



Centre for European Policy
Studies (CEPS)



INSEAD OEE Data Services
(IODS)



TABB Group

**Markets in Financial Instruments Directive
Markets in Financial Instruments Regulation**

**Technical Advice delivered by ESMA
to the European Commission**

Investor Protection topics

Data Gathering

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Introduction

In the context of the preparation of the technical advice on possible delegated acts concerning MiFID II and MiFIR, a data gathering exercise has been conducted to support the final advice to be delivered by ESMA to the Commission.

Because of the tight deadline for the submission of the advice to the Commission, it was only possible to gather information from stakeholders, or potential stakeholders, on the text of the draft advice included in the Consultation Paper published by ESMA on 22 May 2014. The final technical advice may differ from the one stakeholders based their answers on, as it would take into consideration comments received during the public consultation. The answers and comments provided may therefore no longer be of relevance.

To inform data gathering on the Investor Protection topics identified in the Consultation Paper, five distinct data gathering questionnaires were prepared.

A questionnaire was sent to about 300 investment firms and UCITs management companies providing investment services in the twelve Member States¹ surveyed to gather information on the obligations for investment firms proposed in the draft advice. The number of answers received varied depending on the questionnaire and the sample of respondents was not homogeneous across countries.

A second questionnaire relating to the exemption under Article 2(1)(c) of MiFID II was sent out to a large number of potential stakeholders but attracted little interest.

Finally, a third questionnaire on the topic of 'Product intervention' was sent to national competent authorities in the Member States surveyed.

The purpose of this document is to provide an analysis of the answers received. Some information on allocation of responses per country is provided where a sufficient number of responses was received from firms based in the same country. It should be noted that responding to the questionnaires was a self-assessment exercise conducted by respondents. Therefore, the accuracy of the self-assessment remain under the exclusive responsibility of the respondents.

The document has five Sections, matching the five questionnaires:

- i) Exemption from the applicability of MIFID II for persons providing an investment service in an incidental manner
- ii) Organisational requirements for investment firms
- iii) Rules, systems and procedures to ensure that investment firms comply with the principles set out in Article 24 of MiFID II, including information to clients
- iv) Best execution
- v) Product intervention

¹ Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Spain, Sweden, United Kingdom.

It should be noted that the data gathering exercise was conducted essentially based on questionnaires sent to firms and aimed at gathering information on the impact of the draft advice on firms' organisation and activities, at individual level. It therefore tends to focus more on the costs and challenges associated with the ESMA proposals and does not assess nor analyse the benefits associated with the proposals from a broader perspective. Examples of such benefits would include, without being limited to, enhanced investor protection at a time where investors are offered a more complex wide-ranging set of services and instruments, more harmonised rules across the EU to the benefit of both firms and investors and a clearer regulatory framework providing more predictability as regards supervisory decisions.

Exemption from the applicability of MIFID II for persons providing an investment service in an incidental manner - Article 2.1 (c) of MIFID II

Draft Technical Advice: Consultation Paper, Section 2.1 p 13-15

The MIFID II text for this exemption is similar to the MIFID text and sets out that “persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service” are exempted from the MIFID II provisions. No implementing measure was adopted under MIFID I to provide further clarification as to the definition of “on an incidental manner”.

In the Consultation Paper published on 22 May 2014, ESMA suggested, as draft advice, a set of conditions to be jointly fulfilled for an investment service to be considered as being provided “in an incidental manner”:

Data gathering

1.1 Questionnaire

For the purpose of data gathering, a short questionnaire was developed for the attention of persons who may potentially be operating under the exemption provided under article 2.1(c) of MIFID I and who might therefore be impacted by the definition of “in an incidental manner” propose in the draft technical advice.

The questionnaire asked whether respondents were currently providing investment services, and if so, which ones. Investment advice and portfolio management were suggested as possible answers to guide respondents but an open question invited respondents to mention any other investment services that would be relevant.

Finally, respondents were asked to qualify the impact of the definition of “on an incidental basis” provided in the draft technical advice on their business activity or business model (no impact, low impact, high impact).

1.2 Processing of the Data gathering questionnaire

As regards the determination of when an activity is provided in an incidental manner, an initial upfront identity questionnaire was sent to a large number of potential stakeholders. Those potential stakeholders included contacts provided by the European Federation of Accountants (Fédération des Experts Comptables Européens) in each of the twelve Member States surveyed² (between one and four contacts in each Member State) and contacts made bilaterally by the contractors either at professional body level (e.g. the CFA Institute) or firm levels, including law firms.

² Denmark, France, Germany, Greece, Italy, Ireland, Luxembourg, Netherlands, Poland, Spain, Sweden, United Kingdom.

This upfront identity questionnaire aimed at identifying persons willing to participate in the MIFD/MIFIR Level 2 data gathering exercise. A handful of Task 17 potential stakeholders expressed their interest in participating in the survey and ultimately, just one audit firm answered the questionnaire, saying that they did not provide investment services.

1.3 Tentative considerations

Rather than a formal conclusion, some tentative considerations might however possibly be drawn from the outcome of the data gathering on the “incidental manner” definition.

Had the proposed definition proved controversial, it is indeed very likely that the response rate from potential stakeholders would have been substantially higher. Some desk research was conducted to supplement the data gathering and see whether the proposed definition may have attracted further attention in other fora. It remained rather unsuccessful as well. Anecdotal evidence goes in the same direction. Detailed e-mails sent to two national law professional bodies to raise awareness and explain the potential impact of the proposed definition and follow-up calls attracted no reaction.

