



European Securities and
Markets Authority

Supervisory Convergence

Work Programme 2016



Table of Contents

1	Executive Summary	2
2	Context for ESMA’s supervisory convergence work	3
2.1	ESMA’s mandate and strategic orientation	3
2.2	The regulatory environment in 2016	4
2.3	The market environment in 2016	5
2.4	The context for NCAs in 2016	6
3	Parameters for the 2016 work programme	6
4	Supervisory convergence priorities for 2016	8
5	Thematic overview for 2016	9
5.1	Corporate Finance	10
5.2	Corporate Reporting	11
5.3	Investment Management	13
5.4	Investor Protection and Intermediaries	14
5.5	Market integrity	16
5.6	Post-trading	18
5.7	Secondary markets	20
5.8	IT delegated projects	22
5.9	Cross-cutting activities	23
6	Conclusion	25



1 Executive Summary

Reasons for publication

The European Securities and Markets Authority's (ESMA) Supervisory Convergence Work Programme for 2016 (2016 SCWP) supplements ESMA's Annual Work Programme for 2016 (ESMA/2015/1475) by further elaborating the nature and focus of the work ESMA will carry out in order to promote supervisory convergence and how that will contribute to implementing ESMA's Strategic Orientation for 2016-2020 (ESMA/2015/935).

Contents

The 2016 SCWP provides an overview and explanation of the steps ESMA will take in 2016 to promote sound, efficient and consistent supervision in the EU. It sets out priority areas and how they have been identified and sets them in the context of the wider work programme and environment.

Next Steps

Implementation of the 2016 SCWP will be monitored in the course of 2016 and depending on developments during the year, priorities might be re-adjusted. It will also be used to inform ESMA's Annual Report and its supervisory convergence work programme for future years which will be risk-based.

2 Context for ESMA's supervisory convergence work

2.1 ESMA's mandate and strategic orientation

1. Regulation 1095/2010 requires ESMA to foster supervisory convergence in order to ensure sound, effective and consistent supervision. The Regulation specifies a number of tools ESMA can use to achieve this aim, and enables it to devise additional tools where necessary.
2. Supervision and hence supervisory convergence is an important complementing activity, as it ensures that investor protection, orderly markets and financial stability are achieved in practice. Supervisory convergence contributes to ensuring that the EU Internal Market works effectively, by creating a level playing field and preventing regulatory arbitrage or a race to the bottom.
3. Supervisory convergence does not mean that we will aim to converge to a one-size fit all approach. It does mean that we promote the consistent and effective implementation and application of the same rules and using sufficiently similar approaches for similar risks. The overall goal is to strive for comparable regulatory outcomes. An important aspect of ESMA's work is to promote consistent approaches between the EU national competent authorities but also, when appropriate, with third country regulators. At times this will mean ESMA providing advice to the Commission on third country issues, helping NCAs to establish memoranda of understanding with third country regulators.
4. Another way of enhancing supervisory convergence might result in the provision of common IT or other infrastructure as it is the case with the IT delegated projects.
5. In its Strategic Orientation 2016-2020, ESMA undertook to focus more of its resources on supervisory convergence work during this period than had been possible in previous years given the extent of 'single rulebook' work in relation to new legislation. It also set out a number of parameters for what the work aimed to achieve, and how it should be done. These include:
 - a. increased resource and focus on supervisory convergence relative to single rulebook
 - b. greater focus on up-front assistance to NCAs, alongside *ex post* review/remediation
 - c. use of a wider range of tools for supervisory convergence
 - d. clearer criteria for prioritisation
 - e. enhanced internal governance to ensure coherence of strategy overall.
6. ESMA also committed to setting out an annual supervisory convergence work programme to facilitate improved governance and complement the regulatory and direct supervision work programmes which cover other key aspects of ESMA's work. The supervisory convergence work programme also reflects the important input from risk assessment work, which is ESMA's fourth core activity.

2.2 The regulatory environment in 2016

7. Much new legislation from the last few years is still bedding in and some provisions have yet to be fully activated; for example, while EMIR itself has been in force since 2012, the first clearing obligation, in relation to certain interest rate derivative swaps, will start to be applied only from 2016. Similarly, while most provisions of AIFMD have applied since 2013, given the transitional arrangements many AIFMs would only have been authorised recently so new supervisory issues are still emerging; furthermore the provisions on a potential passport for third country AIFMs have not yet been applied.
8. There is also a significant new package of measures soon to come into effect, within a short space of time, including MAR/MAD (July 2016), MiFID 2/MiFIR (Jan 2017), CSDR (depending on the finalisation of the EBA RTS and overall approval process by the European Institutions) from 2016.
9. Further new legislation has recently concluded or remains under negotiation, such as proposals on benchmarks and on money market funds and other regulatory initiatives, of which some will be legislative, are envisaged by the Commission in the context of its work on enhancing the Capital Markets Union, including reviews of the Prospectus, EUVeCA and EUSeF Directives. ESMA's contribution to the development of the single rulebook is set out in the Annual Work Programme and Regulatory Work Programme for 2016.
10. New legislation has a number of important implications for competent authorities and hence the planning of supervisory convergence work:
 - a. It can bring challenges for NCAs in terms of identifying and authorising a new population of regulated firms, where the scope of the regulatory perimeter has been expanded;
 - b. It can require the acquisition of new technical expertise in unfamiliar areas, and bring other challenges in terms of prioritising the allocation of resource to new as against existing responsibilities;
 - c. Questions are likely to arise from market participants and from NCAs themselves as to the precise standards to which regulated firms are to be held accountable, and how those standards apply in specific situations, not all of which may have been envisaged when the legislation was prepared;
 - d. Legislation can itself stimulate changes to firms' business models and activities. NCAs need to be aware of such changes and consider whether a response is needed. A good example of such a situation was the development of new business models following the implementation of MiFID 1;
 - e. New legislation can also provide NCAs with new powers and tools which may prompt or enable a reflection on whether new approaches to supervision are desirable or necessary;
 - f. Input to the preparation of new legislation before it is finalised can help to ensure that the rules can be effectively supervised once in force, and may help to reduce previously-identified barriers to effective supervision.

11. These considerations have informed the development of the supervisory convergence work programme for 2016 because it means there is a typical 'cycle' for the challenges NCAs face and the steps ESMA can take to help facilitate and co-ordinate dealing with these, and a common timeframe and sequence in which these are typically needed.

