this point, it can also be mentioned that a few legislative changes (or mandates for Level 2 measures) under the revised version of EMIR, following the adoption of the Refit legislative proposal) have been introduced to deal directly with this issue (as well as under CRR with regards to the leverage ratio). But as the Refit changes were

⁴⁴ These three countries are FR, NL, UK. Furthermore, MT mentioned that market participants had expressed concern regarding some difficulties to access clearing in the first implementation stages of EMIR but that later on market participants reported those barriers had disappeared.

introduced after the period in scope for this report, the report covers 2018 while the Refit text was adopted in 2019, we will only be able to analyse their impact in future reports.

4.6.1.1 Supervision of the clearing obligation for NFCs

54. In preparation for this report, ESMA has looked at the different supervisory approaches used by NCAs when supervising the clearing obligation in relation to non-financial entities that are above the clearing thresholds⁴⁵ and therefore, are subject to the clearing obligation. According to Article 10(3) of EMIR, when calculating positions, a non-financial counterparty shall include all the OTC derivative contracts entered into by the NFC or by other NFCs within its group that are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity (hedging). This implies that NCAs should establish ways in which to cooperate and exchange the relevant information to understand the full group picture and the total aggregated volume of OTC derivative contracts at group level.
55. The survey investigated how NCAs supervised the clearing obligation for NFCs in the period between January and December 2018 and on the ways in which NCAs have cooperated to supervise entities pertaining to international groups with presence in more than one EEA country. Figure 6 shows the supervisory approach chosen by NCAs in relation to supervising compliance with Article 10 of EMIR and the clearing obligation.
56. Figure 6: Supervision of the clearing obligation by NFCs⁴⁶



⁴⁵ Clearing thresholds: one billion euros for credit derivative and equity derivative contracts; three billion euros for interest rate derivative, for foreign exchange derivative and for commodity derivative contracts and others.

⁴⁶ More detailed information per country can be found in the detailed Table 7 in Annex II.

57. Based on the information submitted by NCAs, the majority of countries rely on the notifications submitted by market participants (according to Article 10 of EMIR) as the main source of information to identify the population of NFCs that are above the clearing threshold. Within this group, some of the countries highlighted that they also perform extraordinary checks regarding specific counterparties on a risk-based approach or when there is suspicion of a breach of the duty to notify.
58. Around 22% of the EEA countries perform preventive or proactive controls that are complementary to the information notified by the counterparties. These procedures aim at verifying which NFCs are above the clearing threshold without exclusively relying on the counterparties' calculation. Within this group, France⁴⁷ and Malta implemented a tool that calculates counterparties' positions using the data reported by the entities to the trade repositories. In Spain, after pre-screening the NFCs with the highest levels of activity (within their jurisdiction), the NCA assesses if the positions reported as reducing risks directly relating to the commercial activity or treasury financing activity (hedging positions) have been reported as such following a rigorous methodology or assessment. In Italy, the NCA checks on a periodic basis the procedures that NFCs have in place to monitor their positions in OTC derivative contracts against the clearing thresholds. Some NCAs⁴⁸ also pointed out that their supervisory system for NFCs compliance with EMIR requirements relies upon the cooperation between NCAs and certified auditors who check the figures sustaining NFCs' calculation of positions against the clearing thresholds.
59. Finally, Latvia and Slovakia specified that there are no NFCs above the clearing thresholds in their countries. In Iceland, where EMIR was implemented only in October 2018, by the time the survey was launched, the NCA was still mapping the potential NFCs+ under their supervision.
60. In relation to the level of cooperation between NCAs in different EEA member states, around 30% of the countries⁴⁹ confirmed they cooperate and exchange information with other NCAs for the purpose of supervising the clearing obligation for NFCs belonging to groups with entities in different member states. Among these countries, Cyprus and Malta indicated to have signed Memorandums of Understanding (MoUs) to cover the details of such cooperation.
61. In terms of how NCAs cooperate for the purpose of supervising NFCs activity and the clearing obligation, NCAs referred to the cooperative framework in place in relation to granting intragroup exemptions from the clearing obligation (which are also applicable for the exemption from exchange of collateral). This framework agreed among ESMA and the NCAs aims at facilitating the exchange of information and suggests a calendar

⁴⁷ FR indicated that the tool they have developed to calculate counterparties' positions has some limitation, i.e. the data from Trade repositories is not always 100% accurate, for instance there could be reporting errors in flagging whether a trade is for hedging purposes; and this would impact the result of such calculations. In addition, FR also highlighted the limitations regarding group entities that are in third countries, for which it is challenging to get reliable data.

⁴⁸ BE, DE, LI and MT.

⁴⁹ CY, CZ, DK, HR, IT, MT, NO, RO and SE.

for the procedure for assessing intragroup exemptions when the two group entities are in different member states. The general comment from NCAs with respect to the functioning of such framework was that it is working well and that it is a useful mechanism to benefit from other authorities' views and concerns.

62. Furthermore, NCAs also provided information on which means they use for mapping groups with presence in several member states. Four countries⁵⁰ indicated working with the GLEIF⁵¹ database, to map groups through the LEIs of the different entities. In Malta, whilst the MFSA makes use of GLEIF, it is not the only source used. The NCA requests entities to provide them with group structures and this information is cross-checked against the information on the entity's website and where necessary, with the information held by the Registry of Companies and auditor's confirmations. In Denmark, group information is obtained from the financial statements and organizational diagrams.

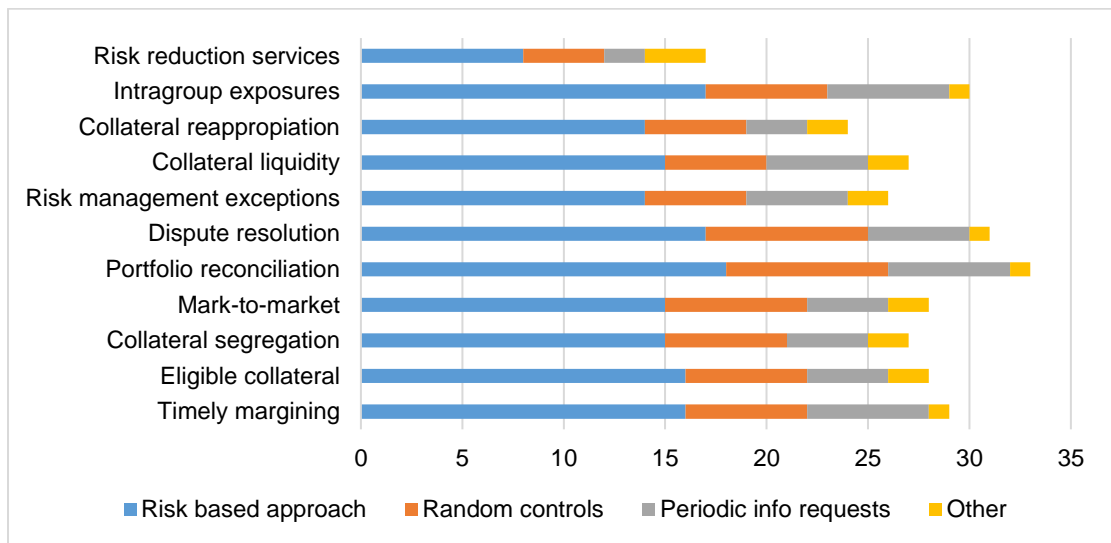
4.6.2 Risk mitigation techniques for non-cleared OTC derivatives

63. Through the responses submitted by the NCAs, it is apparent that in the area of risk mitigation techniques contained in Article 11 of EMIR, all countries seem to follow a risk-based supervisory approach combined with other spontaneous checks or periodic controls. Notably, the survey launched to gather information this year, intended to obtain more granular information on the main areas supervised in relation to risk management procedures (i.e. timely, accurate and appropriate segregated exchange of collateral). To be noted that the survey allowed for a multiple answer and, as can be seen in the table below, one same country could indicate one or more supervisory approaches (e.g. one country could monitor intragroup exposures on a risk-based approach and with periodic requests for information).
64. Figure 7 below shows this more granular information on the main areas currently supervised in relation to risk management procedures.

⁵⁰ CZ, HR, IT and MT.

⁵¹ GLEIF refers to the Global Legal Entity Identifier Foundation. More information can be found: <https://www.gleif.org/en/>

65. Figure 7: Supervision of risk management procedures for non-cleared OTC derivatives



66. The table below presents the number of countries undertaking such supervisory actions combined with detailed information on the regulatory approaches chosen by the NCAs when supervising risk management procedures. The information gathered includes the answers from twenty-nine countries⁵².

⁵² In the Netherlands the NCA said that due to other priorities they had not focused their supervision efforts on risk management procedures under Article 11 of EMIR. In Iceland, EMIR was implemented in October 2018 and for that reason there were no specific supervisory measures in place during the period covered in this report.