The low level of interest attracted by the “on an incidental basis” definition proposed in the technical advice tends to suggest that it is not a very controversial one and that the impact on firms providing investment services across the European Union under the MIFID I article 2.1(c) exemption across the European Union would be manageable

Organisational requirements (Article 16 of MiFID II)

Methodology

84 answers were received to the questionnaire on organisational requirements for investment firms set out in the Consultation Paper published by ESMA on 22 May 2014. Those answers came from firms based in ten out of the twelve jurisdictions³ surveyed, mainly from authorised firms based in the United Kingdom, in Germany, France and Ireland. The sample of respondents is not homogeneous across jurisdictions. For instance, German savings banks account for a large number of German respondents while investment firms providing mainly portfolio management services prevail in the answers received from France.

The purpose of this document is to provide an analysis of the answers received to the questionnaire for each item. The number of employees was the size indicator most respondents completed and is therefore the one used in the analysis of the answers per size. Indications on allocation of responses per country may be provided, where appropriate, when responses include at least 10 firms based in the same country.

Finally, it should be noted that some respondents answered the questionnaire only partially.

1. Compliance Function

Draft Technical Advice - Consultation Paper, Section 2.3, p 18-21.

Firms were first asked the extent to which they were currently compliant with the draft technical advice on the Compliance function, which substantially draws on the ESMA Guidelines 2012/388 and on certain aspects of the MIFID compliance function requirements.

One third of the respondents answered they were fully compliant with the draft technical advice and half of them that they were mostly compliant. None of the respondent deemed being not compliant.

Most of the largest firms answered they were mostly compliant, while the proportion of the smallest firms replying they were fully compliant (61%) far exceeds the proportion for all answers (35%) . The percentage of firms “fully compliant” decreases as the size of the firm increases and the percentage of firms “mostly compliant” increases with the size of the firm.

Where a sufficient number of responses⁴ was provided, the country criteria was looked at. Half of the respondents in the UK and in Ireland answered they were fully compliant and around 40% that they were mostly complaint. It is the opposite for France where 50% of the respondent said they were mostly compliant and 40% fully compliant. 65% of German respondent answered they were mostly compliant.

³ Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, United Kingdom, Spain and Sweden. No answers were received from Luxembourg and Poland.

⁴ 10 or above

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	<i>Answers</i>
35%	52%	13%	0%	100%	83

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Answers</i>
<i>0 - 50</i>	61%	28%	11%	0%	18
<i>51 - 250</i>	33%	56%	11%	0%	18
<i>251 - 1,000</i>	50%	36%	14%	0%	14
<i>1,001 - 10,000</i>	21%	63%	16%	0%	19
<i>10,000</i>	8%	83%	8%	0%	12

Firms were then asked about the area in which they would need to make one off/recurrent changes to become compliant with the draft advice. They were also asked to provide a qualitative assessment of the changes to be made.

Unsurprisingly, the area most frequently identified by respondents as requiring some one-off and recurrent changes are compliance policies and procedures (quoted by 68% of respondents) followed by monitoring. However, in both cases, respondents expected the necessary changes to be minor rather than significant. For all other areas, a majority of respondents said that no change would be needed. However, training and staffing are areas which attract a lot of attention.

Many respondents answered that other areas would be impacted but did not specify which ones. Back-offices and internal audit were mentioned.

A handful of larger firms commented that estimates of impact were based on their reading of the proposals as drafted in the consultation and on an initial but not final nor comprehensive analysis. Changes may still be needed when the finalised proposals are published. Those comments were reiterated under each item of the questionnaire.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures and policies	One off changes	33%	49%	19%	100%	70
	Recurrent changes	46%	40%	14%	100%	65
Training	One off changes	52%	37%	10%	100%	67
	Recurrent changes	66%	27%	8%	100%	64
Staffing	One off changes	57%	33%	10%	100%	67
	Recurrent changes	56%	34%	9%	100%	64
Risk management	One off changes	59%	34%	6%	100%	64
	Recurrent changes	63%	33%	3%	100%	60
Monitoring	One off changes	43%	47%	10%	100%	68
	Recurrent changes	46%	42%	12%	100%	65
IT	One off changes	62%	24%	14%	100%	66
	Recurrent changes	65%	23%	13%	100%	62
Other areas	One off changes	90%	7%	3%	100%	29
	Recurrent changes	90%	7%	3%	100%	29

2. Complaints Handling

Draft Technical Advice: Consultation Paper, Section 2.4, p 23-25

Firms were asked the extent to which they were currently compliant with the draft technical advice on Complaints handling, which substantially draws on the ESMA-EBA Guidelines on Complaints handling.

An equivalent proportion of respondents stated that they were currently fully compliant (36%) or mostly compliant (37%) with the draft technical advice. 26% of respondents answered that their firms were only partly compliant with the proposed requirements.

A majority of the smallest firms in terms of number of employees (53%) answered they were fully compliant, while a majority of the largest ones (58%) said they were mostly compliant, in line with the responses provided on Compliance function. The responses provided from firms with 1,001-10,000 employees come somewhat as a contrast to the smallest and largest firms with 47% of them stating they were “Partly compliant”.