2.3 The market environment in 2016

12. ESMA publishes its assessment of the risk environment twice a year in its Trends, Risks and Vulnerabilities report. Risk levels under ESMA's remit remain high reflecting elevated risks for investors, infrastructures and services, and the financial system at large, as well as high risks in the securities market. ESMA has considered which market and risk developments are most relevant to determining the focus of its supervisory convergence work. These are set out below.

- a. Challenging economic climate for 'real economy' firms and uncertainty about demand, given low economic growth in EU and uncertainty about China. Businesses will be seeking low cost access to finance, whether through traditional capital markets (issuance activity increased) or alternative finance;
- b. An environment of substantial monetary policy support reflected in very low interest rates and search for yield strategies among investors with particular dangers if retail investors do not understand the risks they are taking on with less familiar types of investment;
- c. Moreover in securities markets, asset price valuations and volatility remain high, running ahead of fundamentals, exposing investors to sudden adjustments due to imbalances;
- d. The entry into effect of the clearing obligation for certain derivatives will increase the situations in which collateral is required and spur further development of innovative market practices in the area of collateral management;
- e. The clearing obligation will also increase the concentration of risk in CCPs and increase the incentives on individual CCPs to compete through reducing margin requirements;
- f. Disruptive innovation, particularly due to developments in technology, looks set to continue with uncertain impacts; an emerging example is the use of distributed ledger technology.

13. This environment has in some cases directly influenced the choice of priority areas, with an example being ESMA's continued focus on the prudential soundness of CCPs. In others it provides the context for many threads of work, for example in relation to investor protection. Finally, it illustrates the connection between the risk identification and analysis work undertaken by ESMA and by NCAs in informing current and future supervisory convergence activities.

2.4 The context for NCAs in 2016

14. NCAs' supervisory activities may be affected to differing degrees by the aspects of the regulatory and market environment set out above depending on, among other things, the number and type of firms active in their market. An overview of NCA firm populations is set out in Appendix 1. Although there are important limitations to this data, it will help to inform ESMA's targeting of supervisory convergence activity in 2016. In preparing this work programme we have therefore considered the firm populations of the different NCAs, their supervisory priorities and their supervisory mandates, powers and resources.
15. Considering NCAs' own supervisory priorities also led ESMA to identify a number of horizontal issues which raised potentially important issues for supervisory convergence. These include a focus on the practical application of the AIFMD, continuation into 2016 of the crowdfunding supervisory forum established in 2015, and assistance in collecting and using the additional data envisaged under MiFIR/MiFID 2.
16. We plan to use and develop this information on firm population and level of prospectus activity, regulatory remits and resourcing of supervisory activity, the supervisory priorities of NCAs and self-assessed compliance with ESMA Guidelines as a tool to assist with effective implementation of the strategy and to develop an appropriately targeted work programme for future years.

3 Parameters for the 2016 work programme

17. Given that 2016 is the first year of ESMA's new strategic orientation and also given the very significant new legislative requirements which take effect in 2016 or early 2017, ESMA sees 2016 as in many ways a transitional year. The experience of this transitional year will be used as a basis for multi-annual planning in future years.
18. In order to ensure that the work programme reflects the emphasis given in the strategic orientation of providing increased *ex ante* support ESMA has categorised the tools available for its supervisory convergence work into three broad categories and used these both in bottom-up planning and to provide a top-down sanity check that the right balance has been found. The three categories are 'preparatory', 'implementation' and 'assessment/remedial' tools. In practice, there will be some overlap between 'preparatory' and 'implementation' tools, and assessment/remediation tools will sometimes form the last part of a cycle which in turn gives rise to a need for preparatory tools. These distinctions are therefore not rigid but useful to clarify the objectives of different aspects of supervisory convergence work and identify the most appropriate types of tools to deliver those objectives.

A Preparatory tools	B Implementation tools	C Assessment/remediation tools
Preparatory tools are designed to help support the effective application of new rules or a response to new	Implementation tools are designed to understand how rules or market developments are being supervised in	Assessment/remediation tools are designed to test whether supervision of rules or market developments is being carried

<p>market developments, and to support the application of common basic standards of supervision.</p>	<p>practice (this includes where relevant authorisation/licencing and enforcement action), to enable NCAs to improve the efficiency, effectiveness and consistency of current or future work, and/or to take action to address a live issue.</p>	<p>out in line with expectations and/or to take action to address a situation where this appears not to be the case. In this category are included the tools we use to formally assess whether NCAs' supervision is effective.</p>
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19. In 2016, reflecting the Strategic Orientation and the significant volume of new legislation, ESMA's resource will be predominantly focused on preparatory tools. Increased resource will be devoted to implementation tools relative to previous years and we would expect this to increase in future years as new legislation is embedded, probably relative to preparatory tools. Resource will continue to be allocated to assessment/remediation tools in 2016; however, this will be a lower proportion than the other two categories of tools, and a smaller share of supervisory convergence resource in the first half of the year.
20. ESMA will also be devoting additional resource to ensuring effective governance of the supervisory convergence work programme, from increasing understanding of and alignment to NCA and other stakeholder priorities, tracking progress and developing new supervisory convergence tools where necessary to improve the effectiveness of future work.
21. In order to enable prioritisation ESMA has used the following criteria in determining how, in areas where it has discretion, to focus its resources. These criteria enable us to identify areas where the greatest benefit can be obtained from action at EU level (the first three criteria), and to identify factors which could help us deliver in the most effective way this convergence across the EU (the second three criteria):
- a. Impact of supervisory effectiveness on investor protection/market integrity/financial stability
 - b. Value added of action at EU level e.g. passporting/cross border activity/reducing arbitrage
 - c. Potential to increase efficiency through joint/co-ordinated/delegated action
 - d. Opportunity for change where there are e.g. new market developments, new Level 1 legislation, stakeholder appetite for action, issue is "live" and needs resolution
 - e. Relevance to NCAs 'fit' with NCAs' own situation and priorities/working methods/identified needs/firm population
 - f. Feasibility taking into account the available resources, tools and other constraints
22. However, planning supervisory convergence work brings challenges. It will involve some new types of activity for ESMA and NCAs and with timelines and milestones which will in some cases be less driven by legislative deadlines. Some activities (for example, binding

mediation) are 'demand led' and hence unpredictable. Where the need for consideration of a particular supervisory convergence problem is identified, it may be some time before it is clear what form the most appropriate response should take, and the outputs of such work may be less easy to identify, or to discuss publicly, than for single rulebook work. It is also natural that new issues will emerge in the market and that ESMA, like NCAs, needs to have the capability to respond to these.

