



European Securities and
Markets Authority

Consultation Paper

Guidelines on standardised procedures and messaging protocols used between investment firms and their professional clients under Article 6(2) of CSDR



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **20 February 2019**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

The collection of confidential responses is without prejudice to the scope of Regulation (EC) No 1049/2001¹. Possible requests for access to documents will be dealt in compliance with the requirements and obligations laid down in Regulation (EC) No 1049/2001.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents , (OJ L 145, 31.5.2001, p. 43–48)
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Who should read this paper

All interested stakeholders are invited to respond to this consultation. In particular, this paper may be specifically of interest to investment firms and professional clients as referred to in Article 6 of Regulation (EU) No 909/2014²(CSDR).

² Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directive 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (*OJ L 257, 28.8.2014, p. 1-72*).

Table of Contents

1	Executive Summary.....	5
2	Background and mandate	6
2.1	Background	6
2.2	Mandate: Article 6(2) of CSDR.....	6
3	Proposed guidelines	7
3.1	Scope.....	7
3.2	Legislative references, abbreviations and definitions	8
3.3	Purpose	9
3.4	Compliance and reporting obligations	9
3.5	Guidelines on standardised procedures and messaging protocols	11
4	Annexes	16
4.1	Annex I – Summary of questions	16
4.2	Annex II – Examples of available allocation/confirmation processes.....	17
4.3	Annex III – Preliminary high-level cost-benefit analysis	19

1 Executive Summary

Reasons for publication

Article 6 of CSDR requires investment firms to take measures to limit the number of settlement fails, which shall at least consist of arrangements with their professional clients ensuring prompt communication of an allocation of securities to the transaction, confirmation of that allocation and confirmation of the acceptance or rejection of the terms in good time before the intended settlement date.

This requirement has been further specified in Article 2 of the Commission Delegated Regulation (EU) 2018/1229 on settlement discipline, in respect of the content of this allocation message and deadlines for sending these messages.

Article 6(2), third paragraph, of CSDR provides that ESMA shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 on the standardised procedures and messaging protocols to be used for complying with this requirement.

This consultation paper (CP) represents a first step in the development of the guidelines described above and sets out proposals on which ESMA is seeking the views of external stakeholders.

Contents

Section 2 contains information on the background and mandate, while Section 3 contains the proposed guidelines.

Annex I sets out a summary of the questions contained in this paper, Annex II contains a few illustrative workflows identified on the market for this allocation/confirmation processes and Annex III includes a high level cost-benefit analysis for the guidelines.

Next Steps

ESMA will consider the feedback it will receive to this consultation with a view to finalising the guidelines by July 2019.



2 Background and mandate

2.1 Background

Under Article 6 of CSDR, investment firms are expected to take measures to limit the number of settlement fails. Pursuant to this article, ESMA has developed regulatory technical standards to specify inter alia the details of the allocation and confirmation measures and of the procedures between investment firms and their professional clients facilitating settlement, which have been included in Article 2 of the Commission Delegated Regulation (EU) 2018/1229.

To complement this, ESMA is also expected pursuant to the same article to develop guidelines on the standardised procedures and messaging protocols to be used to comply with this requirement.

The main objectives of ESMA when drafting these guidelines will be that they contribute to (i) the early settlement of transactions on the intended settlement date; and to (ii) the reduction of the number of instructions that fail to settle on the intended settlement date. This is aimed to be achieved whilst not inflicting unnecessary costs on the CSDs and their participants.

ESMA believes that investment firms should ensure that they have all the necessary settlement details as much as possible on the business day in which the transaction takes place. In order to achieve this, if the investment firms do not already have the necessary settlement information, they should communicate with their clients in order to obtain the respective information, which should include standardised data useful for the settlement process.

2.2 Mandate: Article 6(2) of CSDR

Article 6

Measures to prevent settlement fails

2. Notwithstanding the requirement laid down in paragraph 1, investment firms authorised pursuant to Article 5 of Directive 2014/65/EU shall, where applicable, take measures to limit the number of settlement fails.

Such measures shall at least consist of arrangements between the investment firm and its professional clients as referred to in Annex II to Directive 2014/65/EU to ensure the prompt communication of an allocation of securities to the transaction, confirmation of that allocation and confirmation of the acceptance or rejection of terms in good time before the intended settlement date.

ESMA shall, in close cooperation with the members of the ESCB, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 on the standardised procedures and messaging protocols to be used for complying with the second subparagraph of this paragraph.



3 Proposed guidelines

3.1 Scope

Who?