67. Table: Supervision of risk management procedures for non-cleared OTC derivatives per countries⁵³

	Supervisory measures only following a risk-based approach	Random controls/inspections to monitor compliance	Periodic requests for information/documentation to proof compliance	Other
a. Timely calculation and collection of margins	16	6	6	1
b. Eligibility of collateral	16	6	4	2
c. Adequate segregation of collateral	15	6	4	2
d. Daily mark-to market of outstanding contracts	15	7	4	2
e. Portfolio reconciliation	18	8	6	1
f. Dispute resolution	17	8	5	1
g. Authorisation and recording of any exceptions to the risk management procedures	14	5	5	2
h. Periodic verification of the liquidity of the collateral to be exchanged	15	5	5	2
i. Timely re-appropriation of the collateral in event of default by the posting counterparty	14	5	3	2
j. Monitoring the exposures arising from intragroup OTC derivative contracts	17	6	6	1
k. Monitoring risk reduction services such as compression	9	4	2	3

⁵³ Detailed information on the countries can be found in Table 8 in Annex II.

68. From the information gathered some conclusions can be drawn. The first is that almost all NCAs perform specific compliance checks regarding the entities' risk management procedures and that, in terms of supervisory approaches, the risk-based approach seems to be predominant, followed by random controls and inspections and periodic requests for information or documentation to evidence compliance. In addition, the areas where a majority of NCAs have put more supervisory efforts are the following five: portfolio reconciliation; monitoring the exposures arising from intragroup OTC derivative contracts; dispute resolution; the eligible collateral and the timing calculation and collection of margins. Furthermore, some other regulatory approaches and supervisory actions were identified; for instance, supervisory actions that involve analysis of data from trade repositories to produce statistics that are very useful to select areas for thematic reviews.
69. Additionally, a closer look into the supervision of risk reduction services such as compression, shed some light on what the means and approaches employed by NCAs for that purpose are. A total of twelve countries⁵⁴ (out of twenty-nine) undertook supervisory checks regarding risk reduction services in the period between January and December 2018.
70. In Spain, the CNMV monitors the contract rates resulting from compression and sends inquiries to entities about the use they make of risk reduction services. As a result of this follow-up, the CNMV noticed that only the largest entities use risk reduction services. In Italy, the BDI monitors risk reduction services as part of the supervision of collateral management activities and checks the efficiency of the processes in place and the adequacy of the risk compression activities. The BDI initiated an inquiry to understand the use of risk reduction services as a follow-up action after an on-site inspection to one of their supervised entities. In addition, the NCA has also worked on a specific analysis in relation to compression and its implication in the context of the United Kingdom leaving the European Union.
71. In Germany, any portfolio compression should be covered by the review from auditors signing the annual accounts. In Belgium, risk reduction services are also part of the auditors' checks. Moreover, the NCA contacted their supervised entities to understand whether they use risk reduction services, how they do it and which processes and vendors they use for such services. Lastly, besides the practices mentioned, other countries such as Denmark indicated that the NCA conducts back-office investigations addressed to supervised entities' compliance with risk management procedures.

4.6.3 Third countries

72. The survey also investigated any specific measures undertaken by NCAs from January to December 2018 in relation to third country entities trading contracts with substantial effect in the Union, which would be subject to the clearing obligation if established in

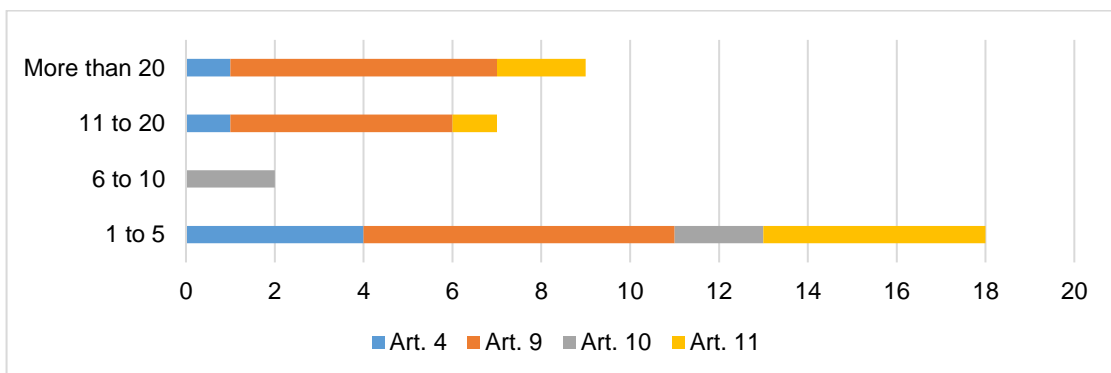
⁵⁴ BE, DE, DK, ES, IT, IS, LU, MT, NO; SE, SK, UK.

the EU. The question was aimed at understanding how NCAs have put in place any strategy to detect potential clearing evasion, and thus maybe identify best practices. However, similarly to the findings in the previous report, only a few comments were received on the practices in this respect. It would appear that there might be a need to follow-up further on the assessment of this aspect in relation to the clearing mandate.

4.7 Investigations conducted

73. The survey asked for information on the investigations conducted by NCAs during the period covered in this report (from January to December 2018). Not all NCAs answered and we assume that the ones that did not report any information on the investigations carried out, did not conduct any during the analysed period. Figure 8 presents the investigations conducted with a break-down of the EMIR requirements involved.

74. Figure 8: Investigations conducted between January and December 2018⁵⁵.



75. From the answers received, the area in which more countries conducted investigations is on the reporting requirements (eighteen countries conducted investigations), followed by the risk mitigation techniques (eight countries conducted investigations); the clearing obligation (six countries conducted investigations); and non-financial counterparties requirements (four countries conducted investigations).

4.7.1 Investigations regarding the clearing obligation (Article 4)

76. Regarding requirements related to the clearing obligation, NCAs performed **up to five investigations** from January to December 2018.

77. To name a few, in Germany, Bafin carried out five investigations to different types of entities (three credit institutions, one insurance company and one non-financial counterparty) and no serious breaches were detected. In Spain, the CNMV also performed two investigations to assess the number of contracts centrally cleared by certain entities. In Norway there were two investigations on compliance with the

⁵⁵ Detailed information on the country names can be found in Table 9 in Annex II.

clearing obligation. In Hungary, the NCA reported four investigations, two of which are still on-going.

78. Italy reported having performed **between eleven and twenty investigations** from January to December 2018 for matters connected to the clearing obligation: Consob investigated fourteen major financial counterparties in Category 1 and 2 and asked them to provide their internal procedures to comply with the clearing obligation for OTC derivatives contracts.

4.7.2 Investigations regarding the reporting obligation (Article 9)

79. Some NCAs reported having performed **up to five investigations** from January to December 2018 for matters connected to the reporting obligation.
80. In Bulgaria two investigations were completed. In Latvia, the NCA conducted one investigation regarding the quality of the data reported. In Norway, one investigation focused on verifying reporting levels of certain energy market participants. Similarly, the SMA in Sweden undertook one investigation and sent a request for substantial information regarding the data submitted to trade repositories.
81. In Cyprus, the NCA undertook a single investigation that involved fifteen entities and included on-site visits with a desk-based review of documentation to assess the adequacy of the internal policies and arrangements in place with regards to EMIR reporting and the process for valuation of outstanding contracts. These investigations were still on-going at the time of the responses to the survey. In addition, CySEC in Cyprus also launched an investigation covering practices of all collective investment funds (CIFs) to verify the agreement with the trade repositories or service providers regarding EMIR Reporting; to verify that all CIFs, which have reporting obligation, have provided CySEC with all the necessary information about their trade repository or service provider; and to verify that all firms, which are subject to the reporting obligation, do indeed report their trades.
82. France conducted three investigations in 2018 (one launched in 2017 and two launched in 2018). As a result, insufficiencies of different severity were identified regarding the time, quality, and comprehensiveness of the reporting. The NCA sent two reports in 2018 (to be noted that there was a follow-up in 2019, although 2019 is not covered in the period assessed for this report, but obviously supervisory actions do not stop at the end of each year). At the time of the answers to the survey, one of the investigations was still on-going.
83. Some NCAs reported having performed **between eleven and twenty investigations** from January to December 2018 for matters connected to the reporting obligation.
84. In Spain the CNMV initiated nineteen investigations, some of them related to the application of the Data Quality Annual Review (DQAR) agreed at ESMA and the relevant entities committed to resolve the problems identified. In Portugal, the CMVM

conducted fifteen investigations, also under the DQAR. Most of the investigations focused on counterparties that delegate their trade reporting to another entity, usually a credit institution that is counterparty to the transaction. The CMVM identified incorrect reporting information and therefore asked the counterparty to provide the Delegation Agreements signed between the two parties in order to understand the provisions established in these agreements; to verify the fulfilment of some reporting fields and to correct the information reported on their behalf. As a result, the CMVM highlighted that the counterparties need to have established internal procedures implemented to ensure the accuracy of the reports made on their behalf.

