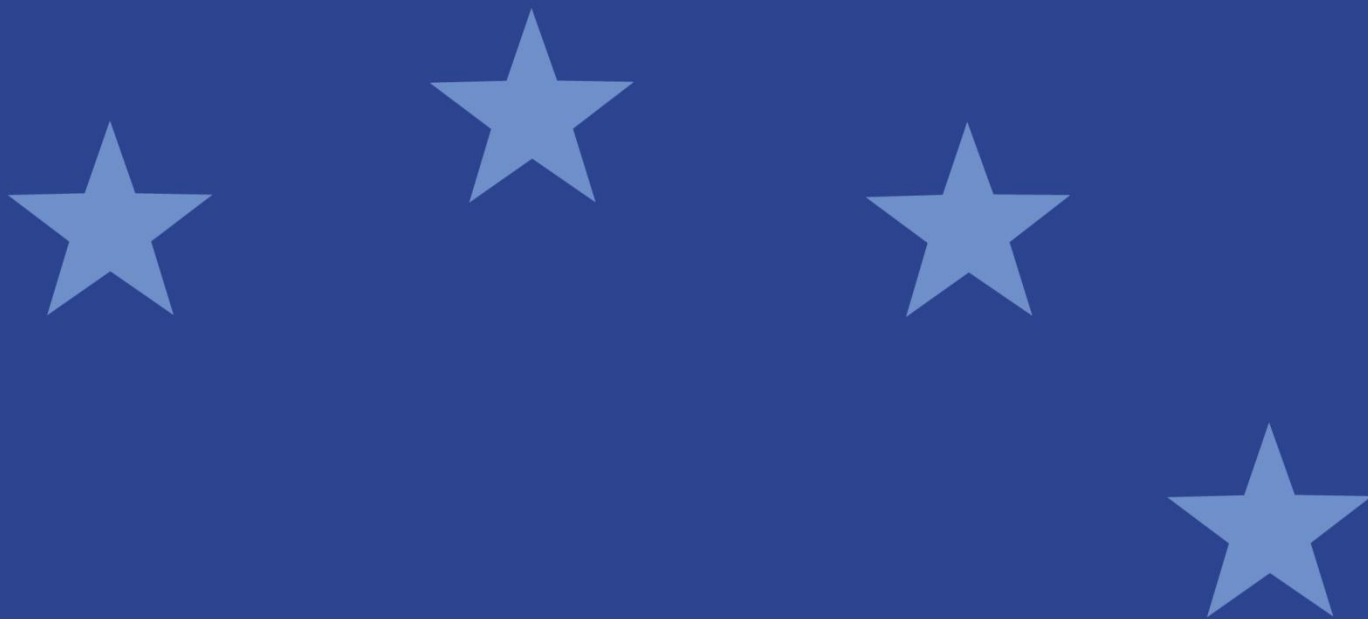


# **MiFID – Conduct of Business, fair, clear and not misleading information**

Peer Review Report



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## 1 - Introduction

1. In December 2011, the ESMA Board of Supervisors (BoS) tasked the Review Panel with a peer review on the supervisory practices as regards Conduct of business under MiFID, specifically the practices with regard to the rules on fair, clear and not misleading information.
2. In line with the Review Panel methodology in force at the time of the launch of this exercise (ESMA/2012/33), the first step was to conduct a mapping of the practices among Member States for fulfilling their responsibilities. This helped to identify good practices, which form the basis for the peer review. The mapping report was approved by ESMA BoS in January 2013.
3. This report assesses how the EEA national competent authorities (CAs), which are represented in the ESMA Review Panel, apply the agreed good practices with regard to the supervision of the MiFID conduct of business rules, including marketing communications and any other information to enable clients to understand the nature and risks of the investment services and type of products being offered<sup>1</sup>. This exercise does not include information such as on-going reporting, post-sales communications, execution of orders, etc... In addition, the exercise does not cover the provision of personalised advice including portfolio management. Reference will be made to 'information and marketing communication' throughout the report.
4. The practices reflected in this document may apply to the CAs' approach to supervision in general and are not always specific to information and marketing communications only.
5. The peer review comprises two phases: the first phase is the self-assessment in which CAs answer a number of questions on how they apply the agreed good practices in their supervisory approach in relation to MiFID conduct of business rules, including information and marketing communications, that have been developed against a set of benchmarks. The second stage is the review of the self-assessment by a small group (the "Assessment Group") composed of experts from the CAs and ESMA staff.
6. The self-assessment questionnaire was launched on 2 September 2013 and the deadline for Members to provide the responses to the questionnaire (including the provision of supporting evidence) was 14 October 2013<sup>2</sup>. In December 2013, the Assessment Group requested a number of clarifications and additional information supported by evidence from CAs.
7. The desk-based review was also complemented by an on-site visit program, which constitutes an additional and integral part of ESMA's peer review process under the new Review Panel Methodology (ESMA/2013/1709). The purpose of the on-site visits is to determine the extent to which the practices observed reflect the good practices which are subject to a peer review as agreed by the May 2013 ESMA BoS. In particular, on-site visits have the key objectives to learn more about the practices and supervisory tools used by the reviewed CAs, and to reveal potential difficulties in the implementation of the agreed good practices under review. For the present review the following CAs were selected: BaFin, Germany; CMVM, Portugal; CNB, Czech Republic; Consob, Italy; CySec, Cyprus and FCA, United Kingdom.

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<sup>1</sup> Article 19(2) of MiFID 1 states that "all information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading" - both in its content and its presentation. Furthermore, it states that "marketing communications shall be clearly identifiable as such". Article 27 of MiFID Implementing Directive (Commission Directive 2006/73/EC) details the conditions to be satisfied by information addressed to clients, or disseminated to clients, in order to be fair, clear and not misleading.

<sup>2</sup> The types of evidence which may be provided include all information described in para. 61 of the peer review methodology in force at the time of the launch of the questionnaire (and not limited to the indicative list in the appendix to the methodology, see ESMA/2012/33).

8. The information gathered in the course of the self-assessment has been reviewed by peers taking into account the written evidence provided by the CAs, and, in relation to those CAs subject to on-site visits, the information provided on this occasion.
9. This report sets out the result of this assessment and describes the degree of implementation across the EU of the good practices in relation to supervision of MiFID conduct of business rules, including information and marketing communications.
10. All ESMA Members, except Iceland, contributed to this peer review. The country codes and acronyms of CAs are listed in the following table.
11. The review period is from 1 January 2010 to 30 June 2012. The on-site visits at BaFin, CMVM, CNB, Consob, CySEC and FCA took place between 04 December 2013 and 23 May 2014.

**Table 1: Country codes and acronyms of Competent Authorities/Member States participating in the ESMA survey (in addition to those in table 2)**

<b>AT</b>	Austria	Finanzmarktaufsicht	FMA
<b>BE</b>	Belgium	Financial Services and Markets Authority	FSMA
<b>BG</b>	Bulgaria	Financial Supervision Commission	FSC
<b>DK</b>	Denmark	Finanstilsynet	Finanstilsynet
<b>EE</b>	Estonia	Estonian Financial Supervision Authority	EFSA
<b>EL</b>	Greece	Hellenic Capital Market Commission	HCMC
<b>ES</b>	Spain	Comision Nacional del Mercado de Valores	CNMV
<b>FI</b>	Finland	Finanssivalvonta	FIN-FSA
<b>FR</b>	France	Autorité des Marchés Financiers	AMF
<b>HU</b>	Hungary	Magyar Nemzeti Bank <sup>3</sup>	MNB
<b>IE</b>	Ireland	Central Bank of Ireland	CBol
<b>LI</b>	Liechtenstein	Finanzmarktaufsicht	FMA
<b>LT</b>	Lithuania	Lietuvos bankas	LB
<b>LU</b>	Luxembourg	Commission de Surveillance du Secteur Financier	CSSF
<b>LV</b>	Latvia	Financial and Capital Markets Commission	FCMC
<b>MT</b>	Malta	Malta Financial Services Authority	MFSA
<b>NL</b>	Netherlands	Autoriteit Financiële Markten	AFM
<b>NO</b>	Norway	Finanstilsynet	Finanstilsynet
<b>PL</b>	Poland	Polish Financial Supervision Authority	KNF
<b>RO</b>	Romania	Financial Supervisory Authority	FSA
<b>SE</b>	Sweden	Finansinspektionen	Finansinspektionen
<b>SI</b>	Slovenia	Securities Market Agency	SMA
<b>SK</b>	Slovakia	National Bank of Slovakia	NBS

<sup>3</sup> The Hungarian Financial Supervisory Authority (HFSA) was merged into Magyar Nemzeti Bank (MNB) as of 1 October 2013.

**Table 2: Country codes and acronyms of on-site visited Competent Authorities/Member States**

<b>CY</b>	Cyprus	Cyprus Securities and Exchanges Commission	CySEC
<b>CZ</b>	Czech Republic	Czech National Bank	CNB
<b>DE</b>	Germany	Bundesanstalt für Finanzdienstleistungsaufsicht	BaFin
<b>IT</b>	Italy	Commissione Nazionale per le Società e la Borsa	Consob
<b>PT</b>	Portugal	Comissão do Mercado de Valores Mobiliários	CMVM
<b>UK</b>	United Kingdom	Financial Conduct Authority	FCA

**Table 3: Country code and acronym of Competent Authority/Member State not participating in the ESMA survey**

<b>IS</b>	Iceland	Financial Supervisory Authority	FME
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## 2 - Executive Summary

### 2.1 Introduction

12. The aim of this exercise was to evaluate the application of the agreed good practices with regard to the supervision of MiFID conduct of business provisions, including those requiring that the marketing communication and the information addressed to clients or potential clients is fair, clear and not misleading and that marketing communication should be clearly identifiable as such. A copy of the relevant MiFID provisions is attached in Annex I.
13. This report reflects the results of the peer review on the application of the agreed good practices in the supervision of MiFID conduct of business rules, in respect of information and marketing communications. It reveals potential difficulties in their implementation.
14. The analysis under this peer review has been conducted on the basis of the responses to a self-assessment questionnaire (the questionnaire can be found in Annex II) and supporting evidence provided by the 30 responding CAs – the desk-based review - and the results of the on-site visits conducted in relation to six CAs: BaFin, CMVM, CNB, Consob, CySEC and FCA. The written evidence included a wide range of documents (e.g. excerpts from national implementing measures, guidelines and circulars issued by CAs, internal CA procedures, etc.) and where necessary had to be translated into English.

### 2.2 Desk-based review and on-site visits: analysis and comment

#### Definition of information and marketing communication

15. It is worth mentioning that there is no precise and common definition in the community legislation of the term “marketing communication”. Neither does a definition appear in the other bodies of community legislation alongside the MiFID which deal with the subject. These include the UCITS Directives where reference is made (again without precise definition of the term) to ‘marketing communication’ and the Prospectus Directive and its implementing measures where there is another set of provisions on which CAs rely, and where reference is made to ‘advertising’. As a consequence of the lack of a community definition, it appears that there is no harmonised approach across the community. Such circumstance is particularly relevant when a firm freely provides services on a cross-border basis throughout the EU.
16. More broadly, the CAs rely on the partition between pre-contractual information and contractual information. This is particularly relevant with respect to the second part of the mandate which deals with “information” provided to clients or potential clients. The boundary between marketing communication and pre-contractual information is often blurred. In terms of Union legislation the issue of pre-contractual information is dealt with by the legislation applicable to contractual obligations, when services are provided through solicitation to consumers across borders: in such a case the applicable legislation is that of the country where the consumer resides. However, it should be noted that this topic was strictly speaking outside the focus of the on-site visits.