1. These guidelines apply to competent authorities designated in accordance with Article 67 of Directive 2014/65/EU, investment firms authorised pursuant to Article 5 of Directive 2014/65/EU and professional clients as referred to in Article 4(1)(10) of MiFID II).

What?

2. These guidelines apply in relation to the standardised procedures and messaging standards comprising the arrangements set up between investment firms and their professional clients for complying with the second subparagraph of Article 6(2) of CSDR.

When?

3. These guidelines apply from the date of entry into force of the Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline [13 September 2020].



3.2 Legislative references, abbreviations and definitions

Legislative references

<i>Regulation (EU) No 909/2014</i>	Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directive 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 ³ (CSDR)
<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ⁴
<i>Directive 2014/65/EU</i>	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MIFID II)
<i>Commission Delegated Regulation (EU) 2018/1229</i>	Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline

Abbreviations

<i>CP</i>	Consultation Paper
<i>EC</i>	European Commission
<i>ESFS</i>	European System of Financial Supervision
<i>ESMA</i>	European Securities and Markets Authority
<i>EU</i>	European Union

³ OJ L 257, 28.8.2014, p. 1-72

⁴ OJ L 331, 15.12.2010, p. 84.

3.3 Purpose

4. These guidelines are based on Article 16(1) of the ESMA Regulation and Article 6(2) of Regulation (EU) No 909/2014 which provides that investment firms should set up arrangements with their professional clients that include the use of standardised procedures and messaging standards. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure the common, uniform and consistent application of the second subparagraph of Article 6(2) of Regulation (EU) No 909/2014.
5. This requirement is focused on the preparation of the settlement process: investment firms should ensure that they have all the necessary settlement details as much as possible on the business day on which the transaction takes place. In order to achieve this, investment firms that do not already have the necessary settlement information should communicate with their clients in order to obtain the respective information, which should include standardised data useful for the settlement process.
6. These guidelines therefore aim to specify the scope of this requirement and certain characteristics of the standardised procedures and messaging standards comprising the arrangements between investment firms and their professional clients.

3.4 Compliance and reporting obligations

Status of the guidelines

7. In accordance with Article 16(3) of the ESMA Regulation, competent authorities, investment firms and their professional clients must make every effort to comply with these guidelines.
8. Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

Reporting requirements

9. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
10. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.



11. Investment firms and professional clients are not required to report whether they comply with these guidelines.

3.5 Guidelines on standardised procedures and messaging protocols

V.I. Scope of the requirement set out in Article 6(2) of Regulation (EU) No 909/2014

- 12. Guideline 1: Investment firms and their professional clients should exchange the information required under Article 6 of Regulation (EU) No 909/2014 depending on their roles in each transaction.**
13. When two entities licensed as investment firms are facing each other in a transaction on financial instruments referred to in Article 5(1) of Regulation (EU) No 909/2014, the respective roles of each entity in the concerned transaction should be considered.
14. The requirement pursuant to Article 6(2) of Regulation (EU) No 909/2014 should apply only to investment firm - professional client relationships, i.e. when there is no investment firm involved in a transaction (e.g. in a transaction between parties exempted under Article 2 of Directive 2014/65/EU), such requirement should not apply.

Q1: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

- 15. Guideline 2: Investment firms and their professional clients should apply the requirements set out in Article 6(2) of Regulation (EU) No 909/2014 and Article 2 of Commission Delegated Regulation (EU) 2018/1229, in relation to transactions in financial instruments referred to in Article 5(1) of Regulation (EU) No 909/2014, that are executed on a trading venue or not, cleared by a CCP or not, and settled in an EU CSD.**
16. Article 5(1) of Regulation (EU) No 909/2014 refers to transactions in the following financial instruments:
 - a. transferable securities, as defined in point (44) of Article 4(1) of Directive 2014/65/EU,
 - b. money-market instruments, as defined in point (17) of Article 4(1) of Directive 2014/65/EU,
 - c. units in collective undertakings, as referred to in point (3) Section C of Annex I to Directive 2014/65/EU, and
 - d. emission allowances, as described in point (11) of Section C of Annex I to Directive 2014/65/EU, excluding derivatives in emission allowances.
17. There is no condition as to the law under which these financial instruments are constituted, or their place of trading or clearing.
18. There is no condition as to the jurisdiction where the parties are established, therefore, these requirements should cover transactions entered into between:

- a. An EU investment firm and an EU professional client;
- b. An EU investment firm and a non-EU professional client;
- c. A non-EU branch of an EU investment firm and an EU professional client;
- d. A non-EU branch of an EU investment firm and a non-EU professional client.