As per country, the vast majority (80%) of respondents based in from France stated they were currently fully compliant. It was noted that the French Autorité des Marchés Financiers (AMF) has already implemented the contemplated provisions for retail clients and stressed that it would not be suitable to extend them to professional clients and eligible counterparties. This may suggest that some French firms considered they were compliant with the draft advice when complying with the AMF regulation. In the UK and in Ireland, answers were evenly split between fully compliant and mostly complaint (41% each for the UK, 45% each for Ireland). A majority of respondents scored “Partly compliant”.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

Fully	Mostly	Partly	Not compliant	Total	Answers
36%	37%	26%	1%	100%	78

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
0 - 50	53%	40%	7%	0%	15
51 - 250	33%	39%	22%	6%	18
251 - 1,000	46%	23%	31%	0%	13
1,001 - 10,000	21%	32%	47%	0%	19
10,000	33%	58%	8%	0%	12

Firms were then asked about the area in which they would need to make one-off/recurrent process changes to become compliant with the draft advice and to provide a qualitative assessment of the changes to be made.

The areas most frequently identified by respondents as requiring one-off changes are compliance policies and procedure (quoted by 72% of respondents) and training (62% of respondents). However, again, in both cases, they expected the necessary changes to be minor (50%) rather than significant. Risk management and monitoring are next on the list of areas where one-off minor changes would be needed.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		<i>No change</i>	<i>Minor changes</i>	<i>Significant changes</i>	<i>Total</i>	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	28%	50%	22%	100%	68
	<i>Recurrent changes</i>	54%	33%	13%	100%	63
<i>Training</i>	<i>One off changes</i>	38%	50%	12%	100%	66
	<i>Recurrent changes</i>	66%	27%	6%	100%	62
<i>Staffing</i>	<i>One off changes</i>	67%	21%	12%	100%	66
	<i>Recurrent changes</i>	73%	19%	8%	100%	62
<i>Risk management</i>	<i>One off changes</i>	63%	32%	5%	100%	60
	<i>Recurrent changes</i>	72%	25%	3%	100%	60
<i>Monitoring</i>	<i>One off changes</i>	53%	34%	13%	100%	68
	<i>Recurrent changes</i>	58%	33%	9%	100%	64
<i>IT</i>	<i>One off changes</i>	65%	23%	12%	100%	65
	<i>Recurrent changes</i>	67%	25%	8%	100%	61
<i>Other areas</i>	<i>One off changes</i>	88%	4%	8%	100%	25
	<i>Recurrent changes</i>	88%	4%	8%	100%	26

3. Conflicts of Interest

Draft Technical Advice: Consultation Paper, Section 2.9, p 70-74

Stakeholders were asked to what extent they currently complied with ESMA's draft advice, which proposes to amend the MIFID Implementing Directive on conflicts of interests by introducing new provisions dealing with the disclosure of conflicts of interest and with the assessment and periodic review of the conflict of interest policy.

Although the percentage of "fully compliant" answers (20%) was lower than for the two previous items, the combination of the "fully" and "mostly compliant" answers reaches the highest score (91%). That combined percentage is however significantly lower (64%) for the largest firms in terms of the number of employees.

In the additional comments provided, the current law obligations in the UK to usually obtain client's informed consent to a given conflict of interest was mentioned. It was stressed that such requirement should not be viewed as the firm having inappropriately used client disclosure for the purpose of its regulatory obligations derived from MiFID II.

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
20%	71%	9%	0%	100%	80

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	24%	76%	0%	0%	17
<i>51 - 250</i>	29%	65%	6%	0%	17
<i>251 - 1,000</i>	15%	85%	0%	0%	13
<i>1,001 - 10,000</i>	21%	68%	11%	0%	19
<i>10,000</i>	8%	58%	33%	0%	12

Consistent with the fact that 91% of the respondents assessed they were fully or mostly compliant with the draft advice, the changes in processes needed to comply with the proposal are qualified as minor by a majority of respondents. Compliance procedure/ policies is the only area in which slightly more than 10% of the respondents expected significant changes to be necessary. A majority of respondent quoted compliance procedures/policies and training as area where minor changes would be needed.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	19%	68%	13%	100%	68
	<i>Recurrent changes</i>	38%	56%	6%	100%	63
<i>Training</i>	<i>One off changes</i>	37%	62%	2%	100%	63
	<i>Recurrent changes</i>	58%	42%	0%	100%	59
<i>Staffing</i>	<i>One off changes</i>	79%	21%	0%	100%	58
	<i>Recurrent changes</i>	75%	25%	0%	100%	57
<i>Risk management</i>	<i>One off changes</i>	56%	39%	5%	100%	57
	<i>Recurrent changes</i>	64%	34%	2%	100%	56
<i>Monitoring</i>	<i>One off changes</i>	52%	45%	3%	100%	62
	<i>Recurrent changes</i>	53%	42%	5%	100%	59
<i>IT</i>	<i>One off changes</i>	75%	16%	8%	100%	61
	<i>Recurrent changes</i>	76%	19%	5%	100%	59
<i>Other areas</i>	<i>One off changes</i>	91%	4%	4%	100%	23
	<i>Recurrent changes</i>	91%	4%	4%	100%	23

4. Underwriting and placing

Draft Technical Advice - Consultation Paper, Section 2.10, p 75-87

Stakeholders were asked to what extent they currently comply with ESMA’s proposal to introduce additional requirements regarding organisational arrangements and provision of information in the areas of underwriting and placing, where the potential for conflicts of interest is significant.

As many of the responding firms do not provide underwriting and placing services, fewer answers were received to this set of questions. The percentage of “not compliant” answers (17%) is higher than for other items and the answers more evenly split between “fully/mostly” on the one hand, and “partly/not compliant” on the other hand. It is worthwhile noting that the level of compliance decreases for the largest firms. The highest level of “fully compliant” answers (56%) and one of the highest level of “not compliant” answers (33%) were both provided by firms based in Ireland.