23. The work programme therefore identifies both particular topics and says how ESMA plans to address them in 2016, and in certain areas ongoing activities which will enable us to identify and respond appropriately to emerging issues.

4 Supervisory convergence priorities for 2016

24. Within the overall programme, ESMA has identified a core package of priority areas. ESMA and NCAs will resource these priority areas whatever other new issues arise. This package is set out below, along with the reasons for the choice of these areas and the key objectives for each area.
25. The identification of this package of priority areas aims to ensure that there is a balance between certainty that the most important issues will be addressed and flexibility to respond to emerging challenges.
26. ESMA's core package of priority areas in relation to supervisory convergence for 2016 will be:

a. **Preparing for the sound, efficient and consistent implementation and supervision of MiFID 2/MiFIR.**

This is a high priority for 2016 because the new legislation will have a significant impact on investors, market participants, regulators as well as the orderliness of markets and because of the need to promote ex ante sound and consistent application and supervision, particularly in areas regulated for the first time or where new requirements are introduced. Intensive work will be needed in 2016 regardless of whether there is any change to the timeline for application of the Level 1 legislation in order to ensure that NCAs and market participants have the necessary clarity in good time.

This work will cover key investor protection issues such as product governance and information on risks, costs and charges, in addition to aspects which underpin the orderly operation of secondary markets, such as preparation for extension of the pre-trade transparency regime to a wider range of financial instruments and preparations for use of the 'product intervention' powers which are relevant for both investor protection and market integrity. Measures in this area will include the development of guidelines, Q&As, common procedures, 'application workshops', supervisory briefings and training on key aspects of the new regime, and preparations for application of the third country regime.

b. **Finalising the IT infrastructure needed to support the effective implementation and supervision of MiFID 2/MiFIR and MAR**

Closely related to our first priority, ESMA will continue with building and testing the IT infrastructure NCAs will use for key aspects both of MiFID 2/MiFIR and of MAR.

- c. **Facilitating the sound and consistent supervision of OTC derivatives markets and in particular of EU CCPs:** this is a priority for 2016 because, with the first derivatives now declared subject to the clearing obligation, the systemic importance of CCPs is increasing while commercial incentives for CCPs to compete on the basis of risk remain. Consistent data quality is essential for authorities to be able to monitor risks in the OTC derivatives markets;
- d. **Supporting the effective application of the Capital Markets Union** through directly relevant supervisory convergence work. While a range of work envisaged in the SCWP will contribute to this objective, including those mentioned above, our highest priorities for 2016 will include:
 - i. the planned thematic study on home and host responsibilities under UCITS and AIFMD with a view to clarifying the respective responsibilities of the NCAs and enabling smooth operation of the passports for marketing and management; and
 - ii. capitalising on the recently completed thematic study and peer review which will conclude early in 2016, to promote increased convergence in relation to prospectuses and to inform the deliberations on new legislation on this area which we will undertake in our 'single rulebook' activity.

27. In addition, we will prioritise calls on resource for the following two activities, so as to deliver an effective overall package of supervisory convergence work:

- a. **Promoting *ex ante* discussion of specific 'live' cases**, including through the existing mechanisms in relation to corporate reporting, market integrity, MiFID transparency waivers, AIFMD and crowdfunding;
- b. **Providing remediation** in cases where difficulties arise; this could be through facilitating mediation between NCAs whenever initiated, ensuring readiness to pursue a Breach of Union law investigation should an appropriate case be identified, or through other less formal mechanisms. Depending on the number and intensity of the remediation cases, reprioritisation of other supervisory convergence work might be needed to handle these cases.

5 Thematic overview for 2016

28. This section provides more detailed information on the supervisory convergence activities envisaged in each area ESMA covers, and in relation to some cross-cutting issues. In each area priorities are identified, along with other activities which will be taken as far as resources allow, and provided that the overall ESMA priorities and any emerging new priorities can be addressed. Some work streams are likely to continue into 2017, reflecting our transition towards multi-annual work planning. We have already indicated some areas of focus for 2017 in order to take into account the longer term priorities.

5.1 Corporate Finance

29. Two main areas of focus are planned for 2016.
30. The first area of focus is to build on the work undertaken in 2015 in relation to supervisory convergence in the prospectus area so as to continue to support sound, efficient and consistent scrutiny of prospectuses and to use this practical experience to inform ESMA's input to the review of the Prospectus Directive. The aim will be to ensure that the application of the new rules is as efficient as possible for issuers while providing the necessary safeguards for investors, in support of an enhanced Capital Markets Union.
31. The top priority activity in this area will be finalising the ongoing targeted peer review on the prospectus approval process and following up by sharing good practices;
32. Other activities in this area will include
- a. Maintaining up to date Q&A through discussion at working groups and CFSC;
 - b. Reviewing existing tools such as common approaches in the light of findings from the thematic study on scrutiny of financial information in prospectuses and the peer review, and exploring whether these could be collected into a single handbook;
 - c. Setting up training or workshop in the area of prospectus to enhance the knowledge of the convergence work undertaken in 2015, provide an overview of elements concerning scrutiny of prospectuses, approval process and financial information, drawing on experience gained from the thematic study and peer review;
 - d. Towards the end of 2016, feeding in lessons learned from supervisory convergence work to date to wider preparations for the advent of PD III as part of the Commission's CMU initiative, in order to promote workable and consistent application and supervision of the new regime and avoid regulatory arbitrage; this will involve workshops and discussions in the Operational Working Group;
33. The second area of focus is NCA cooperation regarding cross border supervision of the disclosure and dissemination of financial information and major holdings notifications in relation to issuers whose securities are admitted to trading on a regulated market, for which a common basis is provided in the Transparency Directive.
34. Priority activities envisaged in this area are:
- a. Establishing and maintaining a consolidated list of issuers, identifying their correct home Member State under the Transparency Directive in order to make it easier for NCAs to identify and resolve issues with issuers in cross-border situations as well as follow-up on the agreed use and cooperation in this regard;
 - b. Carrying out a thematic study to understand practices with regards to notification of major holdings and the potential impact on international investors and cross-border transactions;
 - c. Follow-up on the use of two standard forms by NCAs in relation to the disclosure of home member state and of major holdings.