17. It can therefore be concluded (and this is particularly evident in the case of on-site visits<sup>4</sup>) that CAs rely on all these provisions to assess information and marketing to clients. Furthermore, when they monitor the intermediaries involved in the distribution of the relevant instruments or in the offering process (which could in certain cases be performed by entities other than MiFID authorised entities) they often enforce at the same time rules that are contained in different community legal instruments. In addition, it should be pointed out that few sanctions (at least among those CAs where on-site visits have been conducted) have been imposed relating to the miss-uses of marketing communications.
18. In this respect, it would be useful if future community legislation could bring some clarity and consistency to this area. The implementing measures of MiFID II, however, could provide the chance of bringing some more clarity at least in the pure MiFID world, and it would be desirable that ESMA would take the initiative of drafting guidelines, taking advantage of the developments of level 3 of MiFID II.

### **Products and marketing material**

19. It should also be noted that nearly all visited authorities focused on the issue of distribution of complex/highly complex products or products difficult to evaluate by potential investors. In this respect various authorities have developed at national level information documents similar to the Key Investor Information Document (KIID) of the UCITS directive or fact sheets which have an informative nature and are provided to investors before any investment decision is taken. Together with this additional standardised form of information to be provided to clients/potential clients, CAs have sought to ensure that information on the price at which the investor can disinvest in case of products which are not listed on trading platforms that provide sufficient liquidity, on the minimum holding period, etc are provided. Certain authorities have also imposed a sort of ban on selling certain products (via *moratoria* or other forms of moral suasion). Certain countries have financial market participants which specialise in selling certain products that are of a borderline nature (and there are different views as to whether they can be considered as MiFID financial instruments or not).
20. The application of the PRIIPs and the MiFID II packages will bring some harmonisation into this field. However, it will take time until the new regimes are implemented. ESMA should therefore continue its efforts (particularly relevant being the Opinion “Good practices regarding product governance arrangements for structured retail products” and the Opinion “MiFID Practices for selling Complex Products”) to try to ensure a level playing field, as to the information to be provided in an understandable format to clients/potential clients and the quality of the service provided to the clients (i.e. products which can be sold only under advice, etc.). This would avoid market fragmentation and the risk of treating clients differently depending on their country of residence. This ESMA activity could also fall under the umbrella of Article 9 of the ESMA regulation.

### **Supervision of different markets**

21. There are relevant differences between the visited CAs (but similar conclusions could be drawn from the responses of the non-visited CAs) in the performance of the supervisory/monitoring activities. The relevant differences include:
  - a. The volume of transactions subject to the CA’s supervision (which is a function of the number of firms and number of customers, i.e. the size of the market);
  - b. The structure of the market, including the proportions of the different products sold, and distribution channels (direct sales by product providers, intermediated distribution etc.);
  - c. The degree of exposure to cross-border business.

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<sup>4</sup> In the case of on site visits the visiting team had the unique opportunity to see the authorities “in action” and they saw samples of the documents collected and analysed by the visited CAs



### **Ex-ante and ex-post supervision**

22. It is worth mentioning that the MiFID implementing directive (recital 37) expressly states that there is no obligation to pre-approve the marketing communication. The supervisory systems are divided between ex-ante and ex-post depending on whether the documents to be used for marketing purposes are reviewed before the launch of the offer or the distribution or afterwards. In turn, ex-post approaches could be categorised on the basis of the different degree of proactivity observed from practices where the revision occurs quite quickly after the marketing material/information document was put into use (through specialised teams as in the UK or by other structures) to other practices where the review may occur at a fairly late stage after the closing of the offer or when the documentation is not used any longer.
23. It is not possible, on the basis of the information gathered, to conclude that supervision should be ex-ante and, in this respect, it should be noted that a genuine ex-ante supervision is performed only in the case of Portugal which is a market fairly limited in terms of the number of intermediaries and products offered. Moreover, ex-ante supervision suffers the limitation of being confined to scrutinizing documents without assessing whether the modalities by which such information is provided to the specific clients/potential clients are appropriate. The evaluation on an ex-ante basis is limited to the ability of an average client to understand the content. A combination of the analysis of the marketing communication, leaflet etc. and supervision of the intermediary is always necessary.
24. It is understood that an ex-post system requires a robust monitoring activity of the market and its selling practices (this is one of the clear requirements in the MiFIR section on product intervention where proactive market monitoring is required). The degree to which this happens and the information collected on an ongoing basis on the activity performed by investment firms varies greatly. Most of the visited CAs rely on intelligence derived from investors' complaints. The negative aspect to this reliance is that a certain amount of time could pass before the investors complain and the information reaches the relevant CA.
25. It is also important to ensure through ex-post supervision that MiFID rules on the communication of fair and not misleading information are effectively applied and applied in a "proactive" manner. In this respect, the use of the tool of on-site inspection and thematic review is particularly relevant, as well as the continuous monitoring through desk-based reviews of the information and marketing communications available to clients on every media (press, internet, brochures, etc.). Again, different practices are observed in various CAs.

### **Direct and indirect supervision**

26. In respect of supervision, it should also be noted that certain CAs rely on direct supervision while others have opted for a model where supervision is mostly indirect and high reliance is placed on the checks performed by external auditors paid by the supervised entity. This model has the disadvantage that the CA only selects or rates the firms on the basis of the work performed by the auditors on a sample of activities selected by the auditors themselves. As the report of the auditors is provided on an annual basis, together with audited accounts, before it is subsequently analysed by the authority there could arise instances where, in the context of marketing communication/consumer information, there are cases in which it is nearly impossible to detect wrongdoings or where detection arrives at a very late stage when the product is no longer offered.

### **Timely reaction**

27. It is important that the monitoring and the ability to intervene on the advertising/marketing communication allows the authority to react timely. As envisaged under the MiFID II regime, the marketing, distribution

and sale of any financial instrument giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial or commodity markets, or the stability of the whole or part of the financial system, should be monitored by CAs. The evidence shows that mass advertising/marketing is particularly used when new products are launched on the market. In this respect, it is important that the authorities are able to intervene to correct the messages/documents and to ensure that investors are not misled, and to avoid that more investors can be lured into unsuitable investments/products. Special attention should be paid to the point of sale, in particular tied agents and investment firms providing services through the freedom to provide services on a cross-border basis.

28. It should also be noted that there seemed to be reluctance on the part of CAs to commence sanctions and financial penalties against firms where potential breaches in the area of information and marketing to clients were identified.

### **Conclusions**

29. There is room for ESMA to reflect more on these various supervisory approaches applied by CAs to see whether more convergence can be achieved. ESMA may wish to identify through an appropriate legal instrument (among those included in the ESMA Regulation) guidance and practices that CAs should implement. Areas for future work could include:
- Development of a clear definition of information and marketing material to be supervised;
  - Assessment of the frequency of CAs' monitoring in the area of information and marketing to clients. Benchmarks for assessment could include the specific use of thematic reviews to address mass marketing by investment firms and the organisation of periodic surveillance of relevant internet sites ("surfing days");
  - Continued monitoring by ESMA of investor protection issues that may arise due to the sale of unsuitable financial instruments. Particular emphasis could be placed on whether such products are sold through aggressive marketing to clients and/or through means of face-to-face provision of information;
  - Assessment of whether there is adequate monitoring of the distribution channels used by investment firms including where a firm freely provide services on a cross-border basis;
  - Requiring investment firms to submit (either on an ex-ante or ex-post basis), in the working language of the CA, details of all information and marketing material to be provided (including under the freedom to provide services to clients/potential clients in other Member States);
  - Assessment of the use of any integrated database to assist in supervision of information and marketing to clients (e.g. by determining whether any increases in sales of particular instruments have arisen through the provision of misleading information);
  - Assessment of frequent and consistent use of proportionate sanctions (with sufficiently high financial penalties and use of naming and shaming) to ensure a credible deterrent against future breaches;
  - Assessment of the level of "implementation" of the guidelines for complaints-handling for the securities (ESMA) and banking (EBA) sectors published on 13 June 2014 to assess the degree of compliance but also to review their effectiveness.

### 3 - Peer review assessment

#### 3.1 Overview:

30. The findings of the desk-based review are organized in five sections mirroring the key issues identified in the questionnaire.
31. Section A is devoted to a description of the main institutional and organizational background, including the modalities by which CAs ensure the clear communication of their supervisory approach across Member States, as well as the internal mechanism ensuring coherent and consistent supervision, such as the establishment of databases and the organization of meetings across teams/units involved in the supervision of MiFID conduct of business rules.
32. Section B is focused on supervisory approach CAs endorse in the general supervision and enforcement of MiFID conduct of business rules, including information and marketing communications.
33. Section C is aimed at assessing whether CAs perform an active monitoring of information and marketing communications, which should include at least a desk-based monitoring, followed by additional requests to firms, where further clarifications are needed.
34. Section D is devoted to the identification of the approach adopted by CAs to determine when and the purposes for which thematic work in relation to information and marketing communications (also with a broader focus) should be carried out.
35. Section E focuses on the modalities by which CAs facilitate the submission of complaints and on the way CAs handle and take into account complaints in their supervisory approach.
36. In summary, from the written information received in the course of the desk-based review, it appears that CAs apply a variety of different approaches.
37. In particular, as regards organisation, in most CAs the supervision of MiFID provisions concerning information and marketing communications is part of the general MiFID conduct of business supervision and the general approach and resources to supervise compliance with such provisions do not differ from those applied in the supervision of MiFID conduct of business rules. In particular, as regards the resources employed, in most CAs more than one unit is involved in the supervision of MiFID provisions, including those on information and marketing communications, while in some CAs the supervisory function is carried out by one unit or task force. A consistent approach among such different organisational units is mainly ensured through internal guidelines and regulatory interpretations, supervisory handbooks and procedures, regular meetings among different teams involved in general in the supervision of MiFID conduct of business and in the specific areas of the provision of information and marketing communications to clients.
38. The use of databases, even though differing on the basis of the relevant level of sophistication<sup>5</sup>, also allows the internal sharing and processing of some intelligence or other sources supporting supervision of information and marketing communication.

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<sup>5</sup> In particular, in 25 Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, FI, FR, HU, IE, IT, LI, LU, LV, NL, NO, PT, RO, SE, SI, SK, UK), the CAs have developed one or more internal databases allowing internal sharing and processing of some intelligence or other sources supporting supervision of information and marketing communication. However, among such CAs, in only 4 Member States (IE, IT, NL, SI), the CAs developed integrated databases, combining data received by various sources, including information and marketing

39. To a certain extent, although it is not always the case, these different organisational arrangements seem to reflect the different dimensions of the local markets of the CAs<sup>6</sup>.
40. Similarly, there is a variety of supervisory approaches which are applied by the CAs in relation to the particular area of the provision of information and marketing communications to clients. In most of the cases<sup>7</sup>, CAs employ mainly or partly a risk based supervision, although a variety of different practices exists de facto. In particular, differences are detected in relation to the application by the relevant CAs of an ex-ante approach, according to which the CAs pre-approve/pre-vet materials relating to all or specific products offered/distributed to the public and/or an ex-post approach, according to which information and marketing communications are monitored after their launch through the employment of different supervisory tools<sup>8</sup>.
41. Moreover, some differences are detected in the use of audit reports, since certain CAs use in their supervision reports prepared by statutory auditors of the intermediaries. These reports include a judgment on the compliance with MiFID obligations on marketing communications. The level of reliance of the CA on these reports and consequently the level of direct supervisory activities also seem to vary from one CA to another.
42. It should be underlined that the peer review shows that a number of the CAs (see relevant details under section B below) should foster their supervisory approach in order to develop clearly defined qualitative and quantitative criteria setting out when and how the CAs should undertake supervisory actions and how they determine the main points of emphasis underlying such actions.
43. In fact, it appears that such CAs do not employ one or more of the minimum factors established in the agreed good practices detailed in the key issues under Section B of the self-assessment questionnaire, or, where such factors are employed, it is unclear how they are used and the extent to which they are able to trigger supervisory actions by the CAs.
44. The review also shows that the monitoring of information and marketing communications provided to clients varies among the CAs according to the relevant frequency, intensity/intrusiveness, coverage and scope of the desk-based reviews<sup>9</sup> and on-site inspections<sup>10</sup> carried out by the CAs. In few instances (see

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communications. Other CAs hold a number of separate databases that are relevant for information and marketing communications (BE, BG, DE, EE, EL, FR, IT, LU, PT). As regards the level of sophistication of the databases there are those storing electronically documents and information (BE, CY, CZ, DE, EE, IT, PT, UK), and others generating a number of reports or alerts to support supervisory, investigatory and enforcement actions relating to information and marketing communication (FR as regards reviews of UCITS NAV and detection of unusual selling practices, LU, NL).