Several respondents pointed out that the proposed requirements would raise difficulties because they are very different from current market practices.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
24%	24%	34%	17%	100%	41

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	40%	40%	0%	20%	10
<i>51 - 250</i>	57%	0%	43%	0%	7
<i>251 - 1,000</i>	25%	25%	50%	0%	4
<i>1,001 - 10,000</i>	14%	29%	29%	29%	7
<i>10,000</i>	0%	27%	55%	18%	11

One respondent out of four considered that the proposed requirements would entail significant one-off changes in compliance procedure/policies and training and 20% in staffing and monitoring. 20% of the respondents as well considered that significant recurrent changes are to be expected in staffing.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	36%	38%	26%	100%	47
	<i>Recurrent changes</i>	46%	34%	20%	100%	41
<i>Training</i>	<i>One off changes</i>	48%	27%	25%	100%	44
	<i>Recurrent changes</i>	63%	21%	16%	100%	38
<i>Staffing</i>	<i>One off changes</i>	73%	8%	20%	100%	40
	<i>Recurrent changes</i>	73%	14%	14%	100%	37
<i>Risk management</i>	<i>One off changes</i>	61%	29%	10%	100%	41
	<i>Recurrent changes</i>	66%	29%	5%	100%	38
<i>Monitoring</i>	<i>One off changes</i>	47%	33%	20%	100%	45
	<i>Recurrent changes</i>	55%	30%	15%	100%	40
<i>IT</i>	<i>One off changes</i>	50%	36%	14%	100%	44
	<i>Recurrent changes</i>	57%	33%	10%	100%	42
<i>Other areas</i>	<i>One off changes</i>	94%	0%	6%	100%	18
	<i>Recurrent changes</i>	94%	0%	6%	100%	16

5. Record keeping (other than recording of telephone conversations or other electronic communications)

Draft Technical Advice: Consultation Paper, Section 2.5, p 26- 31.

Stakeholders were asked to what extent they currently comply with the harmonised record keeping requirement (other than recording of telephone conversations or other electronic communications) suggested in the draft advice. ESMA suggested to transpose in the future MiFID II Implementing measures the content of the existing CESR recommendations on recording keeping⁵ and to specify that records of these data should be kept in an electronic format that facilitates the search of information where the nature and volume of records warrants such a format.

As no fundamental change to current standards was suggested by ESMA, compliance level self-assessed by the respondents was somewhat surprising.

Overall, 25% of respondents declared that their firm was currently fully compliant with the proposed requirements. Answers were very diverse, depending on the size of firms. 53% of the answers provided were “fully compliant” for the smallest firms (0-50 employees) while this was the case for no more than 8% of the largest firms (more than 10,000 employees). Answers were also quite heterogeneous across countries as well. 64% of firms based in Ireland assessed they were “fully compliant” while 59% of German respondents assessed they were “partly compliant”. Around two thirds of respondents in the UK and in France considered they were “mostly compliant”.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
25%	42%	25%	9%	100%	81

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	53%	41%	6%	0%	17
<i>51 - 250</i>	33%	61%	6%	0%	18
<i>251 - 1,000</i>	15%	46%	38%	0%	13
<i>1,001 - 10,000</i>	11%	21%	37%	32%	19
<i>10,000</i>	8%	50%	33%	8%	12

Significant process changes are anticipated in IT (both one-off and recurrent changes) and, minor changes mainly, in compliance procedures and policies. Some respondents added in specific comments that the costs involved would be very material for small firms, in particular

⁵ CESR/06-552c

with respect to the requirement to keep records in an electronic format where paper document are currently used.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	26%	56%	18%	100%	66
	<i>Recurrent changes</i>	52%	32%	16%	100%	62
<i>Training</i>	<i>One off changes</i>	41%	48%	11%	100%	64
	<i>Recurrent changes</i>	57%	34%	8%	100%	61
<i>Staffing</i>	<i>One off changes</i>	70%	20%	10%	100%	60
	<i>Recurrent changes</i>	68%	19%	12%	100%	57
<i>Risk management</i>	<i>One off changes</i>	58%	39%	3%	100%	59
	<i>Recurrent changes</i>	59%	39%	2%	100%	56
<i>Monitoring</i>	<i>One off changes</i>	40%	42%	18%	100%	62
	<i>Recurrent changes</i>	43%	42%	15%	100%	60
<i>IT</i>	<i>One off changes</i>	26%	26%	47%	100%	68
	<i>Recurrent changes</i>	38%	28%	34%	100%	64
<i>Other areas</i>	<i>One off changes</i>	86%	0%	14%	100%	22
	<i>Recurrent changes</i>	86%	0%	14%	100%	22

6. Recording of Telephone Conversation and Electronic Communication

Draft Technical Advice: Consultation Paper, Section 2.6, p 32-38

Stakeholders were asked to what extent they currently comply with ESMA's proposal regarding policies, procedures and oversight of recording rules for telephone conversation and electronic communications. ESMA also proposed to set out the minimum information required from investment firms when documenting the content of face-to-face conversations and proposed to require that records should be stored in a way that enables those records to be accessible and readily available to NCA's upon request.

A small minority of respondents (20%) assessed they were "fully compliant". Full compliance with the proposed requirements is especially rare for firms in the two superior quintiles of firms in terms of number of employees.

In additional comments, notes on face-to-face conversations to be signed by clients were in particular mentioned as being a major change compared to current practices.