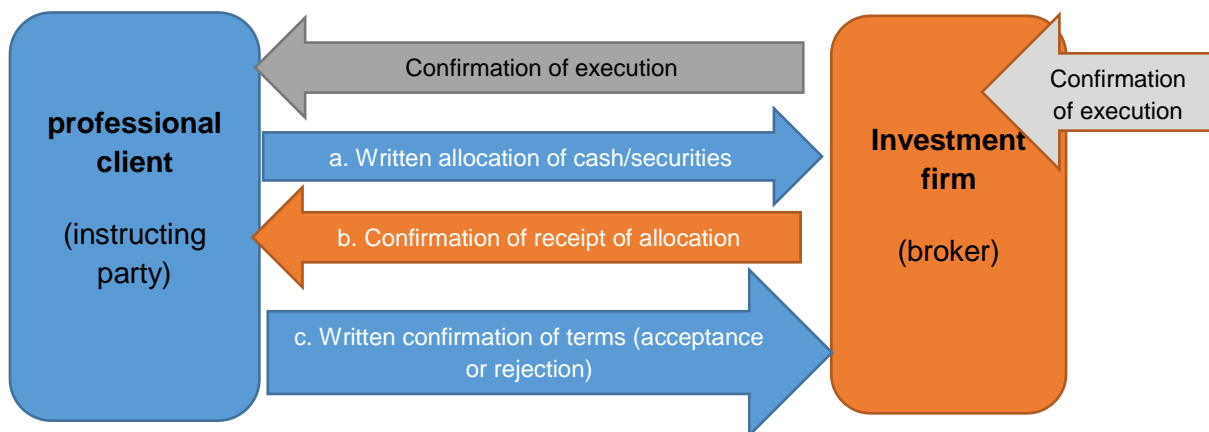
19. There is however a condition as to their place of settlement which should occur in a securities settlement system governed by the law of a Member State (Articles 2(1)(10) and 5(1) of Regulation (EU) No 909/2014), therefore, the scope of this requirement should be limited to transactions in financial instruments which the parties intend to settle in an EU CSD.

Q2: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

V.II. Standardised procedures and messaging protocols

20. **Guideline 3: The measures limiting settlement fails described in Article 6(2) of Regulation (EU) No 909/2014 and further specified in Article 2(1) of Commission Delegated Regulation (EU) 2018/1229 include three steps, but allow including the written confirmation in the written allocation: if the investment firm and its professional client agree to it contractually, the sending of the allocation by the client could imply the client’s confirmation of the terms of the transaction.**

21. Once the transaction has been executed, the workflow described in Article 6(2) of Regulation (EU) No 909/2014 follows those three steps:
- a. The professional client communicates the allocation of the relevant securities or cash to the investment firm;
 - b. The investment firm confirms to its professional client the receipt of this allocation;
 - c. The professional client confirms the acceptance or rejection of the terms of the transaction to the investment firm.



22. According to the third subparagraph of Article 2(1) of Commission Delegated Regulation (EU) 2018/1229, step (c) could be included in step (a).
23. Commission Delegated Regulation (EU) 2018/1229 does not set consequences to the late communication of, or failure to communicate, the written allocation and confirmation by the client to its investment firm. Therefore, as such, the late communication or failure by the client to communicate the written allocation in due time should not be interpreted as a rejection of the terms of the transaction.
24. This should however not prevent the parties from addressing such delay or failure contractually.

Q3: Do you agree with the workflow described here (for your information, various workflows identified on the market have been illustrated in the Annex)? Should other steps be recommended? If so, please specify.

25. **Guidelines 4: Each of the steps should be completed through either manual or automated communication channels as long as the channel used allows for written communication.**
26. This means that oral communication of allocations or confirmations would not comply with this requirement.
27. Any communication channel or platform could be used by the parties (manual or automated process) as long as the investment firm proposes to its professional clients the possibility to communicate electronically using the international open communication procedures and standards for messaging and reference data referred to in Article 35 of Regulation (EU) No 909/2014⁵.
28. Although no specific requirement stems from Regulation (EU) No 909/2014 in respect of the form of the written instrument to be used, parties are encouraged to use a durable medium⁶ *i.e.* any instrument that enables the storage of information in a way that is accessible for future reference for a period of time adequate for the purposes of the information, and allows the unchanged reproduction of the information stored.

⁵ This concept could be further specified for use between investment firms and their clients, as has been done in CSD Question 4 in [ESMA CSDR Q&A, ref. ESMA70-708036281-2](#).

⁶ Article 1(g) of [Commission Delegated Regulation \(EU\) 2017/392](#) on authorisation, supervisory and operational requirements for CSDs [in respect of records to be kept by a CSD]

Q4:

(a) Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

(b) Do you see a need to develop a template for written allocations and confirmations not sent electronically?