<sup>6</sup> For instance, a specific unit or task force has been established in DE, FR, IE, NL, PT, UK.

<sup>7</sup> AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, IE, IT, LT, LU, LV, NL, MT, NO, PL, PT, SE, SI, UK

<sup>8</sup> For instance, in [3] Member States (BE, FR, PT), CAs have set up a pre-approval process on marketing communication. In IT, the CA receives all marketing communications linked to domestic products at the moment of their launch, screening them upon receipt. In other CAs (AT, BE, CY, CZ, DE, EE, ES, FI, IE, IT, LI, LU, NL, NO, SE, SK, UK) an ex post approach is followed in relation to information and marketing communication, where CAs monitor information and marketing communications once they are released.

<sup>9</sup> For instance, in BE, the CA pre-approve/pre-vet all information and marketing communications relating to products distributed to the public, whilst in FR and PT the CAs review marketing communications relating to specific products, i.e. more complex products. In IT, the CA screens all marketing communications linked to domestic products, which are received at the moment of their launch. In other Member States, the CAs review information and marketing communications on a case by case basis (LT, NL) or only in case of deviations/suspected irregularities (LV, RO). Moreover, in some Member States (AT, ES, FI, FR, HU, IT, LV, MT, NL, NO, SE, SK, UK), the CAs apply a proactive approach to desk-based reviews. In particular, in these cases, CAs (FR, HU, IT, LV, MT, NL, SK, UK) have established a marketing watch or a dedicated team checking financial websites and other media which could provide misleading marketing materials to retail clients or they organise internet-surf days allowing for the identification of inappropriate marketing communications.

Section C below for more details), CAs should make additional efforts to ensure a balanced use of all supervisory tools at their disposal. In particular, some CAs should further develop their ability to actively monitor information and marketing communications, through periodic desk-based reviews, which should be prompted by a variety of information (such as regular reporting by firms, media, investors' complaints, quantitative information, etc). Similarly, other CAs should ensure that the employment of the tool of on-site inspections benefits of a regular planning prompted by predefined criteria.

45. As regards thematic reviews, it is observed that they seem to represent a valuable supervisory tool, which may allow CAs to assess and analyse on a horizontal and cross-sectoral basis specific issues and emerging risks. However, it is noted that there are a number of different approaches to the definition and employment of thematic reviews<sup>11</sup>, which seem sometimes to be employed for purposes of individual reviews on a firm-specific rather than on a cross-sectoral and horizontal basis.
46. In few instances, further efforts should be made by CAs to ensure that investors may easily contact the CA to submit their complaints and that such information is duly taken into account in the CA's supervisory approach as regards MiFID conduct of business rules, including those relating to information and marketing communications to clients. In fact, only some CAs<sup>12</sup> have established clear internal written procedures in this respect.

### 3.2 Conclusions

47. Overall, it seems there is a high degree of compliance with the key issues, including among the six authorities that were visited.
48. However, it is suggested that further efforts should be made in order to improve the CAs' different supervisory approaches, eventually achieving additional convergence, and with a view to ensuring that misbehaviours by firms in terms of information and marketing communications delivered to investors when offering/distributing financial products and services are detected in a timely and effective manner.
49. As regards organisation, further efforts should be made to establish more robust structures and more efficient coordination and cooperation arrangements between the different units. In particular, the CAs which are also competent for prudential matters should be encouraged to rebalance the efforts towards the supervision of conduct tasks and actual implementation by supervised entities of MiFID business

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<sup>10</sup> 14 CAs (AT, BE, CZ, DE, DK, EE, ES, FI, FR, IT, LT, PT, RO, SI) draw up biannual/annual work plans which include on-site inspections. In particular, in 3 CAs (RO, SI, SK) individual on-site inspections are routinely planned or carried out in accordance with an inspection cycle which may last two or three years. In BE, every year the CA selects one issue, among MiFID conduct of business rules, to be subject to thematic inspections. In 6 CAs (CY, LI, LU, PL, SE, UK), on-site inspections are mainly conducted on an ad hoc basis, in reaction to specific issues or suspected irregularities emerging from ongoing supervision. Other CAs (BE, EE, NO) employ a combination of planned on-site inspections and event-driven inspections. As regards the scope, 10 CAs (CZ, DE, EE, ES, HU, IT, LU, NL, NO, RO) usually perform broad scope on-site inspections covering reviews of compliance to all MiFID provisions, including information and marketing communications, whereas other CAs (FI, FR, PT, SE) usually make a selection of the subject matters to be reviewed. In 2 CAs (BE, MT) a combination of both broad scope and focused on-site inspections equally applies.

<sup>11</sup> In 16 Member States (BE, CY, DE, ES, FI, FR, HU, IE, IT, LT, LV, LU, NL, NO, RO, UK) thematic works are mostly employed by CAs as a supervisory tool to assess common practises and emerging risks, including risks caused by certain products to investor protection, as well as the level of compliance of firms to a particular set of provisions or the reaction to new regulatory initiatives or other developments, while in 7 Member States (BE, CY, MT, PT, SE, SK, UK) CAs use such tool for risk mitigation purposes, for instance in the form of thematic inspections. In addition, in 4 Member States (BE, CZ, FR, UK) thematic works are used broadly to serve several purposes, whilst in 1 Member States (EE) they are also undertaken for more limited purposes, for instance as a mean to study issues in more details.

<sup>12</sup> CY, CZ, DK, EE, HU, IE, IT, NL, PL, PT, SK

rules. Moreover, efficient and proactive exchanges of information as well as regular meetings should be established.

50. CAs are encouraged to strengthen their supervisory approaches in order to give appropriate relevance to conduct of business supervision in their risk assessments, especially as regards the information to clients in the context of the appropriateness/suitability and conflicts of interests' provisions and to the supervision of point of sale and pre-contractual material.
51. Moreover, additional improvements should be made in order to make supervision on information and marketing communications to clients in the context of offering/distribution of financial products and services more effective. In particular, it is suggested that supervision should not only take place in the form of ex-post reviews and backward looking indicators, whereby violations may be detected a long time after the client invested on the basis of wrong information. This approach, in fact, may not enable the CAs to undertake actions or corrective measures for investor protection promptly.
52. On-site work remains a key tool to identify weaknesses in conduct practices, which cannot easily be detected via off-site monitoring, even if characterised by a high degree of sophistication.
53. Relating to the on-site visits at BaFin, CMVM, Consob, CySEC and FCA, which took place between 4 December 2013 and 23 May 2014, the assessment team also agreed on suggestions directed to the visited authorities with a view of improving convergence and making supervision of marketing communication and investor information more effective. A summary of the key suggestions is provided below:

- BaFin:

While recognising that obligations recently introduced for firms to provide at an early stage information on complaints received and additional specific rules on advisory services, the assessment team felt that the reliance on the audit report (which is based on sampling) implies that BaFin may detect possible misconducts at a very late stage in the process. A more active market monitoring and the extensive use of tools such as web-spidering and analysis of advertising during the offering period could help in improving investor protection.

- CMVM:

Overall the supervisory approach to the supervision of marketing communication and information to investors appears to be robust particularly where complex products are concerned. The system, however, might be improved in increasing the effort on verifying compliance at the point of sale beyond the simple production of the information leaflet in order to ensure that targeted information is provided to the retail investor as appropriate and it is not limited to the delivery of the generic information sheet. Finally, CMVM might consider making use of thematic reviews and improve the enforcement, including by issuing penalties in case of non compliance.

- CNB:

Overall, the CNB supervisory approach is clear and sophisticated taking into account the specific situation. However, the system could benefit from further developments in the monitoring of point of sale provision of information to the actual client. In addition to this, given the surfacing of cases of churning in the Czech market, in particular in relation to the activity of tied agents and investment intermediaries exempted under Article 3 of MiFID, it appears necessary to either reinforce CNB direct supervision or to

reconsider the current approach to exemptions also taking into account the need to implement MiFID II in a process to be initiated by the Ministry of Finance.

- Consob:

Overall the supervisory approach, while based on ex-post review, seems to take into account the need to ensure proactive monitoring of the market. However, Consob might consider further improving its intelligence on information and marketing communications that were not submitted directly by the firm. Consob could also consider improving the website to allow for a direct lodging of the complaints by investors and strengthening the links with the ombudsman to increase the information available to the authority.

- CySEC:

The CySEC partly applies the key issues particularly due to a lack of resources compared to the number of entities and business model employed by the majority of the Cypriot firms which offer their services mostly outside Cyprus across the EU as well as in third countries. Improvements could be made focusing on conduct issues compared to the present focus which seems to be more AML and prudential oriented and increasing the use of on-site inspections as a more intrusive supervision compared to basic data gathering. Enforcement should be really a deterrent and therefore consideration should be given to the possibility of imposing high pecuniary sanctions and not only relying on the fact that the name of the person/entity which violated the rules is published.

- FCA<sup>13</sup>

Overall the FCA supervisory approach to financial promotion (marketing material) is clear, however, such supervisory approach might be further developed in order to focus more on the information actually provided to the specific client at the point of sale and the implementation of the conduct of business requirements. Product governance, on which the FCA is focusing right now, could be one part of the response. An active monitoring of the instruments marketed to the public could also be recommended. The links between the activities performed by the teams in charge of the on-going supervision and the Financial Promotion Team could be more integrated and the use of on-site inspections could be strengthened. It is crucial that thematic work continues to be undertaken in a proactive manner to detect risks of misselling at an early stage.

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<sup>13</sup> It might be worth mentioning that the FCA is newly established as a successor to the FSA (see report for details) and it is still developing its supervisory approach.