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
20%	27%	30%	23%	100%	81

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	33%	28%	33%	6%	18
<i>51 - 250</i>	40%	47%	13%	0%	15
<i>251 - 1,000</i>	21%	43%	21%	14%	14
<i>1,001 - 10,000</i>	0%	5%	26%	68%	19
<i>10,000</i>	8%	23%	46%	23%	13

Significant IT one-off and recurrent changes are expected by a majority of respondents (59%) Monitoring is the next area where one-off and recurrent changes are expected to be significant (44% and 36% of respondents respectively). More than one third of respondents then identified training and staffing as area for significant changes. Compliance was mainly quoted as an area for minor rather than for significant changes.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures/policies	One off changes	21%	49%	31%	100%	72
	Recurrent changes	39%	37%	24%	100%	67
Training	One off changes	21%	42%	37%	100%	73
	Recurrent changes	39%	34%	27%	100%	67
Staffing	One off changes	53%	8%	39%	100%	66
	Recurrent changes	60%	13%	27%	100%	62
Risk management	One off changes	52%	18%	30%	100%	66
	Recurrent changes	61%	21%	18%	100%	62
Monitoring	One off changes	22%	34%	44%	100%	73
	Recurrent changes	23%	41%	36%	100%	69
IT	One off changes	23%	19%	59%	100%	70
	Recurrent changes	33%	15%	52%	100%	66
Other areas	One off changes	86%	10%	5%	100%	21
	Recurrent changes	86%	10%	5%	100%	21

7. Product Governance

Draft Technical Advice: Consultation paper, Section 2.7, p 39-51

Stakeholders were asked to what extent they were currently compliant with the proposals made by ESMA on specific oversight, control and governance obligations for investment firms manufacturing financial instruments and for firms distributing distribute those products.

Fewer respondents (11%) than in the other areas of the questionnaire assessed they were “fully compliant”. However, answers were not evenly split across countries. 78% of German respondents answered they were not compliant, versus 6% of UK respondents.

In additional comments, several respondents indicated that the requirement relating to the target market would necessitate substantial one off and on-going adjustment. It was noted that the importance of needed changes would depend on the scope of the new rule; i.e. whether it covers primary market versus secondary market products and situations in which the product manufacturer operates following a request for quote versus situations where the product manufacturer comes up with product concept and design.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
11%	28%	26%	35%	100%	72

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	17%	25%	25%	33%	12
<i>51 - 250</i>	31%	46%	23%	0%	13
<i>251 - 1,000</i>	0%	54%	15%	31%	13
<i>1,001 - 10,000</i>	5%	11%	16%	68%	19
<i>10,000</i>	8%	15%	62%	15%	13

Unsurprisingly, as 56% of respondents assessed they were “partly compliant” or “not compliant”, significant one-off and recurrent changes in processes are expected by a majority of respondents in a number of areas: compliance procedures/ policies, risk management, monitoring and IT processes. One third of the respondents anticipated significant changes in staffing and training as well.

Marketing was the additional area most frequently quoted as requiring significant changes.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	10%	23%	67%	100%	60
	<i>Recurrent changes</i>	23%	27%	50%	100%	56
<i>Training</i>	<i>One off changes</i>	12%	52%	36%	100%	58
	<i>Recurrent changes</i>	21%	52%	27%	100%	56
<i>Staffing</i>	<i>One off changes</i>	35%	22%	43%	100%	54
	<i>Recurrent changes</i>	40%	15%	45%	100%	53
<i>Risk management</i>	<i>One off changes</i>	21%	19%	60%	100%	57
	<i>Recurrent changes</i>	21%	27%	52%	100%	56
<i>Monitoring</i>	<i>One off changes</i>	13%	27%	60%	100%	60
	<i>Recurrent changes</i>	19%	21%	60%	100%	57
<i>IT</i>	<i>One off changes</i>	22%	12%	66%	100%	58
	<i>Recurrent changes</i>	26%	21%	53%	100%	57
<i>Other areas</i>	<i>One off changes</i>	67%	0%	33%	100%	15
	<i>Recurrent changes</i>	67%	0%	33%	100%	15

8. Safeguarding of Client Assets

Draft Technical Advice: Consultation Paper, Section 2.8, p 52-69;

Stakeholders were asked to what extent they were currently compliant with the additional obligations proposed by ESMA in relation to the safeguarding of clients assets. The following areas of ESMA's draft advice were mentioned as an introduction to the question: governance arrangements, indiscriminate use of Title Transfer Collateral Arrangements (TTCA), diversification of an investment firm's holding of client funds as part of due diligence requirements, inappropriate custody liens over client financial instruments and funds and recording liens and other encumbrances, segregation of client financial instruments in third country jurisdictions, prevention of unintended use of client financial instruments, availability of information easily to insolvency practitioners and relevant authorities and strengthened record-keeping requirements.

Safeguarding of Client Assets is the area where "partly compliant" attracted most answers (50%). However, this result is largely due to a couple of countries where a vast majority (86% of German respondents), if not all respondents, assessed they were partly compliant. In contrast, almost half of the respondents from the UK, and 50% of respondents from France declared their firm was fully compliant. A respondent clarified in additional comments that the UK's current and future Client asset requirements as well as related requirements from the CSD regulation mean that the majority of requirements will be applicable to UK investment firms before the implementation of the new rules.

Among the new rules proposed by ESMA, the obligation to designate a dedicated officer for safeguarding of client assets was considered as one the most constraining by several respondents. It was mentioned that changes would also occur in the relationship with professional clients who currently benefit from additional revenues generated by collateral contractual agreements. It was also noted that the diversification of client assets outside the group will necessitate the management of new operational risks.