29. Article 2(1) of Commission Delegated Regulation (EU) 2018/1229, second subparagraph, provides that the written allocation shall include information on 12 items.

Q5: Is any clarification needed in respect of the content of certain items? If so, please indicate. For instance, should the information to be communicated under fields (f) “trade price of the financial instrument” or (i) “total amount of cash that is to be delivered or received”, or any other field be further specified?

30. Article 2(1) of Commission Delegated Regulation (EU) 2018/1229, second subparagraph, also provides that the allocation shall include all “*other information required by the investment firm for facilitating the settlement of the transaction*”.

Q6: Do you believe any additional information should be required by the investment firm for facilitating the settlement of the transaction? If so, please specify.

31. Guideline 5: The investment firm should provide its professional client with the final price of the transaction by the time the client confirms the terms of the transaction to the investment firm.

32. In order to allow the client to be fully informed before accepting or rejecting the terms of the trade, the investment firm should provide information on the final price of the transaction, *i.e.* not only the trade price of the financial instruments, but also any additional cost applying to the transaction, including any applicable fees, charges and taxes, at the latest when acknowledging receipt of its client’s allocation.

Q7: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.



33. Guideline 6: Parties may include aspects of the agreed procedure in a framework agreement governing their relationship such as the document referred to in Article 25(5) of Directive 2014/65/EU and specified in Article 58 of Commission Delegated Regulation (EU) 2017/565.

34. In particular, such aspects could include that:

- the written allocation could include the confirmation of acceptance of the terms of a transaction (pursuant to the third subparagraph of Article 2(1) of the Commission Delegated Regulation (EU) 1229/2018);
- the written allocation and written confirmation should not be sent where the investment firm receives the necessary settlement information referred to in 2(1) of the Commission Delegated Regulation (EU) 1229/2018 in advance of the timeframes referred to in 2(2) thereof (pursuant to Article 2(3) of the Commission Delegated Regulation (EU) 1229/2018).

Q8: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

4 Annexes

4.1 Annex I – Summary of questions

Q1: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

Q2: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

Q3: Do you agree with the workflow described here? Should other steps be recommended? If so, please specify.

Q4:

(a) Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

(b) Do you see a need to develop a template for written allocation and confirmations not sent electronically?

Q5: Is any clarification needed in respect of the content of certain items? If so, please indicate. For instance, should the information to be communicated under fields (f) “trade price of the financial instrument” or (i) “total amount of cash that is to be delivered or received”, or any other field be further specified?

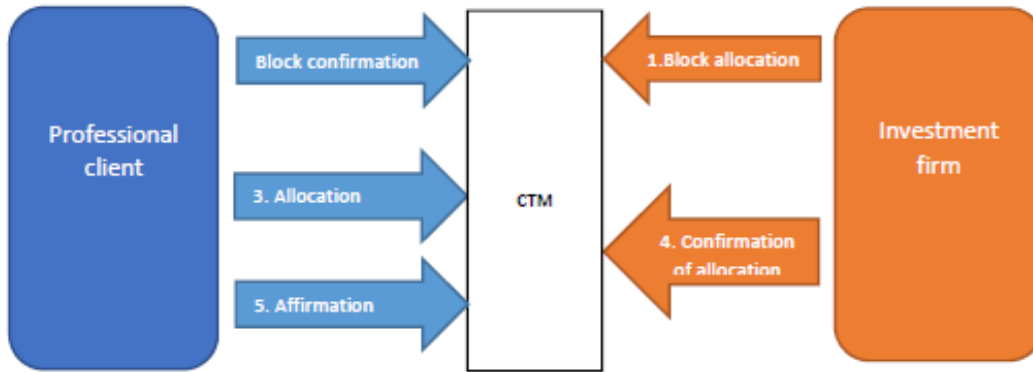
Q6: Do you believe any additional information should be required by the investment firm for facilitating the settlement of the transaction? If so, please specify.