### 3.3 Peer review findings

54. The main findings arising from the application of the criteria set forth in this peer review are summarised in the tables below:

<b><u>ORGANISATION</u></b>
<p><b>Full application:</b> AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK</p> <p><b>Insufficient application:</b> CY</p>
<p>In CY, the CA does not appear to be sufficiently staffed to adequately supervise the marketing activities performed by investment firms authorised by the CA that, however, provide services abroad across EU or in third countries.</p>
<b><u>SUPERVISORY APPROACH</u></b>
<p><b>Full application:</b> AT, BE, BG, CZ, DE, EL, ES, FI, FR, HU, IE, IT, LI, LU, LV, NL, NO, PL, PT, SE, SI, SK, UK</p> <p><b>Insufficient application:</b> CY, DK, EE, LT, MT, RO</p>
<p>In 6 Member States (DK, EE, LT, MT, RO), CAs have not been able to show their use of all minimum factors mentioned in the key issue. In particular, based on the evidence provided:</p> <ul style="list-style-type: none"> <li>– 1 CA (CY), given the limitation of resources, relies on a reactive approach to supervision based on complaints or concerns from fellows regulators;</li> <li>– 1 CA (DK) indicates that factors are not systemically applied, but are used indirectly as factors to be discussed and taken into consideration when investment firms are selected for investigation;</li> <li>– 1 CA (EE) does not appear to make use of the “risk of products” (factor under (n) of the self-assessment questionnaire);</li> <li>– 1 CA (LT) does not have written procedures and has not made clear to what extent the factors are taken into account;</li> <li>– 1 CA (MT) does not appear to make use of the factors under c), e), h) - k), m), p) –u) of the self-assessment questionnaire, since the CA does not consider marketing communications as a major concern for alleged market specificities (the size of the financial market, the number of licensed firms and the limited use of marketing communication by licensed entities);</li> <li>– 1 CA (RO) does not appear to make use of the factors under (g, h, j, r, t) of the self-</li> </ul>



assessment questionnaire.	
<b><u>MONITORING</u></b>	
<b>Full application:</b> AT, BE, BG, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LI, LU, LV, MT, NL, NO, PT, RO, SE, SI, SK, UK	
<b>Insufficient application:</b> CY, EE, LT, PL	
<b>C.1</b>  <b>Desk-based monitoring</b>	<p>In two Member States (EE, LT), the CAs do not actively monitor the information provision and marketing communication through desk-based reviews because:</p> <p>In EE, the focus of desk-based reviews is on investment funds, rather than the all range of financial instruments.</p> <p>In LT, the CA only reviews information and marketing communications on a case by case basis.</p>
<b>C.2</b>  <b>On-site inspections</b>	<p>In PL, the CA does not seem to have established clear criteria to determine when there is a need to organise on-site inspections.</p> <p>In CY, while the CA is able to organise on-site inspections, in the field of information and marketing communications they are carried out only on a limited and ad hoc basis and do not benefit of a regular planning prompted by predefined criteria.</p>
<b><u>THEMATIC WORK</u></b>	
<b>Full application:</b> AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HU, IE, IT, LT, LU, LV, NL, NO, PL, RO, SE, SI, SK, UK	
<b>Insufficient application:</b> EL, LI, MT, PT	
<p>Four CAs do not have a clear approach to determine where to conduct thematic review, for the reasons explained below:</p> <p>in EL and MT, the CA did not provide clear information on the approach adopted by the CA and how the risk-factors are taken into account when determining the need to conduct thematic work in relation to information and marketing communications;</p> <p>In LI, the CAs did not mention any thematic work undertaken in relation to marketing communications, or MiFID1 related issues.</p> <p>In PT, the CA considers as thematic review individual reviews of firms or risk outlooks or other regular reportings, while normally thematic reviews should provide for a cross-sectoral review of a specific issue.</p>	

### COMPLAINTS

**Full application:** AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK

**Insufficient application:** CY, LI

In CY, due to the lack of resources it is still unclear whether the CA fully applies the key issues set in this peer review as regards complaints.

In LI, the CA has not been able to show that information on how to complain is clearly provided to clients. In particular, the CA provides detailed information on how to complain only *on demand*.

## A – Organisation

### A.1 Clear internal communication of supervisory approaches

55. The Key issues are aimed at verifying whether the CAs' supervisory approach to information and marketing communications is clearly communicated to the CAs' staff, and the modalities by which such communication is ensured across Member States.
56. In particular, the peer review shows that internal communication of the CAs' approach to supervision of information and marketing communication is achieved through different ways across Member States, as further detailed below.
57. In 9 Member States (DE, IE, FR, LU, LV, NL, PT, SE, UK), the CAs stated that they have a specific unit or task force dedicated to the supervision of MiFID rules on information and marketing communications. For instance, in FR, the CA has established an internal committee responsible for issues linked to marketing communications/financial advertisement. In LV, the CA has established a small team dedicated to MiFID issues and the staff is exchanging views whenever is necessary. In NL, the CA has a separate department that deals with information requirements for investors and consumers, whereby the information is clearly communicated to the staff via weekly meetings, policy documents and internal manuals. In IE, the CA has established a separate unit, named the Advertising Monitoring Unit, as part of the review and assesment of the conduct in the market. In LU, a cross departemental task force exchanges views on MiFID issues, including marketing communications. In SE, the dedicated group of staff ist part of a division with additional responsibilities.
58. Moreover, in 22 Member States (AT, BE, CY, CZ, DE, EE, ES, FI, FR, IT, NO, SE, SI, HU, IE, LV, NL, PT, RO, SI, SK, UK), the CAs have defined the duties and responsibilities of the units entrusted with the supervision, investigation and enforcement of MiFID obligations, including information and marketing communications, under guidelines and/or internal policies and procedures/manuals/handbooks. In FR, however, there is a specific focus on UCITS and structured products.
59. Some (16) CAs (BE, CY, CZ, DE, ES, FI, FR, HU, IT, LT, LU, MT, NL, NO, SE, UK) mentioned that their plans and/or regulatory interpretations, and/or procedures in relation to MiFID conduct of business rules, including information and marketing communications, are internally published and communicated by e-mail and/or intranet/internal website (CY, CZ, DE, FR, HU, IE, IT, MT, NL, UK) or internal database (FR, LT, UK).

60. In other (2) Member States (BE, EE), CAs make such policies and procedures publicly available through publication on their website whilst 3 CAs (FI, FR, NO) publish regulatory interpretations on their website. In 1 Member State (MT), the CA initially communicates to all staff and subsequently to the public through the CA's website all regulatory issues which have been investigated and result in a formal breach.
61. In 24 Member States (AT, BE, BG, CY, CZ, DE, EL, ES, FI, FR, IE, IT, LI, LT, LU, LV, MT, NL, NO, PT, SE, SI, SK, UK), CAs reported that their supervisory approach in relation to information and marketing communications, e.g. regulatory interpretations and procedures, is also discussed in staff meetings, internal seminars and workshops or informal communications between units. In HU and RO, the CAs do not organize meetings across different sections on a regular basis, but they could ask information from the relevant units.
62. In PL the CA has established a unit which is responsible for drafting opinions and guidelines and communicates to other units involved the internal regulations, including as regards information and marketing communications.

### **Assessment**

63. In all Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK), the CA's supervisory approach to information and marketing communication is clearly communicated internally. In 22 Member States (AT, CY, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LU, MT, NO, PL, PT, RO, SE, SI, SK) this is done as part of the overall approach to supervision of investment firms.

### **A.2 Internal mechanism ensuring coherent and consistent supervision**

64. The Key Issues assess whether CAs have established mechanisms to share information on an ongoing basis, in order to ensure that supervision on information and marketing communications is conducted across relevant teams involved in a coherent and consistent way over time. In particular, they assess whether the CAs have established internal databases, where precedent cases/decisions are stored, and organise periodic meetings and/or they have developed other relevant internal mechanisms.
65. As to the relevant specific means to do so, in 24 Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, FI, FR, IE, IT, LI, LU, LV, NL, NO, PT, RO, SE, SI, SK, UK), the CAs have developed one or more internal databases allowing internal sharing and processing of some intelligence or other sources supporting supervision of information and marketing communication.
66. However, in 1 Member State (SE), the CAs has developed a general database for information from external sources, where also internal observations could be documented. The database forms the basis of summaries and further analyses. Specific information on decision/precedents was not provided.
67. In 4 CAs (ES, LT, MT, PL), such databases have not been established. In particular, in MT, the CA does not retain any online database; however records of adverts which were found to be in breach of the MiFID requirements are retained on file along with the manner in which the issue was rectified.

68. In 4 Member States (IE, IT, NL, SI), the CAs developed integrated databases, combining data received by various sources, including information and marketing communications. For instance, in NL, the CA has a complex database in which all signals, including those coming from consumers, other investment firms or other relevant departments, and supervisory actions are logged, ensuring that the supervisory actions are consistent and enabling the CA to see trends within the market. Other CAs (BE, BG, DE, EE, EL, FR, IT, LU, PT) hold a number of separate databases that are relevant for information and marketing communications.
69. The level of sophistication of the databases also varies to a great extent, ranging from those storing electronically documents and information (BE, CY, CZ, DE, EE, IT, PT, UK), to those generating a number of reports or alerts to support supervisory, investigatory and enforcement actions relating to information and marketing communication in DE, FR, LU and NL (DE with the FIS database processing data automatically and producing a firm risk profile, FR as regards reviews of UCITS NAV and detection of unusual selling practices).
70. Other means to ensure coherent and consistent supervision are the organisation of regular internal meetings. In particular, in 21 Member States (AT, BE, CZ, DE, EE, EL, ES, FI, FR, IE, IT, LI, LT, LU, LV, NL, NO, PT, SE, SI, SK), the CAs organise regular meetings across different sections / teams involved on application of MiFID requirements, including those relating to information and marketing communications. A dedicated task force is in place dealing with MiFID and/or marketing communications in 6 CAs (DE, FR, IE, LU, PT, UK). In 6 CAs (CY, DK, HU, LV, MT, RO), such meetings only take place on an ad hoc, rather than on a regular basis, and mainly for limited purposes (e.g. prior to commencement of an investigation or an on-site inspection, or where particular issues are identified in the course of the supervision activities). 1 Member State (BG) responded that it does not organise regular meetings across the organisation. In MT, the CA does not organise meetings across different sections / team on a regular basis, due to the fact that marketing communications are reviewed by one sub-group only. However, any issues or trends which are noted (in relation to marketing communications) are communicated to the rest of the investment services team as well as to other SMSU (Securities and Markets Supervision Unit) staff.
71. In those CAs where regular meetings take place, the frequency of such meetings greatly vary: they may be at least weekly (DE, ES, FI, IT, NL, NO, PT), monthly (BE, FR, IE, SK), quarterly (LT, LU). Due to the limited size of the CAs, in EE, EL and SI experts meet spontaneously every day.
72. During the above-mentioned meetings the following issues are usually discussed: on-site inspections issues and results (AT, IT, LI, LT, LV, NL, NO, SK), investigation procedures (IT, LI, EE, EL, NO), ongoing supervision (AT, BE, EE, FR, IE, IT, LI, LT, NL, NO, PT, SK), MiFID issues (DE, FR, IT, LI, LU, NO), enforcement actions (AT, IT, LI, LT, NL, NO, PT, SK), interpretation of procedures (IT, LI, NL, NO, PT).
73. In 23 Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LI, LV, MT, NL, NO, PL, RO, SE, SK, UK), the CAs have in place other mechanisms to achieve effective communication across different sections / teams involved, as described under paragraph 72 above, while in 4 Member States (BG, LT, LU, SI), the CAs do not.
74. In particular, in 12 CAs (AT, CZ, DE, ES, FI, IE, IT, LI, LV, MT, SE, UK), additional means of communication are mailing lists, newsletters or intranet facilities involving different departments, divisions and teams. In 13 CAs (BE, CY, CZ, DE, EE, FR, HU, IT, LI, LV, MT, RO, UK), informal

communications and other internal information flows are deemed another useful tool to exchange information between units. In 7 Member States (BE, CZ, DE, FR, IE, IT, UK), the CAs organise training sessions. 3 CAs (FI, IT, NO) publish regulatory interpretations on their website. In DK, there is a reporting mechanism in place between relevant divisions. In IE, the Advertising Monitoring Unit from the CA submits quarterly reports on the supervisory activities performed in respect of information and marketing communications to other relevant teams involved in the consumer protection area. In EL, investigation cases are being discussed at the Executive Committee level. In MT, the CA's supervisory units are required to prepare a regulatory report on a quarterly basis providing an update on the work streams of each sub-group, including a summary of regulatory issues encountered. In NO, the minutes of the weekly meetings between the heads of all sections involved in application of MiFID requirements are published on the CA's internal web-site, with an e-mail alert to all relevant staff. In PL, a dedicated unit, which is part of the department responsible for supervision on investment firms, is responsible for drafting internal opinions and guidelines that are distributed among other units e.g. compliance, supervision and licensing units. In SK, through a committee of financial market supervision which includes representatives of various departments of supervision are discussed almost all the findings of the supervision.