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
19%	22%	50%	9%	100%	64

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	20%	30%	30%	20%	10
<i>51 - 250</i>	46%	23%	23%	8%	13
<i>251 - 1,000</i>	10%	40%	50%	0%	10
<i>1,001 - 10,000</i>	12%	6%	71%	12%	17
<i>10,000</i>	8%	25%	58%	8%	12

The most frequently quoted significant one-off costs relate to compliance procedures/policies (43% of respondents), followed by monitoring and IT. Minor recurrent changes are anticipated by 50% of respondents in training, and by 46% of respondents in staffing.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		<i>No change</i>	<i>Minor changes</i>	<i>Significant changes</i>	<i>Total</i>	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	21%	36%	43%	100%	47
	<i>Recurrent changes</i>	35%	28%	37%	100%	43
<i>Training</i>	<i>One off changes</i>	37%	44%	20%	100%	41
	<i>Recurrent changes</i>	43%	50%	8%	100%	40
<i>Staffing</i>	<i>One off changes</i>	33%	38%	28%	100%	39
	<i>Recurrent changes</i>	35%	46%	19%	100%	37
<i>Risk management</i>	<i>One off changes</i>	37%	37%	27%	100%	41
	<i>Recurrent changes</i>	38%	40%	23%	100%	40
<i>Monitoring</i>	<i>One off changes</i>	31%	36%	33%	100%	45
	<i>Recurrent changes</i>	31%	36%	33%	100%	42
<i>IT</i>	<i>One off changes</i>	30%	37%	33%	100%	46
	<i>Recurrent changes</i>	35%	44%	21%	100%	43
<i>Other areas :please specify below</i>	<i>One off changes</i>	69%	8%	23%	100%	13
	<i>Recurrent changes</i>	69%	8%	23%	100%	13

9. Conclusion

As a form of wrap-up and conclusion, three questions were eventually asked to firms to assess the potential challenges, impacts, and costs associated with the implementation of the proposals made by ESMA in the eight areas considered above.

It should be noted however that, in many areas, it is difficult to disentangle the potential impact of MIFID II /MIFIR, i.e. of the Level 1 text, on the one hand, and of ESMA's draft advice for the Level 2 provisions on the other hand. As a consequence, firms may have included some costs attributable to the Framework Directive when responding to questions below. This should be kept in mind when reading the comments and indications on impact, costs and challenges provided below, which are therefore to be taken as an upper bound.

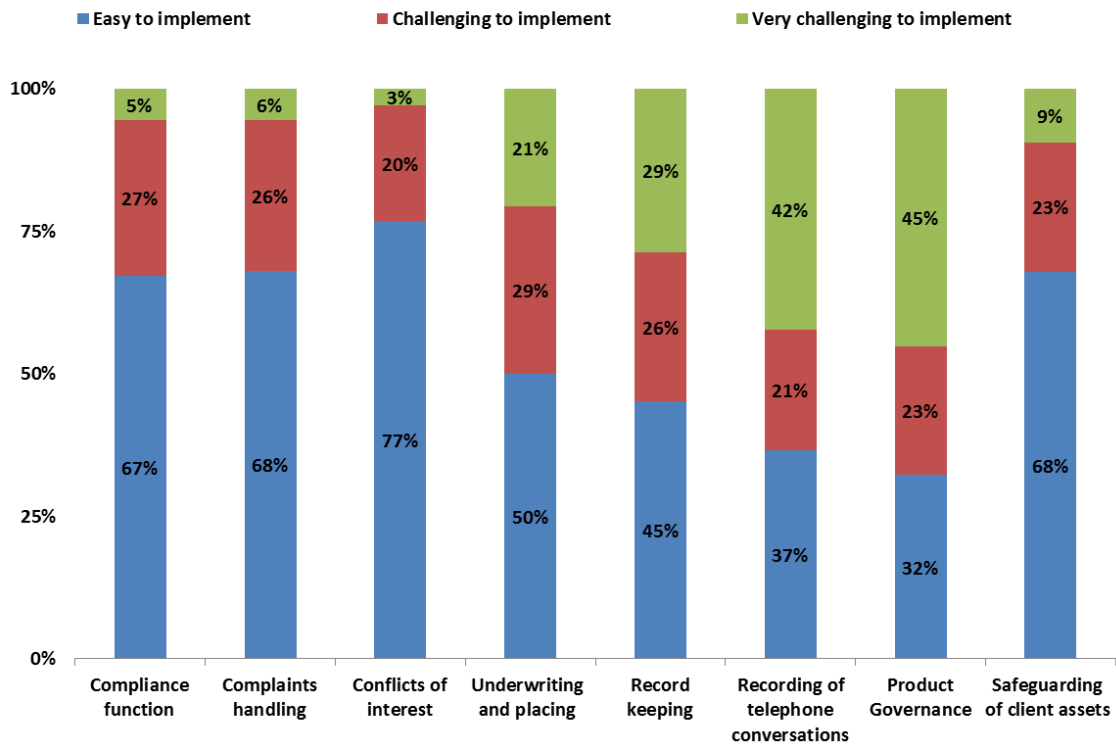
Surveyed firms were first asked how challenging ESMA's proposals would be to implement.

The two areas of the draft advice considered as the most challenging to implement are product governance and the recording of telephone conversations, with 45% and 42% of respondents respectively expecting very challenging implementations. It is worth noting that those are areas where a substantial part of the additional obligations are actually embedded in the Level 1 text. Record keeping requirements (other than telephone conversations) and Underwriting and placing come next, with 29% and 21% of respondents respectively expecting very challenging implementation.