85. Some NCAs reported having performed **more than eleven investigations** from January to December 2018 for matters connected to the reporting obligations.
86. In Belgium, as a follow-up to the reports submitted by the statutory auditors, the FSMA addressed letters to thirty-five NFCs in order to obtain additional information on the lack of monitoring of the data reported on their behalf. The NBB also performed checks on six counterparties to verify their compliance with collateral requirements.
87. In Italy, Consob investigated the accuracy of data reported to trade repositories for more than twenty counterparties. Consob detected quality issues, asked counterparties to monitor the feedback from Trade Repositories and spotted reconciliation issues between trade repositories that were promptly reported to ESMA.
88. Luxembourg sent twelve warnings in relation to Article 9 of EMIR that were followed-up with requests for information, including: actions and remediation plan; information on the number of affected transactions; whether reporting was delegated or not; in case the reporting was delegated, if clients have been informed about failed reporting; and confirmation that the problem was solved and transactions correctly reported. The files were closed without any sanctions due to the appropriate measures implemented by the entities.
89. Furthermore, in Luxembourg, eight investment fund managers with a high rate of rejected reports by trade repositories were contacted in order to obtain confirmation that the transactions have been corrected, reported with the adequate quality standards and accepted by a trade repository. The CSSF also requested seven entities to improve their internal procedures in place to ensure compliance with the reporting obligation (to be noted that the remedial action plans were in progress at the time of the answers to the survey and were due to be completed by end of June 2019). Similarly, the CSSF investigated seven investment fund managers who self-notified the CSSF about issues preventing them to adequately comply with the reporting obligation. After analysing the cases, the main reason found for these issues were technical implementation errors (such as accounts not covered by the reporting tools, LEI renewals not performed, a type of derivatives not included in the scope of the reporting). Four cases are closed and three are on-going.

4.7.3 Investigations regarding NFCs (Article 10)

90. Some NCAs reported having performed **between six and eleven investigations** from January to December 2018 for matters connected to NFC requirements.
91. In Luxembourg, five in-depth investigations of NFCs took place during 2018, covering four of the major market participants in terms of derivatives volume, and the other is an NFC that is part of a large multinational group⁵⁶. Three of the files are closed or nearly closed and the two that were remaining were still under in-depth investigation at the time of the answers to the survey. The CSSF highlights that the supervision of NFCs in respect to the clearing thresholds is challenging for NCAs. One of the issues encountered and for which three entities were investigated is the excessive reliance on the hedging exception, which allows to disregard trades for the purpose of calculating positions against the clearing threshold.

4.7.4 Investigations regarding the risk-mitigation techniques (Article 11)

92. Some NCAs reported having performed **up to five investigations** from January to December 2018 for matters connected to risk mitigation techniques.
93. Norway conducted three investigations on whether counterparties were subject to appropriate centralised risk evaluation, measurement and control procedures. Other two counterparties were investigated regarding their risk management procedures and to assess legal opinions provided on the possibility of prompt transfer of own funds or repayment of liabilities. All investigations are closed.
94. In Luxembourg, the NCA sent four warnings in relation to Article 11 of EMIR and followed-up with further actions, requesting further information and remedial actions, i.e. a detailed action plan including milestones and regular updates on implementation to the authority. The investigation was closed without any sanctions due to the appropriate measures implemented by the entity.
95. Some NCAs reported having performed **between eleven and twenty investigations** from January to December 2018 for matters connected to risk mitigation techniques.
96. In Spain, the CNMV reached out to fifteen entities to investigate their procedures for the exchange of collateral. The NCA assessed the documentation provided, focusing on checking its adequacy and identifying further potential supervisory activities. This assessment remained on-going at the time of the answers to the survey.
97. In Germany, fifty-one investigations were initiated, involving seven credit institutions, one investment firm, five UCITs, fifteen insurance Company and nine NFCs. In the course of 2018, fourteen of those investigations were complete and only less serious

⁵⁶ These investigations to NFCs covered also aspects related to compliance with Articles 4, 9 and 11 of EMIR.

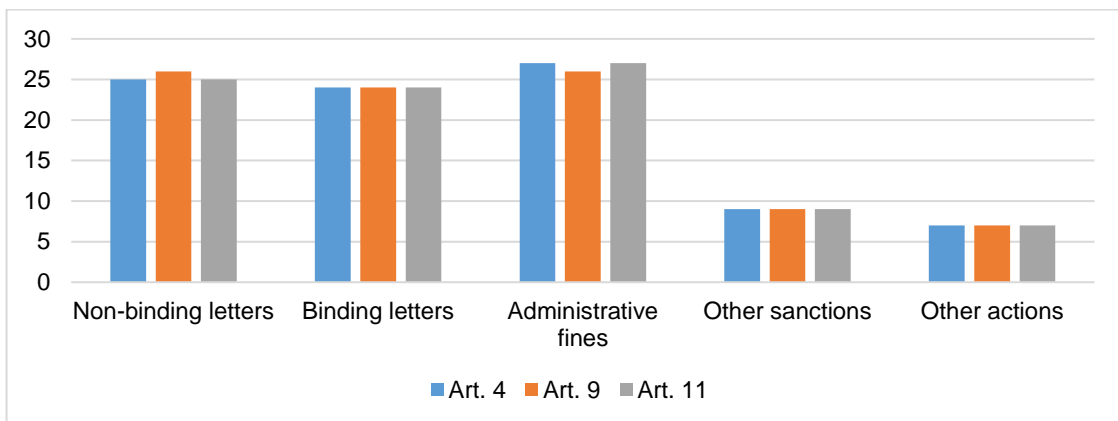
offenses were detected.

4.8 Supervisory and Enforcement competences and uses

4.8.1 Supervisory and enforcement competences

98. The survey's feedback shows that there are three main supervisory and enforcement competences shared by a great majority of the NCAs, which are presented in Figure 9: to impose administrative fines; to issue binding letters; and non-binding letters or recommendations.

99. Figure 9: Supervisory and Enforcement competences⁵⁷



100. Around 90% of the NCAs confirmed that they can impose administrative fines, with only a few exceptions: Denmark, Greece, Iceland, Latvia and Croatia⁵⁸ (where the fines have to be imposed by the Courts).

101. Regarding non-binding letters or recommendations, 86% of the countries do have this competence regarding compliance with Articles 4, 9 and 11 of EMIR. Only Denmark, Estonia, Greece, Iceland, Slovenia and Latvia indicated the contrary. Some countries also reported that they can only issue recommendations in the context of an investigation or when a specific breach has been identified.

102. In other cases, non-binding letters or recommendations can be used to provide clarification on the application of a given regulatory requirement. In the Czech Republic and in Germany, the NCAs mentioned that recommendations are usually issued in the form of FAQs or Q&As. In the Czech Republic, however, the NCA can also issue supervisory briefings to clarify a specific supervisory approach, although they pinpoint

⁵⁷ For detailed information on the names of the countries, see Table 10 in Annex II.

⁵⁸ In Croatia, the HANFA cannot impose administrative fines directly, but applying to the misdemeanour court and initiating a misdemeanour proceeding as the plaintiff.

this is a rare case. Finally, in Portugal, the CMVM may issue general recommendations directed at one or more types of supervised entities and may formulate and publish general legal opinions concerning relevant questions that are placed in writing by single entities or market associations.