### **Assessment**

75. In 27 Member States (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK), the CAs have an internal mechanism ensuring that the supervision of information and marketing communication is conducted in a coherent and consistent way over the time and across teams involved.
76. In CY, the CA does not appear to be sufficiently staffed to adequately supervise the marketing activities performed by investment firms authorised by the CA that however provide services abroad across EU or in third countries. Therefore, the CA appears unable to fully apply the key issues set forth in this peer review as regards organisation.

### **B – Supervisory Approach**

77. The Key Issues refer to the supervisory approach applied by CAs in the supervision of MiFID conduct of business rules, including information and marketing communications. In particular, the Key Issues set out that, irrespective of the supervisory approach applied by each CA, clearly defined qualitative and quantitative criteria setting out when and how CAs apply their supervisory approach and how they determine the main points of emphasis underlying the supervisory approach for their examination shall be established and shall include at least: the scale of activities/ volume of products marketed / volume of assets under management; the volume of complaints and alerts received; the nature of complaints and alerts received; indicators from the regular review of audit reports or indicators from the review of information and data transmitted from intermediaries; the risk of products as assessed by the CA.
78. The review shows that in 20 CAs (AT, BG, CY, CZ, DE, DK, EL, ES, FI, HU, IE, IT, LI, LT, LU, NO, SE, PL, SI, RO) the supervision of information and marketing communication is part of the overall approach of Conduct of Business Supervision.
79. In 24 Member States (AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, IE, IT, LT, LU, LV, NL, MT, NO, PL, PT, SE, SI, UK), CAs employ mainly or partly a risk based supervision where some risk analysis is employed to prioritise actions, although a variety of different approaches apply in practice, as explained

in details in the following sections of the report dedicated to the various supervisory tools. In particular, the type and frequency of periodic reporting by supervised entities, the parameters triggering alerts to identify the risks and prioritize actions, the use of reports by external auditors concerning the rules of conduct, the frequency and scope of on-site inspections and thematic reviews are areas where significant differences are detected.

80. Indeed, in many Member States (AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, HU, IT, LU, LV, NL, NO, PL, PT, SE, SI, UK) CAs use the factors mentioned in the key issues as input data for their risk model (BE, CY, CZ, DE, FR, IE, IT, NL, NO, PT), or are anyway considered in their risk assessment and prioritisation of actions (AT, BG, CZ, DE, EE, ES, FI, IT, LT, LV, PL, PT, SE, UK). Few CAs (AT, BE, FR, IT, NL, PT, UK) employ these factors for their desk based reviews.
81. Moreover, the review shows that in 3 Member States (BE, FR, PT), CAs have set up a pre-approval/pre-vetting process on marketing communication, at least for certain products. In particular:
- in BE, the CA pre-approves all marketing communications concerning financial instruments publicly offered in Belgium;
  - in FR, the CA pre-approves information documents required by regulation and marketing communications relating to more risky/complex investment funds. For debt securities and capital instruments, the CA reviews all information documents before distribution. In the few cases where the financial instrument is highly complex, marketing materials are not examined but a warning is included stating that the product is not adequate to retail clients. FR considers the pre-approval as an important tool to identify current and emerging risks in the retail market;
  - in PT, the CA pre-vets: (i) advertising and prospectuses; and (ii) advertising and KIID for complex financial products.
82. In IT, the CA receives all marketing communications linked to domestic products at the moment of their launch, screening them upon receipt.
83. In addition, in NL, financial institutions providing complex products, such as investment funds or investment insurance, are obliged to provide the customer with a standardized document, the Financial Leaflet, in which information is provided on costs, risks and return on investment, in order to allow consumers to compare different products of different providers. Moreover, in order to enable consumers' decision-making process on financial services and their providers, the CA has also developed a standardized document on financial services, through which investors are informed on the services provided to them. Similarly, in DE, the CA has established the requirement that distributors are obliged to make available an information sheet for all types of financial instruments (including shares) to be provided directly to the investor.
84. In other CAs (AT, BE, CY, CZ, DE, EE, ES, FI, IE, IT, LI, LU, NL, NO, SE, SK, UK) an ex-post approach is also followed in relation to information and marketing communication, where CAs monitor information and marketing communications after they are released. In particular, in BE, next to the a priori supervision described above, the CA also conducts an ex-post supervision on a case-by-case basis, based on a broad review of information communicated to clients, intelligence received and on-site inspections; similarly, in PT, ex-post reviews are also performed, although with less emphasis, for

instance the CA will check whether the materials which have been pre-vetted are the same as those presented to clients.

85. Certain CAs (AT, DE, LI, LU) use in their supervision reports prepared by statutory auditors of the intermediaries. These reports include a judgment on the compliance with MiFID obligations on marketing communications. The level of reliance of the CA on these reports and consequently the level of direct supervisory activities seem to vary from one CA to another. For instance, in LI, all investment firms are audited on an annual basis and the reviews by external auditors are complemented with face-to-face management meetings and on-site visits.
86. In 1 Member State (SI), all investment firms are evaluated on an annual basis. Other CAs (RO, SK) adopt a cycle to review all firms in a period of time. In particular, in SK, even though the CA does not apply automated sophisticated systems for valuation or categorization of these entities, it is able to monitor and supervise every investment firm, on the basis of the information collected on a desk-based basis and on-site, because of the limited number of supervised entities as well as the small number of transactions/activities conducted by them, taking into account all the factors mentioned under the key issues.
87. In 13 Member States (BE, CY, CZ, DE, EL, ES, FI, FR, IT, LT, PT, SE, SI), investor complaints form a part of the CAs supervisory approach and usually trigger supervisory action.
88. In 1 Member State (SK), the CA may be consulted by supervised entities on a particular issue or in order to provide an advice on how to inform clients in correct way.

### **Assessment**

89. The review shows that in 23 Member States (AT, BE, BG, CZ, DE, EL, ES, FI, FR, IE, IT, HU, LI, LU, LV, NL, NO, PL, PT, SE, SI, SK, UK) CAs have clearly defined criteria setting out when and how they apply their supervisory approach in relation to information and marketing communication, when and how to take actions and how they determine the main points of emphasis underlying the supervisory approach for the CAs examination.
90. In these Member States, relevant criteria include all minimum factors indicated in the key issues under paragraph 79 above.
91. In 6 Member States (CY, DK, EE, LT, MT, RO), CAs have not been able to show their use of all minimum factors mentioned in the key issue. In particular, based on the evidence provided:
  - 1 CA (CY), given the limitation of resources, relies on a reactive approach to supervision based on complaints or concerns from fellows regulators;
  - 1 CA (DK) indicates that factors are not systemically applied, but are used indirectly as factors to be discussed and taken into consideration when investment firms are selected for investigation;
  - 1 CA (EE) does not appear to make use of the “risk of products” (factor under (n) of the self-assessment questionnaire);

- 1 CA (LT) does not have written procedures and has not made clear to what extent the factors are taken into account;
- 1 CA (MT) does not appear to make use of the factors under c), e), h) - k), m), p) –u) of the self-assessment questionnaire, since the CA does not consider marketing communications as a major concern for alleged market specificities (the size of the financial market, the number of licensed firms and the limited use of marketing communication by licensed entities);
- 1 CA (RO) does not appear to make use of the factors under (g, h, j,r, t) of the self-assessment questionnaire.

## C – Monitoring

### C.1 Desk-based monitoring

92. The Key Issues are aimed at assessing whether CAs perform an active monitoring of information and marketing communications. Such monitoring should include at least a desk-based monitoring, followed by additional requests to firms, where further clarifications are needed.
93. The review shows that the approach to desk-based reviews varies among the CAs according to the relevant frequency, intensity/intrusiveness, coverage and scope.
94. As mentioned under paragraph 83 above, in BE, the CA pre-approves/pre-vets all information and marketing communications relating to products distributed to the public, whilst in FR and PT the CAs review marketing communications relating to specific products, i.e. more complex products. In IT, the CA screens all marketing communications linked to domestic products, which are received at the moment of their launch.
95. In other Member States, the CAs review information and marketing communications on a case by case basis (LT, NL) or only in case of deviations/suspected irregularities (LV, RO).
96. As regards the reviews of information from investment firms, in 4 Member State (BE, CY, CZ, IT) periodic and/or ongoing firms' reporting is one of the main sources of their desk-based reviews on MiFID conduct of business rules including information and marketing communications, whilst in 1 Member State (NL) the main source is firms' responses to *ad hoc* or periodic self-assessment questionnaires sent by the CAs.
97. In 5 Member States (AT, DE, LI, LU, MT) the external auditors or experts' reports represent the main source used by the CAs to carry out their desk-based reviews. In these cases, more in-depth analysis is carried out by CAs mainly where particular deficiencies or weaknesses emerge from those reports. In LI, the reliance on external auditor's reports is limited because the CA conducts a substantial number of on-site inspections and on-site management meetings. Additional to the problem-triggered on-site inspections or on-site management meetings, LI started to conduct on-site management meetings according to a bi-annual work plan with a number of relevant investment firms from a risk-oriented perspective.
98. In 4 Member States (CY, CZ, LV, RO), investor complaints (LV, RO) or firms internal complaints reports (RO) represent a major source in the CAs' desk-based reviews. In particular, in LV, the CAs stated that



in matters of information and marketing communication clients' complaints are the most important factor and that desk-based reviews are carried out mainly where a legitimate complaint is received.

99. In 2 Member States (CZ, SK) CAs rely more on on-site inspections than on desk based reviews when supervising information and marketing communications; in LV some desk-based reviews are carried out on an *ad hoc* basis, and in connection with other supervisory tools (e.g. in terms of reviews of firms' information before or in connection with an on-site inspection).
100. In 6 Member States (AT, ES, FI, IT, NO, SE), desk-based reviews (e.g. of investor complaints) and on-site inspections are of equal importance.
101. According to the information available, in 1 Member States (AT), the CAs carry out desk-based reviews related to MiFID conduct of business rules including information and marketing communications on at least a yearly basis. In 10 Member States (BE, CY, CZ, DE, FR, HU, IT, PL, PT, SK) desk-based reviews are carried out on an ongoing basis, e.g. following the receipt of information in accordance with periodic reporting obligations on all firms.
102. In some Member States (AT, ES, FI, FR, HU, IT, LV, MT, NL, NO, SE, SK, UK), the CAs apply a proactive approach to desk-based reviews. In particular, in these cases, CAs (FR, HU, IT, LV, MT, NL, SK, UK) have established a marketing watch or a dedicated team checking financial websites and other media which could provide misleading marketing materials to retail. In particular, in AT, the CA does a yearly internet-surf day allowing for the identification of inappropriate marketing communications. In DE, the CA conducts such an annual surf day, and, in addition, the CA's employees regularly check the websites of the institutions they supervise. In FR, the CA makes use of a software providing a daily's desk-based marketing information on retail investment products and carried out ex-post supervision also with the support of the Banque de France. In HU, the CA have signed agreements with the relevant media national institutions or have contacted media firms that record and maintain radio and TV spots and advertisements with the financial relevance, whilst online advertisements are only checked on ad hoc basis. In LV, the relevant CA's divisions review the news daily, but there is no regular day to day check of the internet for specific purpose of the information and marketing communications. In NL, the marketing communications are collected by an external firm and sent to the authority on a daily basis. In UK, the focus of the CA activity is the analysis of advertising on newspapers and other media, which is preselected and scanned by an external provider, and does not include pre-contractual and point of sale material other than advertising, since they seem to rather apply a reactive approach in this respect.