35. If resources allow, we will aim to organise training or a workshop to provide an overview of changes to the Transparency Directive, discuss application of exemptions and outcomes of the mapping and convergence work in 2015;
36. Plans for 2016 also include:
- a. Preparing the implementation of Omnibus II RTS to identify any areas of non-harmonised understanding of the rules through workshop, training sessions, exchange of views at OWG and CFSC;
 - b. Organising a seminar/training on corporate governance for NCAs to provide a platform for supervisory and theoretical discussions on the main trends in the governance of listed companies and implementation challenges;
 - c. Finalising a mapping of practices in relation to the disclosure of directors' remuneration in listed companies and carrying out relevant follow-up work with NCAs;
 - d. Monitoring over the course of the year issues being raised in relation to the consolidated list of issuers and use of standard forms in the transparency area and the application of common approaches in the prospectus area.
37. A further thread running through the corporate finance work in 2016 will be to build on the experience already gained in relation to takeovers of providing opportunities for regular and topical discussions on 'live' cases and on prospective changes to legislation in order to promote *ex ante* co-ordination and convergence.

5.2 Corporate Reporting

38. In 2016, ESMA will pursue its work in the area of corporate reporting in order to ensure that financial information published by issuers complies with the International Financial Reporting Standards (IFRS) and contributes to the transparency of information relevant to the decision making process of investors.
39. In order to achieve a high level of harmonisation in the enforcement of financial information, ESMA has developed since 2012 annual common enforcement priorities to alert issuers, auditors and market participants on the relevant topics on which European enforcers look as part of the examination of the IFRS financial statements. Activities in this area will consist of:
- a. Reporting, in April 2016, on the results of the enforcement of the common enforcement priorities for the 2014 year-end financial statements (IFRS 10 *Consolidated Financial Statements*, IFRS 11 *Joint Arrangements*, IFRS 12 *Disclosure of Interests in Other Entities* and IAS 12 *Income Taxes*). The outcome will be based on the collection and analysis of data from the examination performed at national level.
 - b. Monitoring, in the course of the 9 meetings to be held over the year, issues raised by enforcers in their assessment of common enforcement priorities for the 2015 year-end financial statements in relation to: impact of financial markets conditions (e.g. low interest, high volatility) to the financial reporting, IAS 7 *Statement of Cash Flows* and IFRS 13 *Fair Value Measurement*,



- c. Issuing, in October 2016, a statement on the common enforcement priorities for the 2016 year-end financial statements based on the relevant accounting topics to be identified by ESMA and the European enforcers in consultation with stakeholders;
 - d. Preparing two public statements to inform the market and encourage listed companies to provide timely and relevant information on the expected impact of new financial reporting standards once the endorsement timeline is clarified and thereby contribute to their proper implementation:
 - i. IFRS 9 *Financial instruments* is expected to have a major impact on the financial statements of financial institutions, mainly because it will determine a material increase in the impairment losses, with effects on the performance, and require major changes in IT systems. ESMA will coordinate its action with the prudential supervisors of financial institutions (EBA and ECB).
 - ii. IFRS 15 *Revenue from Contracts with Customers* is expected to have an impact on all companies because it refers to the recognition, measurement and disclosure of the turnover of companies, a key metrics for analysts and investors.
40. To further enhance the effectiveness of the supervisory process, the following activities will also be conducted:
- a. A thematic study on the implementation of IFRS 10, IFRS 11 or IFRS 13 which is meant to contribute to the post implementation review conducted by the standard setter after 3 years of use of the standards. This priority will be revised in the course of the year and only one topic selected based on the updated workplan of the IASB.
 - b. A supervisory briefing on the measures included in the Guidelines on Alternative Performance measures to answer questions raised by enforcers on the implementation of the Guidelines, especially as they apply to financial information published under 3 different acts (Transparency Directive, Prospectus Directive and Market Abuse Regulation);
 - c. Pursue ongoing work on the preparation of a supervisory briefing on the supervision of disclosures in the financial statements, in order to enhance financial reporting, make it more relevant, and where possible accompany it with elements for reducing the overload;
 - d. A training session on the application and enforcement techniques on IFRS, in which participants will be presented with the latest updates on the IFRS and practical issues that might arise during the enforcement process. An IFRS Interpretations Committee member will be invited to attend the training session.
41. In 2016 we will begin a peer review on some of the guidelines for enforcers of financial information (GLEFI) in order to assess compliance by NCAs with the guidelines, identify good practices and potential areas for improvement. The likely focus of the review will be Guideline 2 (ensuring the effectiveness of the enforcement of financial information),



Guideline 5 (risk-based approach and sampling) and possibly Guideline 6 (examination procedures). The review is likely to continue into 2017.

5.3 Investment Management

42. The main focus of work in 2016 is to support the sound, efficient and consistent application of the AIFMD. When AIFMD was first applied in 2013, many of the entities it covered had previously been unregulated. As a result, it has taken some time to build experience of practical supervision, including in cross-border situations, and as experience has grown, new questions on the practical application of the legislation have continued to emerge. There are also important provisions which have not yet taken effect, in relation to the passporting of non-EU AIFMs and AIFs.

43. Priority activities in this area will therefore include:

- a. Regular updates of the AIFMD Q&A to answer questions from external stakeholders and NCAs on such issues as reporting, depositaries and scope;
- b. Improvement of the availability and quality of data on AIFMs and AIFs and starting to use analytical reports to identify and assess potential issues;
- c. Follow-up to the consultation on asset segregation under AIFMD;
- d. Development of a common procedure for the operation of the powers to impose leverage limits on an AIFM or group of AIFMs envisaged under Article 25;
- e. Development of cooperation procedures in the context of the AIFMD non-EU passport (Article 37) allowing for smooth cooperation between the NCAs and ESMA. This work can be considered as a follow-up to the advice delivered in July on the extension of the AIFMD passport to non-EU jurisdictions to the European Commission;¹
- f. Information gathering and sharing of experiences on supervisory actions in relation to liquidity management tools;

44. In addition, work will continue to support the consistent application of the UCITS framework, with activities in this area including the finalisation of guidelines concerning the application of the remuneration principles set out under Article 14b of the UCITS Directive in Q1 2016. Consideration will also be given to issues relating to the development of common approaches to the rules on eligible assets in the UCITS Directive.