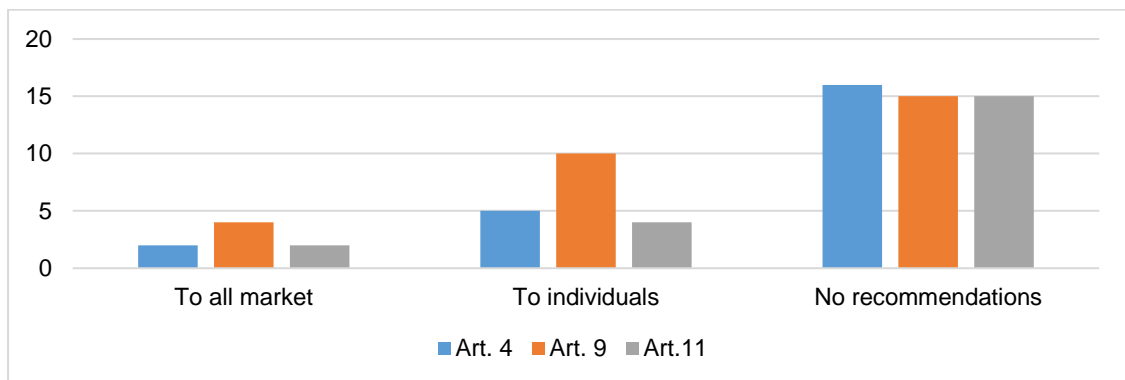
103. Furthermore, around 80% of the countries consulted have also the capacity to issue binding letter orders or reprimands, generally, in situations where there is a suspicion of infringement. In such cases, these binding letters are used to require supervised entities to cease a certain behaviour and to comply with EMIR requirements. When these letters are not respected, other administrative procedures could be initiated. On the contrary, seven countries indicated that they cannot issue binding orders: Bulgaria, Czech Republic, Greece, Iceland, Latvia, Poland and Slovenia.
104. In Denmark, for instance, the NCA issues binding orders and can report any infringements of EMIR to the police with the intention of the imposition of a fine. Additionally, in Denmark the NCA gathers information on market practices in order to identify the best practices in the industry. Binding letters are thus used to benchmark other institutions and make them aware of some improvements that they could implement to adhere to those best practices.
105. In France, the AMF issues binding letters whenever a repeated breach is detected. These letters can take either the form of an injunction proceeding (the binding letter is used to put an end to a current and continuing breach); or of an administrative settlement (a settlement procedure which provides binding commitments).
106. In addition, Cyprus, the United Kingdom and Norway expressed that they can initiate procedures leading to criminal penalties, which in the case of Norway, can translate into up to a one-year imprisonment.
107. From the information gathered through the survey, it was also apparent that there are other types of supervisory and enforcement tools in place. In the United Kingdom, for instance, the PRA has a variety of formal powers available, which allow to intervene directly in an entity's business, to modify an entity's authorisation or to impose a requirement to prevent or curtail an entity from undertaking certain regulated activities. The PRA considers when and how to use its formal powers on a case-by-case basis, and in all cases it is likely to consider a number of factors in connection with the possible deployment of such powers, including: the confidence that the supervisors have that these entities will respond appropriately to the PRA's requests without the use of powers; the entity's proximity to failure; and the likely impact, including systemic implications, of the entity's failure.
108. The PRA may also prohibit any individuals (not just those who currently hold a senior management function) from performing functions in relation to a regulated activity carried on by a PRA-authorized entity. The PRA may only do this where it appears that an individual is not fit to perform such functions.

109. Some countries such as France, Hungary and Romania also mentioned other capacities or competences, for example, to impose the discontinuation of all activities which are in breach of the provisions of EMIR; to order a market operator to suspend trading in a financial instrument; or to suspend the licence of an entity to provide services (temporarily or permanently).

4.8.2 Recommendations and warning letters issued

110. NCAs were asked in the survey to provide information on whether they issued recommendation letters or sent warnings to supervised entities during the period analysed for this report (2018), on how many they issued and for which purposes. Figure 10 below illustrates the responses received.

111. Figure 10: Recommendations or warnings issued in the last period⁵⁹



112. Around half of the NCAs did not issue any recommendation or warning for the period between January and December 2018. However, on average⁶⁰, five countries addressed recommendation letters or warnings to individual market participants and on average, four countries addressed general recommendations to all market participant. The issues tackled in these communications vary.

4.8.2.1 Recommendations addressed to individual market participants (non-public)

113. In relation to the **clearing obligation**, in Germany, five letters were sent to supervised entities regarding their client classification procedures and back-office controls for trades subject to mandatory clearing. In Italy, the NCA addressed communications to the largest credit institution regarding their ability to continue complying with central clearing requirements before the possibility of the United Kingdom leaving the EU without an agreed deal. In Romania, the NCA addressed three letters to market participants in relation to the clearing obligation.

114. Regarding the reporting requirements, in Luxembourg, the CSSF sent fourteen letters

⁵⁹ Detailed information on the countries can be found in Table 11 in Annex II.

⁶⁰ An average considering the recommendations and warnings sent regarding Article 4, 9 and 11 of EMIR.

to entities and investment fund managers with a high level of rejected reports based on the information received from trade repositories. The letters aimed at understanding if the reports had been corrected and resubmitted. In Germany, Bafin also sent one hundred ten letters addressed to entities with a high level of rejected reports. The CSSF also sent five warning letters to supervised entities regarding technical issues hampering reporting processes (e.g. IT changes and the introduction of the new reporting standard on 1 November 2017) and other letters to seven entities requesting the enhancement of the internal oversight procedures to ensure an adequate compliance with the reporting obligation.

115. In Belgium, around thirty letters were sent to market participants in relation to lack of reporting. Likewise, in Spain, the CNMV issued fourteen non-public letters warning specific entities about the need to report contracts correctly. In Italy, the NCA sent more than twenty letters in relation to the reporting obligation (in relation to data quality issues). In Latvia and Malta, the NCAs also sent letters aimed at addressing misreporting. In addition, in Italy some other communications were sent to counterparties in relation to the ability to comply with the reporting obligation in a no deal Brexit scenario. In Slovenia, the SMA addressed an individual letter regarding Guidelines on portability of data between trade repositories.
116. Concerning compliance with the **risk mitigation techniques requirements**, in Luxembourg the NCA sent three letters, in Belgium the NCA sent ten and in Germany, fourteen letters were addressed to supervised entities regarding the timing and content of portfolio reconciliation and valuation.

4.8.2.2 Recommendations addressed to all market participants (public)

117. In Malta, the MFSA published a general findings report based on on-site inspections which included recommendations addressed to all market participants. The Slovenia NCA, the SMA, issued a public letter regarding the guidelines on portability of data between trade repositories; and the CySEC in Cyprus, published a circular (C291) on compliance with the reporting obligation under EMIR.
118. In the United Kingdom, the FCA sent a number of email updates to market participants (which followed supervisory convergence statements from ESMA) clarifying the risk-based approach for the supervision of the EMIR requirements impacted by changes introduced in EMIR REFIT (i.e. namely with regards to the clearing obligation for pension schemes and non-financial counterparties as well as with respect to the third country intragroup transaction exemptions). In addition, the FCA also sent an email update to market participants specifying the risk-based approach to the supervision of the implementation of the margin requirements for FX transactions.

4.9 Penalties and Sanctions

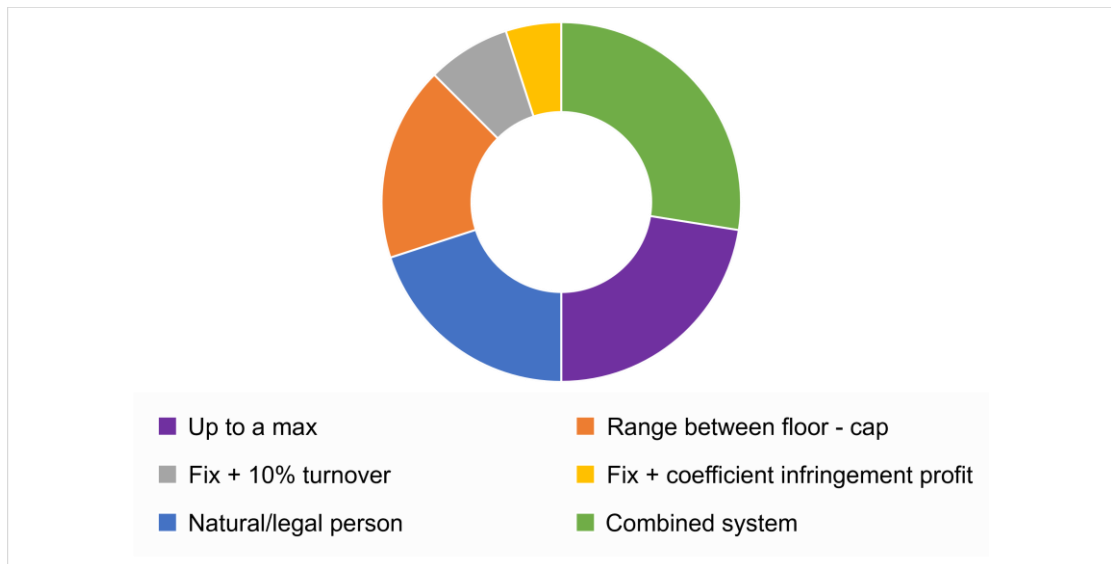
119. During the period in scope for this report (between January and December 2018) no

new penalty or sanction was imposed in any of the countries responding to the survey launched by ESMA. Accordingly, the report focuses then only on the sanctions and penalties that are envisaged in each jurisdiction with regards to breaches of the requirements defined in Articles 4, 9 10 and 11 of EMIR.

4.9.1 Quantification of administrative fines

120. Based on the information received from NCAs, the different countries are classified in groups according to the methodology that they use to quantify administrative fines with respect to the clearing mandate, the reporting requirements and the risk mitigation techniques. Figure 11 displays this grouping of countries based on the methods implemented to quantify administrative fines.

121. Figure 11: Groups of countries by methodology to quantify fines⁶¹.



122. Besides the methods used to quantify fines, NCAs also provided information related to the amounts of such fines. As expected, there have been no major changes in the administrative fines imposed, except for a few cases for which the NCAs reported some information on the different ways used for calculating them. Overall, fines' amounts range from very low numbers (it can be lowered to potentially € 0 in the Netherlands depending on the circumstances or be as small as € 125 in Luxembourg) and up to very large numbers (potentially € 100,000,000 in France, also depending on the circumstances).