## Assessment

103. In 27 Member States (AT, BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LI, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK), the CAs actively monitor the information and marketing communication through desk-based reviews, while in 2 Member States (EE, LT), this is not the case because:
- in EE, the focus of desk-based reviews is on investment funds, rather than the all range of financial instruments;
  - in LT, the CA only reviews information and marketing communications on a case by case basis.

## C.2 On-site inspections

104. The Key Issues focus on on-site inspections and are aimed at assessing whether CAs carry out dedicated or broad scope periodic on-site inspections. The Key Issues also focus on whether the CAs are able to carry out non routine on-site inspections and face-to-face meetings with the firms they supervise, in order to check information and marketing communications and on whether they have criteria in place to decide on when to undertake them and their frequency.
105. The review shows that the approach to on-site inspections, the relevant coverage, frequency and scope vary among CAs.
106. 15 CAs (AT, BE, CZ, DE, DK, EE, ES, FI, FR, HU, IT, LT, PL, PT, RO, SI) draw up biannual/annual work plans which include on-site inspections. In particular, in 3 CAs (RO, SI, SK) individual on-site inspections are routinely planned or carried out in accordance with an inspection cycle which may last two or three years. In BE, every year the CA selects one issue, among MiFID conduct of business rules, to be subject to thematic inspections.
107. In 5 CAs (CY, LI, LU, SE, UK), on-site inspections are mainly conducted on an ad hoc basis, in reaction to specific issues or suspected irregularities emerging from ongoing supervision. For instance, in AT, the results of the internet surf day, the audit reports or complaints will lead to on-site inspections. In CY, LI and UK, the CAs seem to carry out on-site inspections on an event-triggered basis. In LU, the weak scoring in MiFID assessment, negative press or complaints will result in on-site inspections. In SE, the CA collects information from external sources in an internal database on a continuous basis; such information is summarised and the outcome of the analysis may trigger an on-site inspection. In SI, the selection of investment firms and the frequency of on-site visits are determined by the CA's yearly risk assessment of the entities it supervises, according to which firms that are assessed as more risky will be subject of an on-site visit at least once a year, investment firms posing a lesser risk will be visited once every three years.
108. Other CAs (BE, EE, FR, NO) employ a combination of planned on-site inspections and event-driven inspections.
109. In 2 Member States (DE, LI) on-site visits may also be performed by external auditors acting on behalf of the CAs. However, in LI, the CA conducts on-site visits itself and only resorts to external audit firms in supervision cases demanding additional resources.
110. Moreover, in 21 Member States (AT, BE, BG, CZ, DE, EE, EL, ES, FI, FR, IE, IT, LI, LU, LV, NL, NO, MT, PT, SI, UK), CAs select the investment firms to subject to on-site visits according to pre-defined criteria. In SE, the CA uses a process, which is based on the risk-analysis, to select the appropriate supervisory method including on-site inspections. In (BE, CZ, DE, ES, FI, FR<sup>14</sup>, IE, IT, LU, NO, NL, PT, SE, UK), CAs developed a scoring model based on risk assessments. Such risk assessment is mainly based on information received from the firms (BE, CZ, FR, IT, PT, UK), investor complaints (AT, BE, CZ, FR, IE, LU, NL, PT), information filed by external auditors (AT, DE, LI, LU), information received by other authorities (BE, LV), media review (AT, FR, LU, UK). In addition, the risk factors considered in the assessment are mainly the following: scale of activities (BE, BG, DE, IE, IT, LV, NL, PT, UK), complexity of business or of products offered (BE, FR, IT, LV, PT, UK), volume and nature of complaints (BE, FR,

<sup>14</sup> In FR, the scoring model concerns funds.

LV, NL), the seriousness of the infringement (BG), provision of information to the customers (NL). In SI, the risk assessment is also taken into account when determining the inspection cycle to be applied with reference to the individual investment firm.

111. As regards the scope, 10 CAs (CZ, DE, EE, ES, HU, IT, LU, NL, NO, RO) usually perform broad scope on-site inspections covering reviews of compliance to all MiFID provisions, including information and marketing communications, whereas other CAs (FI, FR, PT, SE) usually make a selection of the subject matters to be reviewed. In 2 CAs (BE, MT) a combination of both broad scope and focused on-site inspections equally applies.
112. 26 CAs (AT, BE, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, SE, SI, SK, UK) are able to perform both routine and non-routine visits. Non-routine on-site inspections are mainly triggered by investor complaints (CZ, DE, EL, LT, LV, PT, RO), when there is a suspicion of possible irregularities (BE, CZ, DE, FR, HU, LT, NL, MT, PL, PT, RO, SI, SK, UK), or by information received by other authorities (DE, LV), or from a media review (HU, UK).
113. In 19 Member States (AT, BE, CZ, EE, ES, FI, FR, IE, IT, LI, LT, LU, MT, NO, PT, RO, SE, SK, UK), CAs have recently conducted on-site inspection concerning at least in part information and marketing communication. In particular, [1] CAs (LU) stated to have carried out from 1 to 5 inspections. AT stated that marketing communication was a priority subject for on-site inspections in 2012-2013 to ensure the application of the FMA-circular letter by market participants.
114. In 5 Member States (AT, BE, FR, PT, UK), the CAs also organise face-to-face meetings with firms' representatives and directors, where issues concerning information and marketing communications are also discussed
115. In 4 Member States (BG, CY, EL, SI) CAs have not conducted any on-site inspection relating to information and marketing communications in the review period, while for the remaining Member States CAs failed to provide figures.

### **Assessment**

116. In 26 Member States (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LU, LV, NL, NO, MT, PT, RO, SE, SI, SK, UK), CAs have established clear criteria to plan and carry out on-site inspections which may be either dedicated to checking information and marketing communications, or as part of broader on-site inspections, while in (2) Member States (CY, PL), this is not the case for the reasons explained below:
  - In CY, while the CA is able to organise on-site inspections in the field of information and marketing communications, they are carried out only on a limited and ad hoc basis and do not benefit of a regular planning prompted by predefined criteria;
  - In PL, even if the CA conducts periodic on-site inspections, it does not seem to have established clear criteria to determine when there is a need to organise on-site inspections.

## D – Thematic work

117. The Key Issues assess whether CAs undertake thematic work in relation to information and marketing communications (including whether it is carried out as part of a broader review). The Key Issues also assess whether the CAs have developed a clear approach to determine when thematic work should be carried out, for instance through the establishment of a process or the identification of a set of criteria.
118. The approach, purpose, frequency and coverage of thematic works concerning information and marketing communications vary to a great extent among CAs.
119. In particular, as regards the purposes, in 16 Member States (BE, CY, DE, ES, FI, FR, HU, IE, IT, LT, LV, LU, NL, NO, RO, UK) thematic works are mostly employed by CAs as a supervisory tool to assess common practises and emerging risks, including risks caused by certain products to investor protection, as well as the level of compliance of firms to a particular set of provisions or the reaction to new regulatory initiatives or other developments, while in 7 Member States (BE, CY, MT, PT, SE, SK, UK) CAs use such tool for risk mitigation purposes, for instance in the form of thematic inspections.
120. In addition, in 4 Member States (BE, CZ, FR, UK) thematic works are used broadly to serve several purposes, whilst in 1 Member States (EE) they are also undertaken for more limited purposes, for instance as a mean to study issues in more details.
121. In 15 of Member States (AT, BE, CY, CZ, DE, EE, ES, FI, FR, HU, IT, LT, NL, PT, UK) thematic work may be dedicated to information and marketing communication, whilst in other Member States (BG, DK, IE, LU, NO, PL, RO, SE, SI, SK) only general thematic works are conducted in which CAs may also review information and marketing communication.
122. During the review period, in 10 Member States (AT, BE, CY, CZ, DE, FR, IT, NL, SK, UK) CAs carried out thematic work covering the topic of information and marketing communications, whilst other CAs (EL, HU, LI, LV, MT, SI) have not yet. In EL, the CA reported that it has not conducted a thematic review on this particular area during the review period (January 2010-June 2012) but has done so in 2013-2014.

## Assessment

123. 23 CAs (AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HU, IE, IT, LT, LU, LV, NL, NO, RO, SE, SK, UK) carry out thematic work including information and marketing communication.
124. In 25 Member States (AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HU, IE, IT, LT, LU, LV, NL, NO, PL, RO, SE, SI, SK, UK), CAs have a clear approach to determine where to conduct thematic review, although these approaches vary across jurisdictions whilst in 4 Member States (EL, LI, MT, PT) CAs have not been able to show their ability to do so, for the reasons explained below:
- in EL and MT, the CA did not provide clear information on the approach adopted by the CA and how the risk-factors are taken into account when determining the need to conduct thematic work in relation to information and marketing communications;

- in LI, the CAs did not mention any thematic work undertaken in relation to marketing communications or MiFID1 related issues;
- in PT, the CA considers as thematic review individual reviews of firms or risk outlooks or other regular reportings, while normally thematic reviews should provide for a cross-sectoral review of a specific issue.

## **E – Complaints**

125. The Key Issues seek to assess whether CAs receive complaints, facilitate contact and provide clear information on how to submit a complaint, and where relevant act on legitimate complaints, on the basis of a mechanism ensuring that complaints are taken into account in the supervision of a firm and can lead to supervisory measures where necessary.
126. The peer review shows the different ways in which CAs provide information on how to complain. In particular:
- in 25 Member States (AT, BE, CY, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LT, LU, NL, NO, MT, PL, PT, RO, SE, SI, SK, UK), CAs publish on their public website all the necessary information on how to submit a complaint and the relevant contacts details;
  - in 13 Member States (AT, BE, CY, CZ, EL, ES, FR, HU, LU, PL, RO, SK, UK), the complaint may be submitted through a special form available on the CAs' websites;
  - in 10 Member States (BE, BG, DE, EL, FI, FR, IT, NL, PT, SI), CAs mentioned to have dedicated phone lines to receive complaints from clients;
  - in 1 Member State (FI), the CA makes use of information stands at (investor) fairs;
  - in EE, the CA has elaborated a separated website dedicated to educate consumers where information on financial services are provided in clear and understandable language, including details on how to compile a complaint, where it should be addressed and what kind of information should be furnished there.
127. In assessing whether the CAs ensure that complaints are taken into account in the firms' supervision, and may lead to supervisory actions, in 14 Member States (BE, CY, CZ, EL, ES, FR, IT, LU, NL, MT, PT, RO, SI, SK), the CAs have identified a specific unit or team for the handling, analysis and transmission of the complaints to the competent supervisory and enforcement units. Conversely, in 7 Member State (AT, DE, FI, LI, NO, SE, UK), complaints are dealt within the unit responsible for supervision.
128. In 11 Member States (CY, CZ, DK, EE, HU, IE, IT, NL, PL, PT, SK) CA have established specific internal written procedures or practices in this respect.
129. In 11 Member States (BE, CY, CZ, DE, ES, FI, FR, LU, MT, NO, SE), the CAs mentioned that the complaints are integrated under the risk model used by the CA and contribute to determine the risk level of the firm concerned, therefore triggering specific actions.
130. In 1 Member State (BE), the CAs mentioned that it receives information on complaints also by the alternative dispute resolution system which is responsible for the direct handling of complaints. This source can provide additional intelligence for the CA ongoing supervision.

131. In 1 Member State (LT) firms must clearly and comprehensively supply to clients and potential clients information about the CA and the complaints procedure.