As regards other areas (Compliance function, Complaints handling, Conflicts of interest and Safeguarding of client assets), more than two thirds of the respondents considered that the draft advice would be easy to implement, and less than 10% of them that it would be very challenging to implement.

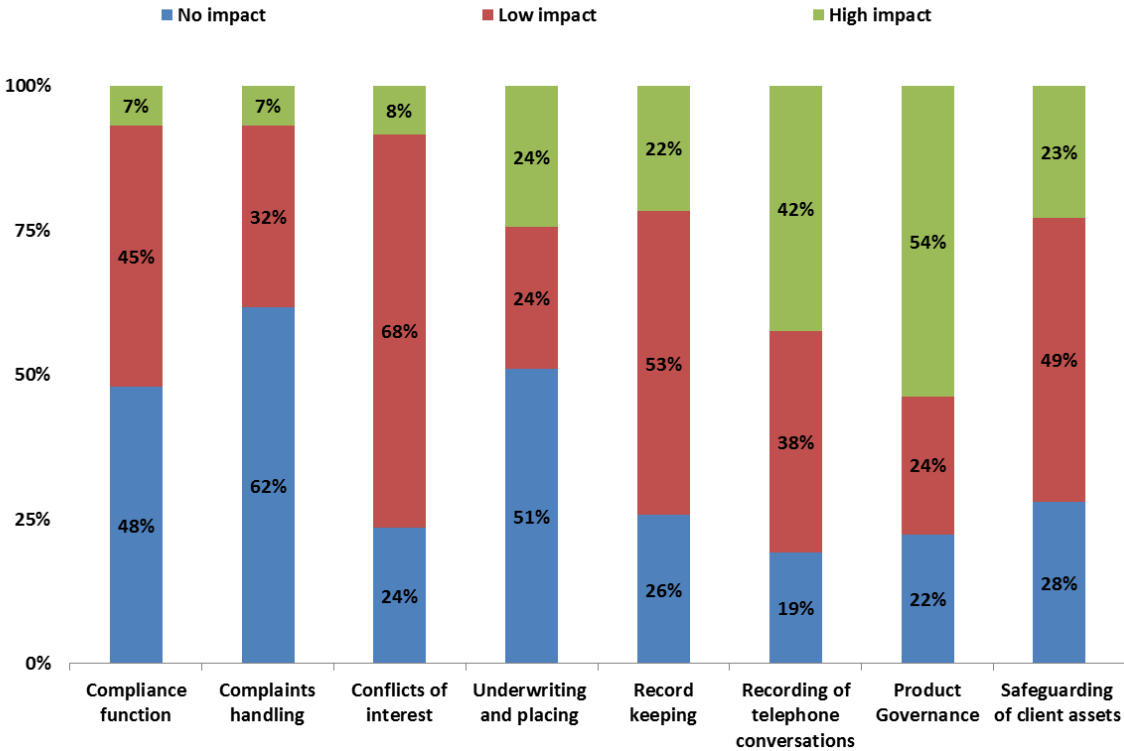
Several respondents also mentioned that even though the proposed rules, taken separately, would be relatively easy to implement, the substantial number of them and the interactions between the different requirements will make implementation more difficult.

Question: For each area of ESMA's proposal, please mention how challenging the implementation would be



The second question aimed at assessing the extent to which the proposals made by ESMA would have an impact on the business activity or the business model of firms. A majority of respondents answered that the new product governance rules would have a high impact but it is very likely that both the Level 1 text and the draft advice were taken into consideration in this assessment. In contrast, more than 90% of respondents said no impact or a low impact was expected from ESMA’s proposals concerning the compliance function, complaints handling and conflicts of interest. In an intermediate position, a strong minority of respondents (22%-24%) considered that rules concerning underwriting and placement, record keeping and safeguarding of assets will have a high impact on the business activity or market model of their firm.

Question: To what extent would the proposals made by ESMA in its draft advice to the Commission impact your business activity or your business model?