123. Among the countries that quantify fines **up to a maximum amount**, numbers differ between countries. In Estonia administrative fines can be up to € 32,000, followed by Austria and Malta where fines can amount to up to € 150.000, and up to approximately

⁶¹ The detail on the names of the countries can be found in Table 12 in Annex II.

€ 400,000⁶² and € 500,000 in the Czech Republic and in Germany respectively. Finally, within this group, fines can go up to € 2,500,000 in Ireland. In Cyprus, depending on the severity of the infringement, the fine can amount to up to € 350,000, however, in case of repeated infringements, the maximum fine can be of € 700,000. In Poland, fines can be up to approximately € 2,356,950 (PLN 10,000,000) but this amount cannot exceed 10% of the revenue indicated in the most recent audited financial statement.

124. Another group of countries quantifies administrative fines within a **range, between a floor and a cap amount** (e.g. from € 500,000 to 1 million). Amidst these countries, in Luxembourg fines range between € 125 and €1,500,000⁶³ whilst in Greece, between € 1,000 and € 3,000,000; and in Sweden between approximately € 475 (SEK 5,000) and approximately € 4,5 million (SEK 50 million). In the Netherlands, the base amount should be € 500,000 and the fine can amount to up to € 1,000,000. However, the base amount can be lowered, even down to zero, based on proportionality, the financial situation of the entity and other special circumstances.
125. In some other countries, the amounts of administrative fines are determined by a **fix amount plus a variable amount consisting of up to a percentage** of the annual turnover of the entity. For instance, in Luxembourg, fines are quantified according to a **fix amount plus a variable amount consisting of a coefficient** of the profit gained by the infringement. If the infringement led to a financial benefit, directly or indirectly, the fine amount will not be less than the profit made and not more than five times the profit. In France, fines can amount to up to € 100,000,000 or up to ten times the amount of the profit derived from the infringement.
126. In addition, in some countries, **fines vary depending on whether the infringement was committed by a natural or a legal person**. In Italy, for example, in case of violation of Articles 4, 9, 10 or 11 of EMIR, the amount of the fine ranges from € 5,000 to € 5,000,000 if the infringement is committed by a natural person and, if the offence is committed by an entity, the fine applied ranges from € 30,000 to € 5,000,000 or up to 10% of the turnover if this amount is more than € 5 million and if the turnover figure is available. Similarly, in Slovenia, the amounts of fines depend on who committed the infringement and its size: from € 12,000 to € 150,000 for infringements committed by a legal person; from € 25,000 to € 250,000 for entities considered medium or large; and from € 6,000 to € 100,000 for individual entrepreneurs. Additionally, an amount ranging from € 800 to € 10,000 shall be imposed on the responsible person of the entity which committed the infringement; or from € 200 to € 5,000 on the individual entrepreneur.
127. Finally, many countries have **mixed methods** to quantify administrative fines and combine the features of the different groups above. For example, in Portugal, different scales can be applied depending on the severity of the infringements (distinguishing from serious infringements), which fines can range from € 1,500 to € 2,500,000; and

⁶² CZK 10,000.

⁶³ Luxembourg has a combined system for the cases in which the offense committed has provided a financial benefit, please see following paragraph for more details.

very serious infringements, which fines can amount from € 5,000 to €10,000,000. In addition, Portugal has a mixed system for quantifying fines that allows to raise the applicable fine up to the highest of the following values: (i) the economic benefit or the losses potentially avoided by infringing EMIR (totally or partially); or (ii) when the infringement is committed by a legal person, 10% of the turnover as per the latest consolidated or individual accounts that have been approved by the management body.

128. In Spain, for very severe infractions, fines can amount to up to any of the following references: (i) five times the gross profit or loss avoided as a result of the acts or omissions constituting the infringement; (ii) 5% of the offending entity's own resources; (iii) 5% of the total funds (own or borrowed) used in the infringement; (iv) 10% of the total annual turnover of the offending entity, according to the latest available accounts approved by the administrative body⁶⁴; (v) € 5,000,000. For severe infractions the following references can be considered: (i) three times the gross profit obtained as a result of the acts or omissions constituting the infringement; (ii) 2% of the offending entity's own resources; (iii) 2% of the total funds, own or borrowed, used in the infringement; or (iv) € 300,000. Finally, for offenders that committed minor infringements, a fine of up to € 30,000 shall be imposed on the offender.
129. Denmark has a different approach because the Danish FSA does not impose penalties directly, instead, the NCA reports an infringement of EMIR with the intention of imposing a fine. The specific amount of the fine will be decided by the courts.

4.9.2 Criminal Sanctions

130. In Cyprus, Denmark, Finland, Ireland, Norway, Spain, Portugal and the United Kingdom there are criminal sanctions in place for the case of an infringement of EMIR provisions.
131. In Cyprus, a person who makes a false statement can be subject to a criminal sanction. In Finland, a major negligence could trigger criminal sanctions. Similarly, in Norway, when a breach is considered negligent or intentional then a criminal fine or imprisonment of up to one year can be imposed⁶⁵.
132. In Spain, the CNMV can only apply administrative fines. However, on a case by case basis and depending on the nature and the circumstances of the infringement, when the CNMV suspects that a criminal offence may have been committed it will report the facts to the prosecutorial and judicial authorities for them to determine if criminal proceedings should be initiated. In Denmark, the NCA can report the breach to the police who will initiate a procedure for a fine as a criminal sanction.
133. In Portugal, the CMVM's Management Board may order the opening of preliminary investigation proceedings to determine the possible existence of a crime. Once the

⁶⁴ If the offending entity is a parent or subsidiary of the parent that is required to prepare consolidated financial statements, the total applicable annual turnover shall be that shown in the latest available consolidated financial statements

⁶⁵ according to the Securities Trading Act section 21-3.

preliminary investigation is concluded and a crime report has been prepared, the CMVM's Management Board refers the relevant details to the competent judicial authority. It is up to the Public Prosecutor's Office to decide on whether to initiate criminal proceedings.

134. In Ireland, there are criminal sanctions for a person, a CCP or a trading venue that is in breach of EMIR provisions (in relation to Article 9), which could, depending on the seriousness, lead to either a fine of up to 5,000 euro and/or imprisonment of up to six months; or to the imposition of a fine of up to 500,000 euro and/or imprisonment up to thirty-six months. In the United Kingdom, the PRA has the power to institute regular criminal proceedings in respect of a small number of criminal offences related to EMIR provisions.

4.9.3 Assessment Reports

135. Under EMIR (Article 12), NCAs are mandated to disclose to the public every penalty that has been imposed for infringements of Articles 4, 5 and 7 to 11, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Therefore, the EEA countries should, at regular intervals, publish assessment reports on the effectiveness of the penalty rules being applied. One of the questions of the survey launched by ESMA in preparation of this report investigated if NCAs have published their assessment reports.
136. Most respondents indicated that they had not published their respective reports. They justified their answer based on the absence of any new sanction or penalty imposed during the last year. However, Malta confirmed that it has published its report, which is accessible on the NCA's website⁶⁶. In Germany, Bafin has mentioned that it is working on the drafting of their first assessment report.

5 Conclusions

137. This report builds on the survey that had been developed and conducted for the first ESMA report on supervisory measures and penalties published last year, by expanding it in order to provide a more granular view of some supervisory aspects in which NCAs are progressively broadening their compliance checks. ESMA has identified an evolution in the supervisory practices in relation to the EMIR requirements that counterparties need to comply with, gradually shifting from an initial focus on raising awareness to bigger efforts towards making a better use of the information available for supervisory purposes. One example of this trend is the much more detailed information reported by NCAs on the compliance checks performed using TR data during this last year. In addition, it is also apparent that NCAs are engaged in enhancing

⁶⁶https://www.mfsa.com.mt/pages/readfile.aspx?f=/Files/Announcements/Circulars/Securities%20and%20markets/EMIR/20180905_EMIR_VisitFindingsOtherUpdates.pdf

or developing IT tools to increase their capacity in treating big amounts of data, which then helps them with their supervisory efforts.