### **Assessment**

132. The review shows that in 28 Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK) CAs ensure that information on how to complain is clearly provided to clients. In 1 Member State (LI), CA has not been able to show that such information is clearly provided to clients. In particular, in LI, the CA provides detailed information on how to complain only *on demand*.
133. In 28 Member States (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK), CAs have established a mechanism to ensure that appropriate supervisory actions are undertaken where weaknesses are identified when a complaint is received.
134. In CY, due to the lack of resources it is still unclear whether the CA fully applies the key issues set in this peer review as regards complaints.

## **ANNEX I - MiFID provisions relevant for this peer review**

### **Directive 2004/39/EC**

#### *Article 19 - Conduct of business obligations when providing investment services to clients*

1. Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm acts honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8.

2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

3. Appropriate information shall be provided in a comprehensible form to clients or potential clients about:

— the investment firm and its services,

— financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,

— execution venues, and

— costs and associated charges

so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.

4. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

5. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In case the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

In cases where the client or potential client elects not to provide the information referred to under the first subparagraph, or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine

whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format.

6. Member States shall allow investment firms when providing investment services that only consist of execution and/or the reception and transmission of client orders with or without ancillary services to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 5 where all the following conditions are met:

— the above services relate to shares admitted to trading on a regulated market or in an equivalent third country market, money market instruments, bonds or other forms of securitised debt (excluding those bonds or securitised debt that embed a derivative), UCITS and other non-complex financial instruments. A third country market shall be considered as equivalent to a regulated market if it complies with equivalent requirements to those established under Title III. The Commission shall publish a list of those markets that are to be considered as equivalent. This list shall be updated periodically,

— the service is provided at the initiative of the client or potential client,

— the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules; this warning may be provided in a standardised format,

— the investment firm complies with its obligations under Article 18.

7. The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

8. The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

9. In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article.

10. In order to ensure the necessary protection of investors and the uniform application of paragraphs 1 to 8, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those implementing measures shall take into account:

(a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;

(b) the nature of the financial instruments being offered or considered;

(c) the retail or professional nature of the client or potential clients.



## **Commission Directive 2006 / 73 / EC**

### *Recital 43*

Nothing in this Directive requires competent authorities to approve the content and form of marketing communications. However, neither does it prevent them from doing so, insofar as any such pre-approval is based only on compliance with the obligation in Directive 2004/39/EC that information to clients, including marketing communications, should be fair, clear and not misleading.

### *Article 27 - Conditions with which information must comply in order to be fair, clear and not misleading*

1. Member States shall require investment firms to ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail clients or potential retail clients, including marketing communications, satisfies the conditions laid down in paragraphs 2 to 8.

2. The information referred to in paragraph 1 shall include the name of the investment firm.

It shall be accurate and in particular shall not emphasise any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks.

It shall be sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received.

It shall not disguise, diminish or obscure important items, statements or warnings.

3. Where the information compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, the following conditions shall be satisfied:

(a) the comparison must be meaningful and presented in a fair and balanced way;

(b) the sources of the information used for the comparison must be specified;

(c) the key facts and assumptions used to make the comparison must be included.

4. Where the information contains an indication of past performance of a financial instrument, a financial index or an investment service, the following conditions shall be satisfied:

(a) that indication must not be the most prominent feature of the communication;

(b) the information must include appropriate performance information which covers the immediately preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided if less than five years, or such longer period as the firm may decide, and in every case that performance information must be based on complete 12-month periods;

(c) the reference period and the source of information must be clearly stated;

(d) the information must contain a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;

(e) where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency must be clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;

(f) where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed.

5. Where the information includes or refers to simulated past performance, it must relate to a financial instrument or a financial index, and the following conditions shall be satisfied:

(a) the simulated past performance must be based on the actual past performance of one or more financial instruments or financial indices which are the same as, or underlie, the financial instrument concerned;

(b) in respect of the actual past performance referred to in point (a), the conditions set out in points (a) to (c), (e) and (f) of paragraph 4 must be complied with;

(c) the information must contain a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

6. Where the information contains information on future performance, the following conditions shall be satisfied:

(a) the information must not be based on or refer to simulated past performance;

(b) it must be based on reasonable assumptions supported by objective data;

(c) where the information is based on gross performance, the effect of commissions, fees or other charges must be disclosed;

(d) it must contain a prominent warning that such forecasts are not a reliable indicator of future performance.

7. Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

8. The information shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the investment firm.

## ANNEX II - MiFID Conduct of Business - Draft Self-assessment questionnaire

### Introduction

1. In December 2011, the ESMA Board of Supervisors approved the Review Panel peer review work stream on the supervisory practices as regards Conduct of Business under MiFID, specifically the practices with regard to the rules on fair, clear and not misleading information.
2. This exercise covers information provided to clients under MiFID including marketing communications and any other information to enable the clients to understand the nature and risks of the investment services and type of products being offered. This does not include information such as on-going reporting, post-sales communications, product documentation information, execution of orders, etc. In addition, the exercise does not include the provision of personalised advice including portfolio management. Reference will be made to 'information and marketing communication' throughout the questionnaire.
3. In line with the Review Panel methodology (ESMA/2012/33), in order to undertake the peer review it was necessary first to find out about the practices among Member States for discharging their responsibilities. To achieve this, the first step of the exercise was to conduct a mapping which helped identify good practices which form the basis for the peer review. The mapping report was approved by ESMA BoS in January 2013.
4. It should be noted that the practices reflected in this document may apply to the Competent Authorities **approach to supervision in general** and not necessarily specifically to information and marketing communications. Please keep this in mind when responding the questions.

### Guidance responses

5. After each block of questions, a space is provided for the provision of the relevant information to support the responses provided. This might include for example: the description of the relevant practices, examples of how the CA's approach works in practice and any other information that might be relevant to support the responses. In line with the RP Methodology any issues of confidentiality will be taken into account.

### Timeline

6. The self-assessment questionnaire will be launched on the 2<sup>nd</sup> September 2013 and the timeline for Members to provide the responses to the questionnaire including the provision of supporting evidence is 6 weeks (i.e. 14<sup>th</sup> October 2013).

## 2 – Good Practices

### A – Organisation

#### *Key issues*

7. CAs should set out their approach to supervision of information and marketing communication<sup>15</sup> which should be clearly communicated to CAs staff, e.g. via CA's internal website, staff manual or other means. This approach can be part of a more general approach to supervision of rules of conduct under MiFID.
8. CAs should have an internal mechanism to ensure that the supervision of information and marketing communication is conducted in a coherent and consistent way over the time and across teams involved.
9. Having a database in place where decisions/precedent cases are stored is one of the ways to ensure that decisions and / or precedent cases are available and can be assessed over the time by different teams within the CA.
10. Sharing information on an on-going basis within the various teams is another way to ensure that appropriate coordination over the time across the CA is achieved. There are different means to achieve effective communication including cascading information for example via email, exchanging documents, discussions in periodic meetings.

#### *Key questions*

A.1 – Is your supervisory approach to information and marketing communication clearly communicated to staff? (yes / no)

A.2 – If yes to A.1, please explain

A.3- Do you have a database? (yes / no)

A.4 – Do you organise meetings across different sections / teams on a regular basis? (yes/no)

A.5 - Do you have in place any other mechanism to achieve effective communication? (yes / no)

A.6 – If yes, please explain.

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<sup>15</sup> Article 19(2) of MiFID L1 states that “all information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading” - both in its content and its presentation. Furthermore, it states that “marketing communications shall be clearly identifiable as such”.

Article 27 of MiFID Implementing Directive details the conditions to be satisfied by information addressed to clients, or disseminated to clients, in order to be fair, clear and not misleading.

*Please provide the relevant information to support the responses provided – examples include, but are not limited to, the description of the relevant practices, examples of how the CA's approach works in practice and any other information that might be relevant to support the responses.*

### **Benchmarks**

#### **Fully applied**

If a positive answer is given to:

Questions 1 and 3, or

Questions 1 and 4, or

Questions 1 and 5.

#### **Not applied**

If a negative response is given to question 1

If a positive response is given to question 1, but a negative response to questions 3, 4 and 5.

## **B – Supervisory Approach**

### **Key issues**

11. The nature of the supervisory approach adopted in relation to information and marketing communications varies among CAs and it will depend among others on issues such as national legal and regulatory requirements (usually resulting from the transposition of EU Directives), the volume of information and marketing communication, the number of firms supervised, etc.
12. CAs should have clearly defined criteria setting out when and how they apply their supervisory approach and how they determine the main points of emphasis underlying the supervisory approach for the CAs examination. The criteria could be qualitative, quantitative or both – examples are provided below.
13. As stated in paragraph 4 above, it should be noted that the practices reflected in this section may apply to the Competent Authority's approach to supervision in general and not necessarily specifically to information and marketing communications.

### **Quantitative**

- a) Scale of activities<sup>16</sup> / volume of products marketed / volume of assets under management
- b) Volume of complaints and alerts received
- c) Number of security deposits

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<sup>16</sup> E.g. number of clients

### **Qualitative**

- d) Indicators from the regular review of audit reports
- e) Indicators from checklists used by the CA
- f) Nature of complaints and alerts received
- g) Aggressive sales approach
- h) Internal arrangements and controls
- i) to investment

### **Both qualitative and quantitative**

- j) Indicators from the regular review of the periodic information and data transmitted from intermediaries
- k) Indicators from the review of information and data transmitted from intermediaries
- l) Complex products marketed by the firm
- m) Products with innovative features / new products
- n) Risk of products as assessed by the CA
- o) Significant consumer detriment as assessed by the CA (e.g. widespread impact)
- p) Changes of financial or market conditions
- q) Nature of the target audience (e.g. vulnerable audience)
- r) Aggressive marketing of products and/or services
- s) Marketing reach – type of media used and number of consumers likely to be influenced by the information and marketing communications
- t) Results from thematic review and other types of reviews
- u) Distribution channels, e.g. number of tied agents / commercial agents
- v) Review of the presentation of costs and presentation of past and future performance.