45. Some work is envisaged which will support both these areas of focus, in particular:

- a. A thematic study on the operation of home and host responsibilities under AIFMD and UCITS with a view to clarifying the respective responsibilities of the NCAs and promoting the smooth operation of the EU passports for marketing and management; this is a high priority in view of the significance for the delivery of a fully functioning and efficient Capital Markets Union;

¹ The precise timing of this work is linked to the decisions to be taken by the Commission, Council and Parliament further to the advice submitted by ESMA in July. For example, if it were to become clear that the passport would not be introduced before 2017 at the earliest, this work would be rescheduled accordingly.

- b. In 2015 we have been analysing the phenomenon known as ‘closet indexing’ which would occur where funds are being distributed as being actively managed in accordance with the terms of their legal and marketing documents while they are instead tracking indices. This is misleading for the investors on the investment product they are buying and it prevents them to make an informed decision, based among other on the appreciation of the level of fees charged by such funds, in line with the investment strategy implemented. ESMA will continue to facilitate co-ordinated action by NCAs in relation to this issue in 2016, with the aim of achieving consistent outcomes for investors.
46. We plan to have a common supervisory priority in 2017 on the identification and tracking of delegation arrangements under AIFMD. It is possible that some preparatory work for this will be required at the end of 2016.

5.4 Investor Protection and Intermediaries

47. Two main areas of focus are envisaged in 2016 and consideration will be given to a key initiative set out in the European Commission’s Capital Markets Union Action Plan.
48. The first area of focus is to support preparation for the sound, efficient and consistent implementation and supervision of MiFID2/MiFIR in which significant changes are envisaged relative to MiFID 1. Particular areas of focus will therefore include the application and supervision or supervisory use of rules on product governance; new requirements for recording of telephone conversations/electronic communication; independent advice and product intervention powers. In addition, we expect to cover existing key requirements where changes have been made, such as best execution, suitability and appropriateness, safeguarding of client assets; improved disclosure of costs and charges to investors and inducements and where the market context has changed, for example in relation to the application of information requirements to new media or distribution channels or to financial instruments presenting new features. The high priority activities in 2016 in this area will be:
- a. Continuation of work begun in 2015 to finalise mandatory guidelines on the management body of investment firms;
 - b. Preparation of Q&A through a dedicated working group on questions raised by NCAs and market participants on a range of the topics identified in this paragraph; These Q&A may evolve, for some topics, into guidelines;
 - c. “Application workshops” to promote, in particular, the sharing of experience in relation to the practical application of these areas, including for example the use of telephone records in day to day supervision and the analysis of the complexity of specific types of financial instruments; specific workshops will be held to consider supervisory practices in relation to firms passporting services from another Member State without a branch including the home state supervision of passported services and the notification to host MS NCAs; The output of the application workshops will depend on the nature of the issues identified, but may include, for example, updated or new supervisory briefings to disseminate good practices on specific areas;

- d. Training workshops will also be developed for NCAs on key aspects of the MiFID 2 regime, with the precise focus to be determined in the light of the application workshops.
49. Given that reporting by firms to NCAs underpins the supervision of MiFID organisational requirements and conduct of business rules, we will facilitate an exchange of practices with a view to sharing experiences and potentially identifying common minimum practices.
 50. In addition, follow-up work will also be undertaken on the recent peer reviews on best execution and on the supervision of information and marketing materials, when possible², as well as on the review of supervision of suitability requirements which is due to conclude early in 2016. This follow-up is likely to be integrated into considerations of how to apply and supervise effectively the related requirements in MiFID 2.
 51. The other area of focus for 2016 is to follow up on work undertaken in 2015 on the marketing and sale of financial contracts for difference and similar products such as binary options and spread bets. This is an area in which many NCAs have concerns and where there is a considerable degree of cross-border activity in several Member States. The output of this work might include supervisory briefings, reply to questions of application of relevant requirements, case studies, possible joint action by NCAs in relation to specific cases, or other tools to disseminate good practices in dealing with these products and the firms offering them.
 52. The following tasks are planned for 2017. However, if an opportunity arose once other priorities were resourced, we may attempt to prepare the work in 2016.
 - a. Reviewing existing set of guidelines and Q&A prepared under MiFID 1 to assess compatibility with MiFID 2, probably beginning with the guidelines on suitability.
 - b. Workshops to explore the approaches used across Member States in relation to a range of areas which are already in operation under MiFID 1 which will be of continuing importance under MiFID 2 and where there would be benefit in a co-ordinated approach across the Union. These include the operation of passporting, both where there are branches and where there are not, considering the home state supervision of passported services, the notification of host states and the use of precautionary measures by host states; this may also inform other work to improve the completeness, accuracy and usability of data available through ESMA registers related to MiFID. Supervisory convergence work on investor protection issues with cross-sectoral significance such as automated advice and complaint-handling guidelines will be carried out through the Joint Committee, in accordance with the Committee's 2016 work plan.
 53. The delivery of the activities described above will also have to take into account the need to find capacity to respond to market developments and, for example, to advise on the use of the MiFIR product intervention powers or prepare investor warnings should the need emerge.

² See paragraph 82.

5.5 Market integrity

54. Two areas of focus are envisaged in 2016 in relation to market integrity.

55. The first and highest priority area of focus is preparing for the effective implementation, supervision and enforcement of market abuse, given the entry into application of the Market Abuse Regulation and new Market Abuse Directive from July 2016, and related provisions in MiFIR from January 2017. The new legislation enlarges the financial instruments covered (including, for example, emission allowances and, in certain circumstances, spot commodity contracts) and contains various specific new provisions, for example on whistleblowing and market soundings. Both the existing and new legislation allows for certain practices to be deemed ‘accepted market practices’; however, existing ‘accepted market practices’ cannot automatically be carried forward into the new regime. If the latter are to be maintained, these will need to be notified and ESMA opinions prepared in H2 2016. The same holds true for any new “accepted market practice.”