138. In line with the conclusions from the last report, the findings show that there are certain aspects referring to the supervision and the enforcement of EMIR that are highly harmonised amongst the thirty-one countries surveyed. For instance, the supervisory tools available in the different countries, the sources of information checked by NCAs, the means by which NCAs interact with market participants or the focus of their investigations.
139. However, the report also identifies areas in which NCAs have very divergent approaches, such as the amounts of the administrative fines and the different ways to quantify them; with fines ranging from potentially 0 euro to 100,000,000 euros (although very few fines have been imposed so far, so the assessment of how much they vary in practice will only really be possible sometime in the future).
140. Finally, the report identifies areas that represent a supervisory challenge for NCAs and that might benefit from coordinated approaches. It can be noted that this aspect is in part covered in the changes introduced by the EMIR Refit text under Articles 4a and 10 of EMIR, which calls for cooperation arrangements among authorities. Nevertheless, challenges remain, notably on aspects related to the supervision of NFCs in relation to the clearing obligation and on how to identify excessive reliance on the exception applied to hedging positions (not included in the calculation of positions against the clearing thresholds). Furthermore, similarly to last year, it appears that there is room for improvement regarding the supervisory activity towards preventing clearing evasion in relation to third country entities trading contracts with substantial effect in the Union and which would be subject to the clearing obligation if established in the EU.
141. ESMA expects this report to be a useful tool to understand the supervisory and enforcement efforts of NCAs (which competences they have, which actions they undertake and how their national systems envisage EMIR compliance's monitoring and investigation). This report might also help identify best practices applied in one country that could be useful if applied in other countries in the future. Lastly, ESMA looks forward to continuing developing coordinated frameworks that facilitate supervisory activity, especially regarding areas that appear to be less consistent.

6 Annexes

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

General information

1. Choose your jurisdiction:
2. Please, provide the name of your NCA (the NCA submitting the survey).
3. Please, indicate the name of other NCAs which have contributed to your answers or which presented any challenges in the degree of cooperation, if any:
4. Please, provide the contact details of the person answering this questionnaire (Name, position and email address).
5. Please, provide the number of entities (FC and NFC+) that are subject to EMIR requirements in your jurisdiction. Please include a breakdown of the different types of entities (i.e. investment firm, credit institution, insurance / assurance / reinsurance undertakings, UCITS, AIFs, ...; according to Article 2(8) of EMIR).

6. In relation to articles 4, 9, 10, 11 of EMIR are the competences related to (i) supervisory measures and (ii) imposition of penalties centralised in one single authority?

	Art. 4	Art. 9	Art. 10	Art. 11
Yes				
No				

7. Please, name the team/s working on the supervision and the enforcement of Articles 4, 9, 10 and 11 and the number or estimation of people working in each team. Please, mention if you refer to part-time or full-time officers.

NCA's interaction with market participants

8. Please, fill in the following table according to the actions carried out by your NCA from January 2018 to December 2018: [Allow for multi-answer]

	Art. 4	Art. 9	Art. 11
Prepare specific trainings for market participants			
Launch processes to get feedback regarding the implementation of different regulatory requirements (e.g. launching surveys, preparing questionnaires, etc.)			
Create working groups for providing support/ guidance with the collaboration of market participants.			
Other (e.g. sending reminders for phase in implementations)			

Sources of information checked by NCAs

9. Please specify which are the sources of the information used by your NCA in order to monitor the compliance of market participants in relation to the following EMIR provisions:

	Art. 4	Art. 9	Art. 11
Data from Trade Repositories			
Data directly submitted by market participants			
Other (e.g. check market participant's public information, website, etc.)			

10. Please provide information about the IT tools used by your NCA in order to process TR data.

11. Please, provide a more granular description of the uses of the TR information analysed by your NCA to check market participants' compliance with EMIR requirements:

Information from TR data	Tick if your NCA performed checks	Tick to include additional remarks
Counterparty information (e.g. ID, type of counterparty, ...)		
Clearing threshold		
Information used to identify OTC derivative contracts used to take advantage from the arbitrage between cleared/uncleared trades		
Rates on voluntarily cleared transactions		
Volume of cleared transactions		
Volume of intragroup transactions		
Quality and accuracy of data reported		
Compliance with the timely confirmation requirement		
Compliance with portfolio reconciliation requirement		
Compliance with the exchange of collateral for non-centrally cleared transactions		
Use of risk reduction services (e.g. compression)		
Number of rejected transactions		
Reconciliations		
Other		

12. Please, provide more granular information on the data submitted directly by market participants to your NCAs to check their compliance with EMIR requirements:

Information submitted by counterparties	Tick if your NCA performed checks	Tick to include additional remarks
Exposures of certain market participants		
Information about positions from entities' books		
Cross check data reported to TRs		
Financial statements of market participants		
Information publicly available (e.g. press releases, website, media coverage, etc.)		
Other		

Supervisory activities

13. Please, specify which of the following tools has your NCA to monitor the compliance in relation to the following EMIR provisions:

	Art. 4	Art. 9	Art. 11
Inspect all types of documents and receive copies about documents related to the clearing/reporting/risk mitigation techniques obligations from the counterparties.			
Ask information in relation to the clearing / reporting / risk mitigation techniques obligations from any person (including the ones that are not counterparties in the transaction)			
Conduct investigations on-site			
Summon and interview people			
Other			

14. Has your NCA started conducting or publishing the assessment reports mentioned in art. 12.2 of EMIR?

- a. Yes.
- b. No.

Clearing obligation

15. Regarding the clearing obligation and for the period in scope (January 2018-December 2018) for this survey, has your NCA identified any circumstance preventing market participants to comply with the legal requirements of art. 4 of EMIR?
- Yes, technical, operational barriers or other kind of barriers.
 - Yes, difficulties related to counterparties located in third countries.
 - Market participants are facing difficulties to access clearing.
 - Other.

Supervision of the clearing obligation for NFCs

16. In relation to non-financial counterparties (art. 10 of EMIR), which is the approach adopted by your NCA for ensuring the compliance of the clearing obligation?
- Your NCA performs a preventive supervisory control to check if non-financial counterparties exceed clearing thresholds.
 - Your NCA relays exclusively on market participants' notifications.
 - Other.
17. Regarding the supervision of NFCs that are part of cross-border groups and the clearing obligation, does your NCA cooperate with other authorities?
- Yes
 - No

Third countries

1. Regarding third country entities trading contracts with substantial effect in the Union, which would be subject to the clearing obligation if established in the EU, has your NCA undertaken any specific measures to detect clearing evasion in the period January 2018 -December 2018?

Risk management procedures for non-cleared OTC derivatives

2. In relation to the regulatory requirements envisaged in art. 11 of EMIR, in relation to risk management procedures (i.e. timely, accurate and appropriate segregated exchange of collateral), which kind of supervisory actions does your NCA undertake?

	Supervisory measures only following a risk-based approach	Random controls/inspections to monitor compliance	Periodic requests for information/documentation to proof compliance	Other
Timely calculation and collection of margins				
Eligibility of collateral				
Adequate segregation of collateral				
Daily mark-to market of outstanding contracts				
Portfolio reconciliation				
Dispute resolution				
Authorisation and recording of any exceptions to the risk management procedures				
Periodic verification of the liquidity of the collateral to be exchanged				
Timely re-appropriation of the collateral in event of default by the posting counterparty				
Monitoring the exposures arising from intragroup OTC derivative contracts				
Monitoring risk reduction services such as compression				

Investigations conducted

3. How many investigations, if any, has your NCA conducted in the period in scope for this survey (January 2018-December 2018)?

Enforcement actions

4. In relation to the following EMIR provisions, your NCA has competence to: [Allows for multiple answers]

	Art. 4	Art. 9	Art. 11
Issue non-binding letters / recommendations.			
Issue binding letters / recommendations.			
Impose administrative fines.			
Impose other kind of sanctions (e.g. criminal sanctions).			
Other			

5. Has your NCA issued recommendations or warning letters for the period in scope for this survey (January 2018 - December 2018) regarding the implementation of the following provisions? [Allows for multiple answers]

	Art. 4	Art. 9	Art. 11
Yes, letters addressed to all market participants.			
Yes, letters addressed to individual market participants.			
No, no letters have been issued.			

6. Which is the foreseen procedure in your NCA in case of identifying a breach in compliance or infringements by a market participant?
- Initial written warning before starting a formal investigation (and without involving further actions in the case the issue is solved).
 - Automatic initiation of an investigation procedure to resolve whether there is an actual breach/infringement of EMIR obligations.
 - Other.

Penalties and sanctions

7. In relation to the following EMIR provisions, has your NCA imposed any penalty in the period January 2018-December 2018?

	Art. 4	Art. 9	Art. 10	Art. 11
Yes				
No				

8. Please, specify if during the period January 2018 - December 2018 there has been any criminal sanction or any other type of sanctions imposed in your jurisdiction (besides the administrative penalties covered in Q25) regarding the obligations in Articles 4, 9, 10 and 11.

9. Please, provide information on the system followed to quantify the administrative fines amounts in your jurisdiction in relation to Articles 4, 9, 10 and 11 of EMIR: [Allow for multiple answers].