Q7: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

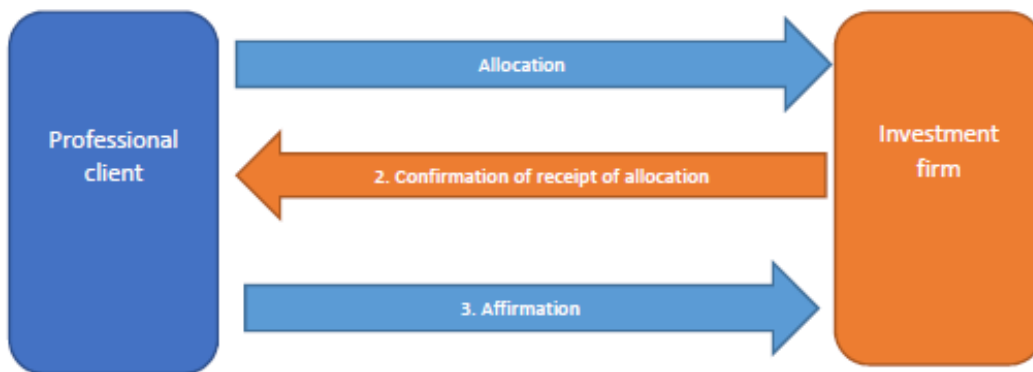
Q8: Do you have any additional comments or suggestions regarding the proposed guideline? Please provide arguments supporting your comments and suggestions.

4.2 Annex II – Examples of available allocation/confirmation processes

CTM



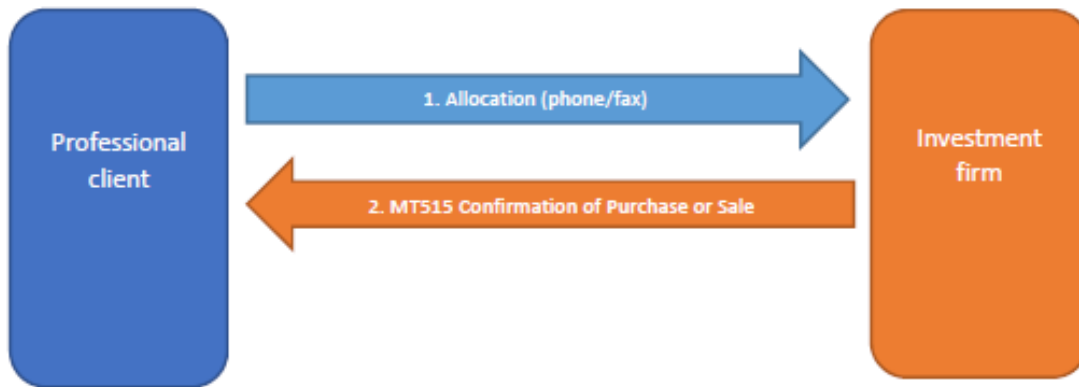
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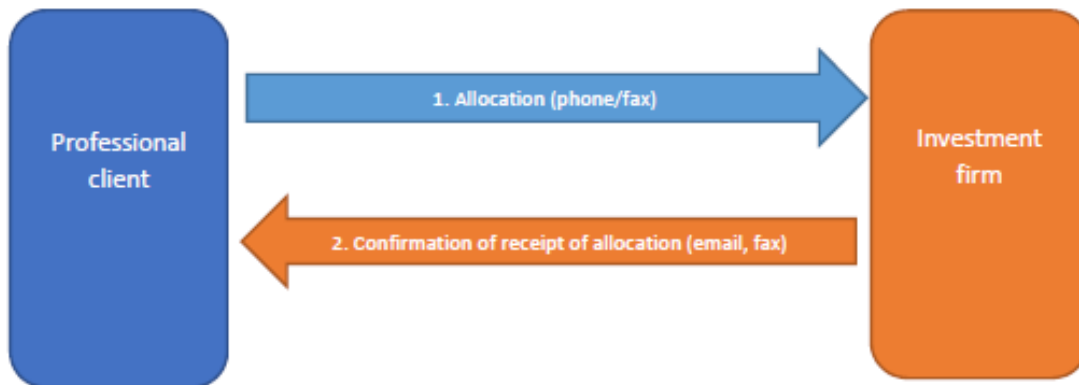
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4.3 Annex III – Preliminary high-level cost-benefit analysis

1. Article 16 of the ESMA Regulation requires ESMA, where appropriate, to analyse the potential costs and benefits relating to proposed guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the proposed guidelines.
2. The objective of performing a cost-benefit analysis is to assess the costs and benefits of the various policy or technical options which were analysed during the process of drafting the guidelines.
3. The guidelines included in this CP are of a mandatory nature, i.e. they are envisaged in CSDR in order to ensure uniform, consistent and coherent application of Union Law.
4. There are directly applicable provisions in CSDR that would not apply in a uniform, consistent and coherent way within the Union in the absence of a clarification from ESMA on the exchange of information between the competent authorities and ESMA.
5. The costs implied by these guidelines can be summarised as the cost of changing current market practices, where necessary.
6. On the basis of the analysis above, ESMA concludes that the benefits of issuing these guidelines reporting outweigh the costs.