56. Work in this area will include the following activities:

- a. Preparing mandatory guidelines on certain aspects of market soundings [MAR Article 11(11)]; delay in disclosure of inside information [MAR Article 17(11)]; information to be disclosed in relation to commodity derivatives or spot markets [MAR Article 7(5)];
- b. Using part of each meeting of the relevant committees as “application workshops” to identify issues, and to monitor and resolve issues already identified. Depending on the outcome of the “application workshops”, supervisory briefings or other guidance materials may then be prepared in late 2016 or early 2017;
- c. Preparing Q&A in response to questions raised by NCAs and market participants;
- d. Preparing one or two ‘in depth’ workshops on particular issues for NCA staff directly involved in the supervision of market abuse; one or both of these may be deferred until early 2017 if work on other activities suggests this would be beneficial;
- e. Reviewing the existing CESR guidance on the application of the current MAD to whether it is still appropriate in the light of the new regime; this work will continue into 2017 and the start may be deferred until 2017 depending on progress with other activities;
- f. Preparing ESMA opinions on the continuation of the existing ‘accepted market practices’ and potential new ones;

57. Another high priority aspect of this work is to build the supporting IT infrastructure and ensure the appropriate data quality to underpin the use of transaction reporting data for effective market surveillance. Activities in this area will include:

- a. Continued work on building and testing IT infrastructure delegated to ESMA by NCAs to support the efficient and effective access to the necessary data for surveillance and investigation of potentially abusive behaviour. This will include extension of the existing TREM system to accommodate the enlarged scope

envisaged under MiFIR, and the development of the Financial Instrument Reference Data System (FIRDS) to enable the automation of data collection, aggregation and key calculations needed to implement MiFIR and enable effective market surveillance. In 2016 work will focus on finalising the detailed specification of business requirements, on testing the systems prior to launch, and on providing training on technical aspects of the systems

- b. In addition, guidelines will be developed to promote consistent application of MiFIR Articles 24-27 and hence consistent and high quality reporting by firms
- c. Finally, continued improvement of data quality under the EMIR transaction reporting regime is a common effort for NCAs and ESMA, given their respective responsibilities for reporting counterparties and the Trade Repositories. The efforts started in 2015 in this regard will continue into 2016 and cover consistency of data reported across different Regulations e.g. EMIR, MiFID/MiFIR and SFTR.

58. The second area is the ongoing application of a range of existing tools to facilitate co-ordinated and consistent action in relation to ongoing market abuse issues and in relation to short selling.

59. Work in this area will include the following activities:

- a. Systematic tour de table in MISC to get an overview of investigations carried out by national competent authorities, and enforcement actions taken, discuss cooperation issues and guide NCAs through in terms of practical supervision;
- b. Using the “call for views” procedure to seek input on live cases;
- c. Using the “urgent issue group” procedure, if need be, to manage cross-border investigations or parallel investigations on matters of common interest;
- d. Conducting an annual survey on Suspicious Transaction Reporting in order to ensure mutual information of NCAs and discuss how the quality of the reporting can be improved;
- e. Adding to/updating Q&As on aspects of the Short Selling Regulation as needed, and subject to availability of resources given the high priority attached to the preparation of guidelines and Q&As relating to MAR/MAD in 2016;
- f. Coordination of short term bans on short selling under Article 23 and of national emergency measures under Article 27, where an ESMA opinion is required, and setting up possible remedial action through settlement of disagreement (conciliation and binding mediation);
- g. If an appropriate situation arose, using ESMA’s own powers to restrict short selling, if the conditions set out in Article 28 were met.
- h. Follow up in relation to the peer review on compliance with SSR as regards market making exemption with possible feed into the recast of the SSR.

60. Many of these activities are ‘demand led’ so the level of activity will depend in large part on the extent to which they are initiated by NCAs.

5.6 Post-trading

61. Three main areas of focus are envisaged for 2016.

62. The first and highest priority area of focus is continued focus on promoting the sound, efficient and consistent supervision of CCPs. This will be particularly important considering the systemic importance of these market infrastructures that will grow even further following the upcoming entry into force of the clearing obligation for certain classes of derivative. It is therefore key to ensure that CCPs are resilient and that commercial incentives do not lead CCPs to compete on risk grounds. In this it will be important to ensure that appropriate standards are met both by CCPs within the EU and those in third countries which have been and will in future be recognised to provide clearing services within the Union.

63. Actions in this area will include:

- a. Co-ordinating between competent authorities and across colleges in order to facilitate the consistent and correct application of EMIR through its participation in colleges; such participation enables ESMA to identify common issues and express recommendations in order to contribute to the development of a common supervisory culture and approach as well as promoting common application of the standards;
- b. Continuing to provide interpretative aids through Q&As, policies, procedures, guidelines and recommendations and to raise awareness on good practices identified in relation to the common issues identified in CCP colleges;
- c. Carrying out an annual peer review, as required by EMIR Article 21(6)(a), consisting of a detailed assessment of how effectively all NCAs supervising at least one CCP supervise specified CCP requirements;
- d. Initiating and coordinating an annual Union-wide stress test exercise for CCPs' based on defined stress scenarios, which in 2016 may extend beyond credit risk to other risks to which CCPs are exposed. ESMA will assess the resilience of each CCP and the impact on its clearing members, taking into account the interconnectedness between CCPs due to the participation of clearing members across CCPs. The exercise might result in the publication of recommendations to CCPs or NCAs in order to further strengthen supervisory convergence. Implementation of such recommendations will be followed through colleges
- e. Validating changes to CCP risk models changes to promote harmonised application of EMIR across CCPs in relation to risk management;
- f. Providing training to NCAs on the role and functioning of CCPs including experience from the stress tests.

64. The second area of focus is on ensuring the sound and consistent application of other EMIR requirements and improving the quality of the data reported to and maintained by trade repositories. This includes the clearing obligation and related exemptions, and the obligations to report derivative transactions to trade repositories and the upcoming obligation to exchange bilateral margins, for which supervisory convergence will need to be ensured across the three ESAs. Activities in this area will include:

- a. Further developing the EMIR Q&As document, taking into account, among other things, the revised reporting standards;
 - b. Defining and implementing common supervisory actions by NCAs and ESMA to improve data quality, e.g. targeted checks on rejections and reconciliation rates;
 - c. Monitoring compliance with the clearing obligation by class of counterparties;
 - d. Continuing monitoring the activity of non-financial counterparties and its systemic relevance;
 - e. Agreeing common procedures and criteria to manage notifications for intragroup exemptions;
 - f. Issuing opinions in consultation with EIOPA on pension schemes exemptions;
 - g. Delivering an annual report to the European Parliament, the Council and the Commission on the penalties imposed by competent authorities, including supervisory measures, fines and periodic penalties.
65. The third area of focus is on the consistent application of CSDR and sound, efficient and consistent supervision of CSDs. In 2016, the work will focus on CSD requirements and cooperation between authorities because the technical standards on CSD requirements will be the first ones to apply and, together with the technical standards on CSD prudential requirements developed by the EBA, trigger the process of authorisation of CSDs under CSDR. Clarifications will also be provided on settlement discipline measures, and internalised settlement reporting, given the starting of the adaptation phase by the industry to these requirements. However, it is expected that the bulk of the supervisory convergence work on settlement discipline and internalised settlement reporting will take place in 2017 and 2018, considering that, based on ESMA's proposed draft technical standards, the obligations would start applying as of 2018.
66. Activities in this area will include:
- a. Issuing mandatory and voluntary guidelines already envisaged under the CSDR covering:
 - standardised procedures and messaging protocols³ (Article 6);
 - consistent, efficient and effective supervisory practices within the Union in relation to the settlement discipline measures under CSDR⁴ (Article 8);
 - efficient and effective supervisory practices within the Union, including cooperation between competent authorities and relevant authorities in the different assessments necessary for the application of the CSDR (Article 14);
 - consistent application of participant default rules and procedures (Article 41);
 - b. Issuing guidelines on other identified areas such as:

³ To be finalised potentially in 2017, depending on the date of application of the technical standards on settlement discipline

⁴ To be finalised potentially in 2017, depending on the date of application of the technical standards on settlement discipline

- the risks to be taken into account by a CCP or a trading venue when carrying out a comprehensive risk assessment following a CSD's request for access to the transaction feed of the CCP or of the trading venue;
 - the process for the collection and calculation of the indicators for determining the substantial importance of a CSD for a host Member State;
 - the reporting architecture and exchange of information between ESMA and other competent authorities regarding internalised settlement;
- c. Contributing to any guidelines that may be issued by EBA in order to ensure consistent, efficient and effective supervision of credit institutions and CSDs authorised to provide banking-type ancillary services (CSDR Article 60);
- d. Developing procedures, policies, Q&As and opinions;
- e. Training on the different requirements in the RTS especially in relation to CSD authorisation and settlement discipline;
- f. Depending on the actual date of application of the various requirements under CSDR and related technical standards, delivering annual reports to the Commission providing assessments of trends, potential risks and vulnerabilities, and, where necessary, recommendations of preventative or remedial action in the markets for services covered by the CSDR5 (see Article 74 of CSDR).

67. In addition, ESMA will continue to co-ordinate the competent authorities for supervision of CSDs participating in TARGET2-Securities (T2S), and to coordinate the exchange of information between authorities under the Settlement Finality Directive (SFD) and action that may need to be taken where notifications are received regarding the opening of insolvency proceedings under the SFD which have cross-border implications

5.7 Secondary markets

68. The focus in 2016 will be on preparing for the sound, efficient and consistent implementation and supervision of MiFIR/MiFID 2. Within the many points to be addressed, two big challenges can be identified.

69. The first challenge is to give effect to the new 'market microstructure' envisaged under MiFIR/MiFID 2. MiFIR/MiFID 2 will bring changes to the available categories of execution venue and NCAs will need to determine which category different operating models fall within. Other changes mean that more transactions will need to be carried out on organised trading venues for certain financial instruments, particularly those classes of derivatives declared subject to the obligation under EMIR to be centrally cleared, where they are sufficiently liquid. New disciplines have been imposed on the existing pre-trade transparency requirements for equities and the cases in which those requirements can be waived. Pre-trade transparency requirements, along with the possibility for waivers, have also been imposed on non-equity instruments for the first time. Provisions on trading controls have been reinforced.

⁵ Most probably, the first reports will be delivered in 2017.



70. The second challenge is the coherent implementation of the system of position limits and reporting on positions for commodity derivatives. Position limits will be new for many NCAs as well as market participants in relation to most of the thousands of instruments within scope.
71. Our priority for 2016 will be to put in place the necessary building blocks for the consistent implementation of MiFIR/MiFID 2 in these two areas from its entry into application, and to prepare for the supervisory action ESMA and NCAs will need to take in the early days of the regime 'going live'. We anticipate that, as with MiFID 1, further challenges will arise later as market participants adapt to the new regime.
72. Work in this area will include the following activities to implement obligations placed on ESMA by the legislation:
- a. Preparation of three sets of mandatory guidelines before the entry into application of MiFIR/MiFID 2, on the management bodies of trading venues [MiFID Article 45(9)] and of data reporting services providers [Article 63(2)] and on the calibration of trading halts [Article 48(13)];
 - b. Designing procedures for and preparing the opinions which ESMA is required to produce on waivers for pre-trade transparency both for new waivers relating to equity instruments, and for waivers from the new pre-trade transparency requirements for non-equity instruments that are introduced by MiFIR, and for the temporary suspension of transparency requirements where liquidity of a non-equity instrument falls below a threshold;
 - c. Putting in place the necessary arrangements for ESMA to publish data on the volume and percentage of trading in equity instruments that takes place under the reference price waiver and, for liquid instruments, the negotiated trade waiver from the pre-trade transparency requirements, in order to allow for monitoring of whether the 'double volume cap' provided in Article 5 MiFIR, under which the operation of those waivers would be suspended, is triggered;
 - d. Designing procedures for and preparing an opinion on whether the position limits set by each NCA comply with the RTS methodology within two months;
 - e. Designing procedures for and preparing an on opinion within 24 hours, where an NCA decides to set more restrictive limits than those implied by the RTS methodology;
 - f. Designing procedures for and preparing for cases where ESMA may need to restrict a person's position in or exposure to a particular commodity derivative;
 - g. Designing and preparing for implementation of ESMA's responsibility to monitor various market developments and NCA activities;⁶
73. In addition, we will prepare Q&A and facilitate discussions between NCAs on key topics so as to promote convergent implementation and supervision of their own responsibilities,

⁶ These include: the sizes at which SI quotes are made available and how the quotes relate to market conditions for similar size trades on trading venues; classes of derivatives not yet subject to the trading obligations to identify potential systemic risk and regulatory arbitrage; the way NCAs have implemented position limits (at least annually); developments in third countries in relation to obligations to trade on organised venues and centrally clear derivatives; arrangements for deferred trade-publication.



and will provide additional support and training to NCAs as far as resources allow on key elements of the MiFID 2/MiFIR regime, in particular:

- a. Training courses for NCA staff on key elements of the MiFIDII/MiFIR regime
 - i. The new 'market microstructure' and the implications for NCAs;
 - ii. Trading controls and their supervision;
- b. 'Application workshops' for NCAs and the formation of a supervisory network to assist, in particular with:
 - i. classifying trading venues according to the MiFID 2/MiFIR categories, in particular to facilitate consistent decisions in relation to what constitutes an OTF or SI;
 - ii. preparing for effective supervision of commodity derivatives markets, including the setting of appropriate position limits, the preparation of position reporting and potential use of NCA powers to require market participants to reduce positions/exposures.