Way in which fines are quantified	Tick according to the system followed in your jurisdiction
Up to a maximum amount (e.g. up to €1 million)	
A range between a floor and a cap amount (e.g. from €500.000 to €1 million)	
A fix amount + a variable amount consisting of up to a percentage of the annual turnover of the entity	
A fix amount + a variable amount consisting of a coefficient of the profit gained by the infringement	
Amounts vary depending on whether the infringement is committed by a natural/legal person	
Other	

10. Does your jurisdiction envisage criminal sanctions in connection with requirements in art. 4, 9, 10 and 11?

	Art. 4	Art. 9	Art. 10	Art.11
Yes				
No				

11. Does your jurisdiction envisage other type of penalties besides administrative fines or criminal sanctions?

Yes	
No	

Annex II: Tables with granular information on the different countries

Table 1: Number of FCs supervised per country.

0-100	101-300	301-600	601-1,000	1,001- 5,000	5,001-10,000	Plus 10,000
BU, 96; EE, 5; IS, 53; LT, 60; LV, 52; SI, 13; SK, 98	CY, 175; GR, 194; HR, 218; HU, 236; MT, 153; RO, 252	BE, 470; CZ, 338; FI, 425; LI, 308; NL, 410; PT, 510	DK, 771;	FR, 3,300; NO, 1,090; IT, 2,858; PL, approximately 1,700; SE, 3,000	DE, 9,272; ES, 5,299; IE, approximately 7,300; LU, 8,990	UK, 58,000

Table 2: Allocation of competences for the supervision and the imposition of penalties between NCAs in relation to provisions in Articles 4, 9, 10 and 11 of EMIR.

	Art. 4	Art. 9	Art. 10	Art. 11
Yes	19: (61%) AT; CZ; DE; DK; EE; ES; FI; FR; HU; IE; IS; LI; LT; MT; NO; PL; SE; SI; SK	20: (64,5%) AT; BG; CZ; DE; DK; EE; ES; FI; FR; HU; IE; IS; LI; LT; MT; NO; PL; SE; SI; SK	24: (77,5%) AT; BG; CZ; DE; DK; EE; ES; FI; FR; GR; HR; HU; IE; IS; LI; LT; LU; MT; NO; PL; SE; SI; SK; UK	18: (58%) AT; CZ; DE; DK; EE; ES; FI; HU; IE; IS; LI; LT; MT; NO; PL; SE; SI; SK
No	12: (39%) BE; BG; CY; GR; HR; IT; LU; LV; NL; PT; RO; UK	11: (35,5%) BE; CY; GR; HR; IT; LU; LV; NL; PT; RO; UK	7: (22,5%) BE; CY; IT; LV; NL; PT; RO	13: (42%) BE; BG; CY; FR; GR; HR; IT; LU; LV; NL; PT; RO; UK

Table 3: NCAs interaction with market participants (from January to December 2018).

	Art. 4	Art. 9	Art. 11
Launch processes to get feedback regarding the implementation of different regulatory requirements (e.g. launching surveys, preparing questionnaires, etc.)	12: (39%) AT; BE; CY; DE; ES; FR; HR; LU; MT; NL; PL; UK	16: (52%) AT; BE; CY; DE; EE; ES; FI; FR; HR; LI; LU; MT; NL; PL; PT; UK	12: (39%) BE; CY; DE; ES; FR; HR; IT; LU; MT; PL; PT; UK
Create working groups to provide support / guidance in collaboration with market participants	6: (19%) DE; FR; UK; LI; NL; SK	8: (26%) AT; DE; FR; UK; LI; NL; SI; SK	7: (22.5%) DE; FR; UK; IT; LI; SI; SK
Webpage with info and updates or published guidelines	8: (25.8%) ES; FR; LI; LU; SE; SI; SK; UK	8: (25.8%) ES; FR; LI; LU; SE; SI; SK; UK	8: (25.8%) ES; FR; LI; LU; SE; SI; SK; UK
Ad-hoc bilateral contacts and meetings with associations	6: (19%) CZ; DK; FR; IT; LU; SE;	6: (19%) CZ; DK; FR; IT; LU; SE;	6: (19%) CZ; DK; FR; IT; LU; SE ;
Statements, press releases, circulars, email list	5: (16%) IE; LU; MT; SI; UK;	5: (16%) IE; LU; MT; SI; UK;	5: (16%) IE; LU; MT; SI; UK;
Prepare specific trainings for market participants 8A	4: (13%) BE; FI; FR; UK	6: (19%) BE; DE; FI; FR; UK; IT	5: (16%) BE; DE; FI; FR; UK
Q&As	4: (13%) DE; SE; SI; SK	4: (13%) DE; SE; SI; SK	4: (13%) DE; SE; SI; SK
Dedicated email inbox	4: (13%) BE; LU; SE; UK	4: (13%) BE; LU; SE; UK	4: (13%) BE; LU; SE; UK
Other	4: (13%) AT; IS; MT; NO	4: (13%) AT; IS; MT; NO	4: (13%) AT; IS; MT; NO

Table 4: Sources of information checked by NCAs.

	Art. 4	Art. 9	Art. 11
a. Data from Trade Repositories	22: (71%) AT; BE; CY; CZ; DE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LU; LV; MT; NL; PL; RO; SI; SK	29: (93.5%) AT; BE; BG; CY; CZ; DE; DK; EE; ES; FI; FR; GR; HR; HU; IE; IT; LI; LU; LV; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	20: (64.5%) AT; BE; CY; CZ; DE; DK; FI; FR; HR; HU; IE; IT; LI; LU; MT; NL; RO; SI; SK; UK
b. Data directly submitted by market participants	19: (61%) BE; CY; CZ; DE; ES; FI; FR; UK; GR; HR; IE; IT; LT; LU; MT; NL; PL; SE; SK	18: (58%) AT; BE; CY; CZ; DE; EE; ES; FR; HR; IE; IT; LT; LU; MT; NL; PL; SK; UK	21: (68%) AT; BE; BG; CY; CZ; DE; ES; FI; FR; HR; IE; IT; LT; LU; MT; NL; PL; SE; SI; SK; UK
c. Other (e.g. check market participant's public information,	17: (55%) AT; CY; DE; DK; ES; FI; HR; IE;	18: (58%) AT; BE; CY; DE; DK; FR; HR; IE; LT;	18: (58%) AT; CY; DE; DK; ES; FI; HR; IE;

website, etc.)	LT; LU; MT; NL; NO; PT; SI; SK; UK	LU; MT; NL; NO; PL; PT; SI; SK; UK	IT; LT; LU; LV; MT; NO; PT; SI; SK; UK
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Table 5: Checks performed using TR data.

Information from TR data	NCA which performed checks	Additional remarks
Counterparty information (e.g. ID, type of counterparty, ...)	25: AT; BE; BG; CY; DE; EE; ES; FI; FR; UK; HR; IE; IT; LI; LU; LV; MT; NL; NO; PL; PT; RO; SE; SI; SK	2: LU; PT
Clearing threshold	6: DK; ES; IT; LU; MT; UK	1: LU;
Information used to identify OTC derivative contracts used to take advantage from the arbitrage between cleared/uncleared trades	0	0
Rates on voluntarily cleared transactions	6: ES; UK; NL; SE; SI; SK	0
Volume of cleared transactions	16: AT; BE; DE; ES; FR; UK; HR; IT; LI; MT; NL; PL; RO; SE; SI; SK	0
Volume of intragroup transactions	11: BE; DE; ES; FR; UK; HR; IE; MT; NL; SE; SK	0
Quality and accuracy of data reported	26: AT; BE; BG; CY; CZ; DE; DK; EE; ES; FI; FR; UK; HR; IE; IT; LI; LU; LV; MT; NL; NO; PL; PT; SE; SI; SK	4: CZ; DK; LU; PT
Compliance with the timely confirmation requirement	16: CY; DE; EE; ES; FR; HR; IE; IT; LU; LV; MT; NL; PL; PT; SI; SK	2: LU; PT
Compliance with the exchange of collateral for non-centrally cleared transactions	6: BE; ES; IE; IT; LU; MT;	0
Use of risk reduction services (e.g. compression)	6: BE; DE; ES; IE; MT; NL;	0
Number of rejected transactions	26: AT; BE; CY; CZ; DE; EE; ES; FI; FR; UK; GR; HR; IE; IT; LI; LU; LV; MT; NL; NO; PL; PT; RO; SE; SI; SK	3: CY; CZ; LU
Reconciliations	22: AT; BE; CY; CZ; DE; DK; ES; FI; FR; UK; GR; IE; IT; LU; LV; MT; NL; PL; PT; SE; SI; SK	4: CY; CZ; DK; LU
Other	7: AT; DE; FR; IE; LU; NO; UK	1: IS

Table 6: Information on Supervisory tools per country.