### **Key questions**

B.1 – Do you have criteria in place setting out when and how you apply your supervisory approach? (yes/no)

B.2 – Do you apply quantitative criteria on the supervisory approach adopted in relation to information and marketing communications? (yes / no)

B.3 – Do you apply qualitative criteria on the supervisory approach adopted in relation to information and marketing communications? (yes / no)

B.4 – Please provide the factors that are taken into account and any other used

- a) Scale of activities<sup>17</sup> / volume of products marketed / volume of managed securities
- b) Volume of complaints and alerts received
- c) Number of security deposits
- d) Indicators from the regular review of audit reports
- e) Indicators from checklists used by the CA
- f) Nature of complaints and alerts received
- g) Aggressive sales approach
- h) Internal arrangements and controls
- i) Conflicts of interest in the context of Article 18 of MiFID
- j) Indicators from the regular review of the periodic information and data transmitted from intermediaries
- k) Indicators from the review of information and data transmitted from intermediaries
- l) Complex products marketed by the firm
- m) Products with innovative features / new products
- n) Risk of products as assessed by the CA
- o) Significant consumer detriment as assessed by the CA (e.g. widespread impact)
- p) Changes of financial or market conditions
- q) Nature of the target audience (e.g. vulnerable audience)
- r) Aggressive marketing of products and/or services
- s) Marketing reach – type of media used and number of consumers likely to be influenced by the information and marketing communications
- t) Results from thematic review and other types of reviews
- u) Distribution channels, e.g. number of tied agents / commercial agents
- v) Review of the presentation of costs and presentation of past and future performance.
- w) Others – please explain

*Please provide the relevant information to support the responses provided – examples include, but are not limited to, the description of the relevant practices, examples of how the CA's approach works in practice and any other information that might be relevant to support the responses.*

## **Benchmarks**

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<sup>17</sup> E.g. number of clients

### ***Fully applied***

If a positive answer is given to question B.1 and the minimum factors below are taken into account,

#### Minimum factors

- a) Scale of activities<sup>18</sup> / volume of products marketed / volume of assets under management
- b) Volume of complaints and alerts received
- d) Indicators from the regular review of audit reports **or** k) Indicators from the review of information and data transmitted from intermediaries
- f) Nature of complaints and alerts received
- n) Risk of products as assessed by the CA

### ***Not applied***

If a positive answer is given to question B.1 but the minimum factors listed above are not taken into account

If a negative answer is given to question B.1

## **C –Monitoring**

### ***Key issues***

14. CAs should have some kind of active monitoring of information and marketing communications, which as a minimum should include desk-based monitoring. Some examples of monitoring through desk-based are listed below:
- a) Checking various internet-based communications, e.g. checking websites, forums, blogs, sponsored links, banners pop-ups
  - b) Newspapers and magazines
  - c) Broadcast media – TV adverts, radio
  - d) Information received from complaints, questions from customers
  - e) Information received from other firms, regulated entities, consumer associations
  - f) Information received from other Competent Authorities
  - g) Information received from other bodies with competence in the field, e.g. Ombudsman, advertising authorities, legal bodies

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<sup>18</sup> E.g. number of clients



- h) Issues detected in audit reports
  - i) Information collected via tools (or database) which would screen/filter a volume of information to produce refined set of information
  - j) Information collected directly from firms such as internal organisation, business strategy, risk strategy, reports by firm's compliance function.
15. As stated in paragraph 4 above, it should be noted that the practices reflected in this section may apply to the Competent Authority's approach to supervision in general and not necessarily specifically to information and marketing communications.
16. CAs should request information from firms where the need for further clarification is identified.
17. CAs should plan and carry out periodically on-site inspections which may be either dedicated to checking information and marketing communications or as part of broader on-site inspections. Listed below are some examples of factors that can be investigated during on-site inspections:
- k) Systems and controls
  - l) Samples of information and marketing communications to customers
  - m) Information received from complaints, questions from customers or associations
  - n) The training and competence of staff
  - o) Target group.
18. CAs should have criteria in place to decide on when to undertake on-site inspections and their frequency, e.g. the overall risk profile of the firm, the time of the last visit, etc.
19. CA should always be able to conduct non routine on-site inspections on information and marketing communications.
20. Where appropriate CAs should organise face-to-face meetings with the firms they supervise. [Listed below are some examples of factors that can be investigated during face-to-face meetings.]
- p) Marketing strategies
  - q) Internal organization
21. CAs should have criteria in place to decide on the frequency of meetings, e.g. the overall risk profile of the firm, the time of the last visit, etc.

### **Key questions**

- C.1 – Do you actively monitor information and marketing communications through desk-based reviews? (yes / no)
- C.2 – What are the sources for your monitoring through a desk-based review?
- a) Checking various internet-based communications, e.g. checking websites, forums, blogs, sponsored links, banners pop-ups
  - b) Newspapers and magazines

- c) Broadcast media – TV adverts, radio
- d) Information received from complaints, questions from customers
- e) Information received from other firms, regulated entities, consumer associations
- f) Information received from supervisors
- g) Information received from other bodies with competence in the field, e.g. Ombudsman, advertising authorities, legal bodies
- h) Issues detected in audit reports
- i) Information collected via database or tools, which might be from external providers
- j) Information collected directly from firms such as internal organisation, business strategy, risk strategy, reports by firm's compliance function.

C.3- Do you undertake on-site inspections on information and marketing communications? (yes / no)

C.4 - Do you have a process / set of criteria in place to determine when there is a need to organise on-site inspections with the firms you supervise where you would look into information and marketing communications? (yes / no)

C.5 – Please provide information on the process / set of criteria to determine when you use on-site inspection

C.6 – Have you used performed on-site inspections in the past? If yes, please provide details

C.7 – Are you able to conduct non routine on-site inspections on information and marketing communications?

*Please provide the relevant information to support the responses provided – examples include, but are not limited to, the description of the relevant practices, examples of how the CA's approach works in practice and any other information that might be relevant to support the responses.*

### **Benchmarks**

#### ***Fully applied***

If a positive answer is given to question 1 and active monitoring is reflected in the responses provided to question C.2

**And** a positive response is given to questions C.4

#### ***Not applied***

If a positive response is given to question 1, but no factors are selected

If a negative response is given to question C.4

## D - Thematic work

### **Key issues**

22. CAs should undertake thematic work whether specific to information and marketing communications or with a broader focus. Thematic work may address for example common practice in a sector rather than regulating individual firms and may be based on an assessment of the risks in the market, so that its impact in terms of reducing potential consumer detriment is greatest or may be used to scrutinise risks or how the market reacted to new legislative aspects, market developments or products.
23. CAs should have a clear approach as to when thematic work will be undertaken. This might include:
- a) Having a process in place which determines when to undertake thematic work, or
  - b) Having a set of criteria for undertaking thematic review, which may include:
    - b.1) New legislative aspects
    - b.2) Market developments
    - b.3) Sensitive areas in terms of investor protection
    - b.4) Complaints and alerts received
    - b.5) Findings from on-going supervision
    - b.6) Significance of the topic for the local market
    - b.7) To prioritise supervisory actions
    - b.8) Issues raised in audit and compliance reports
    - b.9) Launch of new products
    - b.10) New media or new use of existing media

### **Key questions**

D.1 - Do you undertake thematic work **dedicated** to information and marketing communications? (yes/no)

D.2 – If no to D.1 – Do you undertake **general** thematic work in which you also look at information and marketing communications? (yes/no)

D.3 – If yes to D.1 or D.2 – do you have a clear approach to determine when you undertake thematic review? (yes/no) please explain

*Please provide the relevant information to support the responses provided – examples include, but are not limited to, the description of the relevant practices, examples of how the CA's approach works in practice and any other information that might be relevant to support the responses.*

### **Benchmarks**

#### **Fully applied**

If a positive answer is given to:

Questions 1 and 3, or

Questions 2 and 3

***Not applied***

If a negative response is given to questions 1 and 2.

If a positive response is given to questions 1 or 2, but a negative response to question 3.

## **E –Complaints**

### ***Key issues***

24. CAs should be open to and act on legitimate complaints. More specifically, CAs should facilitate contact by complainants by ensuring clearly and prominently issues such as providing information on a contact point, how to complaint, etc. It should be noted that some CAs would not deal with the client's complaints directly, but where appropriate they would use the information / alert for supervisory purposes.
25. CAs should have a mechanism in place that ensures that complaints are taken into account in the supervision of a firm and can lead to supervisory measures where necessary.

### ***Key questions***

E.1 – Do you ensure that information on how to complain is clearly provided to clients?

E.2 - Do you have a mechanism in place to ensure appropriate supervisory actions are taken where supervisory weaknesses have been identified via a complaint received?

*Please provide the relevant information to support the responses provided – examples include, but are not limited to, the description of the relevant practices, examples of how the CA's approach works in practice and any other information that might be relevant to support the responses.*

### ***Benchmarks***

***Fully applied***

If a positive answer is given to questions 1 and 2

***Not applied***

If a negative response is given to questions 1 or 2.

## **ANNEX III - Statements from on-site visited Competent Authorities to the MiFID Conduct of Business peer review report**

- **Statement by BaFin**

BaFin would like to note that the conduct of regular audits of all investment firms by external auditors in relation to all MiFID-Rules of Conduct is a statutory duty under German Law.

BaFin uses a set of tools in the ongoing supervision in order to react timely with regard to false or misleading marketing communication, e.g. internet research and on-site inspections.

BaFin intensified its on-site activities since November 2012. Therefore, members of staff of the Intermediaries Department were on-site in about 1,250 cases in 2013 and 2014.

Amongst other MiFID-requirements, they check information including marketing communication on-site.

- **Statement by the CMVM**

With regards to the use of “thematic reviews” as supervisory tools, it is important to clarify that, although sometimes not originating formal papers, the CMVM carries out cross-sectoral reviews focusing on specific issues during the individual inspections and they constitute also a relevant input for the risk based supervision done by the CMVM.

Furthermore, as conveyed to the Review Team of the present exercise, whenever it was considered that market stakeholders could benefit from the conclusions of CMVM’s thematic work, the underlying analysis were published, being available at CMVM’s internet site. This was the case, for instance, with the study “The Market of Structured Retail Products – evidence for Portugal (2013)” available at <http://www.cmvm.pt/CMVM/Estudos/Working%20Papers/Documents/WorkingPaperCMVM6.pdf>. Several other reviews are available at CMVM’s internet site.

- **Statement by CySEC**

The CySEC expresses its appreciation for the work done by the on-site peer review assessment team and the comments and recommendations made, which will be duly considered with the view to taking the necessary steps to primarily ensure the necessary resources are made available to the CySEC. The CySEC would, however, like to make the following comments:

The Cyprus Securities & Exchange Commission (“the CySEC”): The CySEC, in May 2013, recognizing that all the three aspects of supervision should receive due attention, implemented an internal restructuring through which the Supervision Department comprises three Units: Compliance, Capital Adequacy and AML, with the Compliance Unit being the bigger of the three. Furthermore the investigation of complaints against CIFs which may entail on-site visits, is carried out by a Unit in the Department of Market Surveillance and Investigations.

**Supervisory Approach:** Based on the knowledge of the business models adopted by the CIFs, market monitoring, feedback, complaints and information/referrals received from other NCAs, it was decided that the CIFs engaging in the provision of investment services in forex/binary options (a little more than half of the CIFs), require closer monitoring and supervision. Furthermore it was decided that the exercise of reviewing the marketing communications of those CIFs being complained against, should be proactively extended to cover as many of the CIFs engaging in forex/binary options as possible in the context of a thematic review, irrespective of whether complaints were received against them. The review covered almost 50% of these CIFs.

**Monitoring:** The business model followed by these CIFs which engage in the provision of investment services on Forex/Binary options markets world-wide through highly sophisticated web-based systems and platforms, is that all material (including pre-contractual/point of sale) is available on their web-site and the client/potential client indicates his/her acceptance. Therefore, given that all information to clients/potential clients is accessible on the CIFs website, desk-based review was, under the circumstances, considered to be the most appropriate, efficient and effective deployment of resources thus achieving a higher coverage as opposed to using an alternative approach.

Here it is important to note that the CySEC's policy is to announce the measures taken against its supervised entities on the CySEC's website which can be accessed by anyone anywhere in the world. Therefore, the power to "name and shame" can sometimes prove a much more effective deterrent than just the imposition of a fine.

- **Statement by the FCA**

The FCA appreciates the work done by the ESMA Visit Team, and, in light of the report, will reflect on possible improvements that might be made, consistent within our risk-based approach. While we have proposed some changes to the text to ensure factual accuracy, we acknowledge that there is an element of subjective judgement involved and, so, scope for different perspectives. We note, nevertheless, that:

The peer review assessed the period June 2010 to June 2012, during which time the Financial Services Authority (FSA) was the relevant competent authority (though most of the assessment work was in fact carried out after 2012). In April 2013, the Financial Conduct Authority (FCA) took over responsibility for the MiFID Conduct of Business regime that is the subject of the report, as part of its conduct remit. Understandably, in order to retain relevance, the report makes reference to the FCA's current approach (its organisational structure and new supervision model). However, the effectiveness of the new regime can only be fully assessed once it has been operational for a longer period.

The report also implies that the Financial Promotions Team is separate from the Supervision Division. In fact, it is an integral part of that Division and subject to the governance of its Risk Committee.