74. Until the entry into application of MiFIR/MiFID 2, ESMA will also continue to prepare ESMA Opinions on proposed waivers from the MiFID 1 pre-trade transparency requirements in relation to equity instruments and publication of descriptions of functionalities that have been considered and whether they are considered compliant or non-compliant with MiFID.

5.8 IT infrastructure to support convergence

75. Another significant piece of work in 2016 will be to continue the development of supporting IT infrastructure which has been delegated to ESMA with the MiFIR/MiFID II projects and MAR projects in order to support the development and the implementation of new regulatory and supervisory standards in the Markets area.

76. As regards secondary markets activities, the development of these IT infrastructures will e.g. enable ESMA to publish data on the volume and percentage of trading in equity instruments that takes place under the reference price waiver and, for liquid instruments, the negotiated trade waiver from the pre-trade transparency requirements, in order to allow for monitoring of whether the 'double volume cap' provided in Article 5 MiFIR, under which the operation of those waivers would be suspended, is triggered. ESMA will also prepare for implementation of ESMA's responsibility to compile and publish a range of information on its website;⁷

77. The effective and consistent implementation of MiFID 2 will also be supported by the work ESMA is undertaking in relation to improving data quality and the supporting IT infrastructure described more fully in the market integrity section above. The objective will

⁷ These include weekly commodity derivative position reports, lists of the competent NCAs, of regulated markets, MTFs, OTFs, SIs and data reporting service providers; the database summarising the position limits and position management controls in place in the EU; of the class to which equity instruments belong for the purpose of determining Standard Market Size; financial instrument reference data; a register of derivatives subject to the trading obligation; information on cases where a CCP denies access to a trading venue or vice versa on the grounds of interoperability arrangements; notifications of transitional periods granted in relation to access to CCPs or trading venues;



be to ensure the appropriate data quality to underpin the use of transaction reporting data for effective market surveillance.

5.9 Cross-cutting activities

78. Some topics cut across a range of areas, and some important activities cannot be fully allocated in advance to particular areas. These include two higher priority areas for 2016:

- a. In 2015 ESMA prepared supervisory briefings and operational procedures for the operation of the product intervention powers which are due to be available to NCAs and ESMA under MiFIR Articles 40-43 from January 2017. The powers could potentially be used in a wide range of contexts, to address investor protection, market integrity and financial stability issues within the scope of MiFIR. In 2016 the focus will be on sharing experience on market monitoring techniques with a particular consideration of how to identify those issues for which use of the powers might be appropriate and ensuring arrangements are in place in practice to use the powers, where appropriate to do so.
- b. ESMA carries out monitoring and assessment of financial innovations which can, among other things, lead to supervisory convergence work. That programme will continue and develop in 2016. Dedicated work will continue on investment-based crowdfunding, through the Crowdfunding Supervisory Forum established in 2015. A review will be carried out by mid-2016 of the impact of the forum and whether its temporary mandate should be extended. There is also likely to be a supervisory convergence component to work on distributed ledger technology which will continue in 2016, drawing on the call for evidence held in 2015.

79. In addition, ESMA will look for opportunities which are not resource-intensive to increase knowledge-sharing in relation to overall supervisory models and approaches and in that context will explore the feasibility of facilitating targeted technical assistance where this is possible within existing ESMA and NCA resources and seems likely to be more proportionate than other tools. A possible first step may involve exchanging experience in relation to designing and using risk identification and prioritisation tools and on the measurement of operational risks, including cybersecurity if resources are available.

80. ESMA will continue to use targeted peer reviews to assess NCAs' supervisory practices and compliance with technical standards and with guidelines. The current and known future topics for peer reviews are included in the relevant sections above. Our priority for the first half of 2016 will be to conclude the peer reviews currently underway on suitability and on the approval of prospectuses. In order to ensure that sufficient resource is devoted to embedding the other aspects of the supervisory convergence strategy and to ensure that peer reviews are appropriately targeted and co-ordinated with the rest of the work programme, ESMA will begin its next round of peer reviews once the current round has concluded with the first topic being key aspects of the enforcement guidelines on financial information in the corporate reporting area.

81. Work will also be undertaken in 2016 on how best to link in peer reviews to the other aspects of the supervisory convergence strategy in future years. This will involve considering:
- a. how topics are identified and evaluated before decisions are taken on the focus of peer reviews;
 - b. how to accommodate and carry out the various mandatory peer reviews written into various pieces of legislation (EMIR, AIFMD, CSDR), of which the EMIR requirement in relation to CCPs is already in force and others will be activated in the coming years; it may not be feasible or desirable to apply the full methodology used for other peer reviews in such cases but if not an appropriate alternative needs to be identified;
 - c. whether there are benefits in carrying out targeted country-specific peer reviews and, if so, how to scope, deliver and prioritise such reviews appropriately.
82. Subject to the outcome of this work and the availability of resource relative to other priorities, a second peer review may be initiated later in 2016, possibly on one area of the compliance function guidelines with an eye to covering the authorisation or cross border dimension. Additionally, depending on time and resource available, ESMA may initiate follow-up work on non-compliance identified in the earlier peer review in relation to the supervision of fair, clear and not misleading information under MiFID and the peer review in relation to best execution.

6 Conclusion

83. The Supervisory Convergence Work Program for 2016 set above aims at launching the implementation of our 2016-2020 Strategic Orientation. It reflects the shift of our work towards more activities in the field of supervisory convergence.
84. Supervisory convergence work is extremely important to ensure the common implementation and application of the rules by national competent authorities throughout the Union and therefore supports the building of a Capital Markets Union.
85. A lot has to be done in 2016. This first Supervisory Convergence Work Program lists a high number of activities in the different areas of responsibilities of ESMA. Those activities support the four key priorities identified for the upcoming year:
- a. Preparing for a sound, efficient and consistent implementation MiFID2/MiFIR,
 - b. Finalising the IT infrastructure required by the new regulations
 - c. Enhancing the supervision of OTC derivatives markets and of EU CCPs in particular;
 - d. Supporting the capital markets Union initiative.
86. Despite a clear effort to prioritize the work ahead, this remains an ambitious plan. Other important topics for supervisory convergence were left out for 2016. This is the case for example of working towards more consistent enforcement approaches and sanctions:



such areas will be given due consideration when preparing the next supervisory convergence work programme that will cover 2017-2018.