	Art. 4	Art. 9	Art. 11
Inspect all types of documents and receive copies about documents related to the clearing/reporting/risk mitigation techniques obligations from the counterparties.	28: (90%) AT; BE; CY; CZ; DE; DK; EE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	28: (90%) AT; BE; CY; CZ; DE; DK; EE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	28: (90%) AT; BE; CY; CZ; DE; DK; EE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK
Ask information in relation to the clearing / reporting / risk mitigation techniques obligations from any person (including the ones that are not counterparties in the transaction)	22: (71%) BE; CY; CZ; DE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; MT; NL; NO; PL; PT; SE; SI; UK	24: (77%) AT; BE; CY; CZ; DE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; MT; NL; NO; PL; PT; SE; SI; UK	23: (74%) AT; BE; CY; CZ; DE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; MT; NL; NO; PL; PT; SE; SI; UK
Conduct investigations on-site	28: (90%) AT; BE; CY; CZ; DE; DK; EE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; LV; MT; NL; NO; PL; PT; RO; SI; SK; UK	29: (93.5%) AT; BE; BG; CY; CZ; DE; DK; EE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; LV; MT; NL; NO; PL; PT; RO; SI; SK; UK	28: (90%) AT; BE; CY; CZ; DE; DK; EE; ES; FI; FR; UK; GR; HR; HU; IE; IT; LT; LU; LV; MT; NL; NO; PL; PT; RO; SI; SK; UK
Summon and interview people	27: (87%) AT; BE; CY; CZ; DE; EE; ES; FI; FR; UK; HR; HU; IE; IT; LT; LU; LV; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	26: (84%) AT; BE; CY; CZ; EE; ES; FI; FR; UK; HR; HU; IE; IT; LT; LU; LV; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	27: (87%) AT; BE; CY; CZ; DE; EE; ES; FI; FR; UK; HR; HU; IE; IT; LT; LU; LV; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK
Other	5: (16%) CY; DK; LT; LU; PT	7: (22.5%) CY; DK; UK; LT; LU; PT; UK	6: (19%) CY; DK; UK; LU; PT; UK

Table 7: Supervision of the clearing obligation by NFCs.

Your NCA performs a preventive supervisory control to check if non-financial counterparties exceed clearing thresholds.	7: BE; DE; ES; FR; IT; LI; MT
Your NCA relays exclusively on market participants' notifications.	21: AT; BU; CY; CZ; DK; EE; FI; GR; HR; HU; IE; LT; LU; NL; NO; PL; PT; RO; SE; SI; UK
Other	3: IS; LV; SK

Table 8: Supervision of risk management procedures for non-cleared OTC derivatives.

	Supervisory measures only following a risk-based approach	Random controls/inspections to monitor compliance	Periodic requests for information/documentation to proof compliance	Other
Timely calculation and collection of margins	16: AT; BE; CY; CZ; DE; DK; FI; UK; HU; IT; LT; LU; LV; NO; RO; SE	6: CY; ES; IT; LU; MT; SK	6: BE; CY; DE; ES; LI; MT	1: IS
Eligibility of collateral	16: AT; BE; CY; CZ; DE; DK; FI; UK; HU; IT; LT; LU; LV; NO; RO; SE	6: CY; ES; IT; LU; MT; SK	4: BE; CY; DE; ES	2: IS; MT
Adequate segregation of collateral	15: AT; CY; CZ; DE; DK; FI; UK; HU; IT; LT; LU; LV; NO; RO; SE	6: CY; ES; IT; LU; MT; SK	4: BE; CY; DE; ES	2: IS; MT
Daily mark-to market of outstanding contracts	15: AT; BE; CY; CZ; DE; DK; FI; UK; HU; IT; LT; LU; NO; RO; SE	7: BE; CY; ES; IT; LU; MT; SK	4: BE; CY; DE; ES	2: IS; MT
Portfolio reconciliation	18: AT; CY; CZ; DE; DK; EE; FI; FR; UK; HU; IT; LT; LU; LV; NO; RO; SE; SI	8: BE; CY; ES; IT; LU; MT; SI; SK	6: BE; CY; DE; ES; FR; LI	1: IS
Dispute resolution	17: AT; CY; CZ; DE; DK; EE; FI; FR; UK; HU; IT; LT; LU; NO; RO; SE; SI	8: BE; CY; ES; IT; LU; MT; SI; SK	5: BE; CY; DE; ES; FR	1: IS
Authorisation and recording of any exceptions to the risk management procedures	14: CY; CZ; DE; DK; FI; UK; HU; IE; IT; LT; LU; NO; RO; SE	5: AT; CY; ES; LU; SK	5: BE; CY; DE; ES; LI	2: IS; MT
Periodic verification of the liquidity of the collateral to be exchanged	15: AT; CY; CZ; DE; DK; FI; UK; HR; HU; IT; LT; LU; NO; RO; SE	5: CY; ES; IT; LU; SK	5: CY; DE; ES; IT; LI	2: IS; MT
Timely re-appropriation of the collateral in event of default by the posting counterparty	14: AT; CY; CZ; DE; DK; FI; UK; HU; IT; LT; LU; NO; RO; SE	5: CY; ES; IT; LU; SK	3: CY; DE; ES	2: IS; MT
Monitoring the exposures arising from intragroup OTC derivative contracts	17: AT; BE; CY; CZ; DK; EE; FI; UK; HR; HU; IE; IT; LT; LU; NO; RO; SE	6: CY; ES; IT; LU; MT; SK	6: BE; CY; ES; HR; IT; LI	1: IS
Monitoring risk reduction services such as compression	9: BE; DE; DK; ES; UK; IT; LU; NO; SE	4: IT; LU; MT; SK	2: BE; DE	3: DK; IS; MT

Table 9: Investigations conducted between January and December 2018.

	Art. 4	Art. 9	Art. 10	Art. 11
1-5	4: DE; ES; HU; NO;	7: BG; CY; FR; HU; LV; NO; SI;	2: AT; HU;	5: AT; FR; HU; NO; LU
6-10			2: IE; LU	
11-20	1: IT	5: AT; ES; MT; PT; SE		1: ES
More than 20	1: LU	6: BE; DE; IE; IT; LU; NL		2: BE; DE;

Table 10: Supervisory and enforcement competences.

	Art. 4	Art. 9	Art. 11
Issue non-binding letters / recommendations	27: AT; BE; BG; CY; CZ; DE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PL; PT; RO; SE; SK; UK	27: AT; BE; BG; CY; CZ; DE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; LV; MT; NL; NO; PL; PT; RO; SE; SK; UK	26: AT; BE; BG; CY; CZ; DE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PL; PT; RO; SE; SK; UK
Issue binding letters / recommendations	25: AT; BE; CY; DE; DK; EE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PT; RO; SE; SK; UK	25: AT; BE; CY; DE; DK; EE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PT; RO; SE; SK; UK	25: AT; BE; CY; DE; DK; EE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PT; RO; SE; SK; UK
Impose administrative fines	28: AT; BE; BG; CY; CZ; DE; EE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	27: BE; BG; CY; CZ; DE; EE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK	28: AT; BE; BG; CY; CZ; DE; EE; ES; FI; FR; UK; HR; HU; IE; IT; LI; LT; LU; MT; NL; NO; PL; PT; RO; SE; SI; SK; UK
Impose other kind of penalties (e.g. criminal sanctions)	9: AT; CY; UK; HR; HU; IE; NO; SK; UK	9: AT; CY; UK; HR; HU; IE; NO; SK; UK	9: AT; CY; UK; HR; HU; IE; NO; SK; UK
Other	6: FR; UK; LU; NO; PT; UK	6: FR; UK; LU; NO; PT; UK	6: FR; UK; LU; NO; PT; UK

Table 11: Recommendations or warnings issued in the last period

	Art. 4	Art. 9	Art.11
Yes, letters addressed to all market participants.	3: UK; MT; UK	5: CY; UK; MT; SI; UK	3: UK; MT; UK
Yes, letters addressed to individual market participants.	5: DE; IT; LU; MT; RO	10: BE; DE; ES; IT; LU; LV; MT; NL; RO; SI	4: BE; DE; LU; MT
No, no letters have been issued.	16: BE; BG; CZ; DK; EE; FI; HR; HU; IE; IS; LI; LT; NO; PT; SE; SK	15: BG; CZ; DK; EE; FI; HR; HU; IE; IS; LI; LT; NO; PT; SE; SK	15: BG; CZ; DK; EE; FI; HR; HU; IE; IS; LI; LT; NO; PT; SE; SK

Table 12: Groups of countries by methodology to quantify fines.

Way in which fines are quantified	Tick according to the system followed in your jurisdiction
Up to a maximum amount	9: AT; CY; CZ; DE; EE; IE; LI; MT; PL
A range between a floor and a cap amount (e.g. from €500.000 to €1 million)	7: GR; IT; LU; NL; PT; SE; SI
A fix amount + a variable amount consisting of up to a percentage of the annual turnover of the entity	3: FR; IT; LT;
A fix amount + a variable amount consisting of a coefficient of the profit gained by the infringement	2: LU; SK
Amounts vary depending on whether the infringement is committed by a natural/legal person	8: BG; FI; HR; IT; LV; PT; RO; SI
Other	11: BE; CY; DK; ES; FR; UK; GR; LT; NO; SK; UK