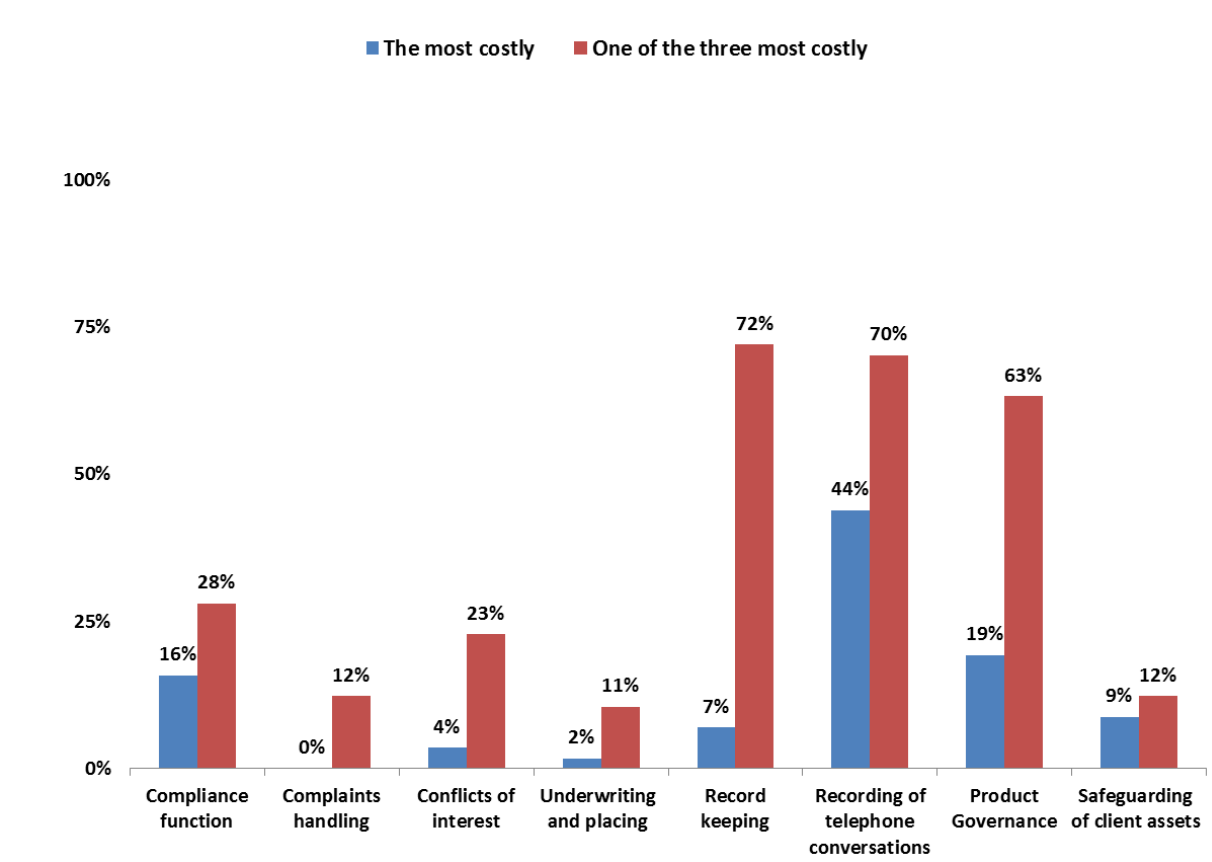


Firms were finally asked to assess implementation costs in the areas addressed in ESMA's proposal. Recording of telephone conversations was mentioned by the highest number of respondents (44%) as being the most costly to implement. In contrast, very few or no respondents rated complaints handling, conflicts of interest and underwriting and placement as the most costly proposal to implement. However, it should be noted that the result concerning underwriting and placement may be biased by the fact that many respondents do not provide this service.

Overall, record keeping, recording of telephone conversations and product governance were the three areas mentioned by respondent where the proposals made by ESMA would be the most costly proposals to implement. However, those are areas, in particular for recording of telephone conversation and product governance, where the essence of most of the additional obligations are to be found in the Framework Directive.

Several respondents specified that their answers were just an initial estimate and that their assessment might change depending on the final specifications of level 2 regulation.

Question: Among the proposals made by ESMA in its draft Advice to the Commission mentioned above, please identify and rate from 1 to 3 the top 3 area that would be most costly to implement (1 being the most costly to implement),



General principles and conduct of business rules (Articles 24 and 25 of MiFID II)

82 answers were received to the questionnaire on rules, systems and procedures concerning measures to ensure compliance with the principles set out in Article 24 of MiFID, based on the Consultation Paper published by ESMA on 22 May 2014. Those answers came from firms based in ten out of the twelve jurisdictions⁶ surveyed, mainly from authorised firms based in the United Kingdom, in Germany, France and Ireland. The sample of respondents is not homogeneous across jurisdictions. For instance, German savings banks account for a large number of German respondents while investment firms providing mainly portfolio management services prevail in the answers received from France.

The purpose of this document is to provide an analysis of the answers received to the questionnaire for each item. The number of employees was the size indicator most respondents completed and is therefore the one used in the analysis of the answers per size. Indications on the allocation of responses per country may be provided where responses include at least 10 firms based in the same country.

Finally, it should be noted that some respondents answered the questionnaire only partially.

1. Fair, clear and not misleading information

Draft Technical Advice: Consultation Paper, Section 2.12 p 91-93

Firms were first asked to what extent they were currently compliant with the draft technical advice on the information to be provided to clients, which consists of targeted improvements to Article 27 of the MiFID implementing Directive.

The majority of respondents answered they were mostly compliant and almost one fifth that they were fully compliant. The percentage of firms “fully compliant” decreases as the size of the firm increases. None of the largest firms (more than 10,000 employees) declared to be fully compliant.

Where a sufficient number of responses⁷ was provided, the country criterion was looked at. No respondent in Germany answered “fully compliant”, the percentages of that answer raises to 25% in France and around 40% in Ireland and the UK.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

⁶ Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, United Kingdom, Spain and Sweden. No answers were received from Luxembourg and Poland.

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
18%	54%	27%	1%	100%	78

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	43%	43%	7%	7%	14
<i>51 - 250</i>	43%	57%	0%	0%	14
<i>251 - 1,000</i>	8%	62%	31%	0%	13
<i>1,001 - 10,000</i>	5%	53%	42%	0%	19
<i>10,000</i>	0%	58%	42%	0%	12

Firms were then asked about the areas in which they would need to make one off/recurrent changes to become compliant with the draft advice.

Compliance procedures and policies, monitoring and IT were the areas where the highest proportion of respondents answered significant changes would be needed, both one-off and recurrent changes. In addition, several respondents said that the proposed requirement will entail significant changes in client documentation and in back-office functions.

A handful of larger firms commented that estimates of impact were based on their reading of the proposals as drafted in the consultation and on an initial but not final nor comprehensive analysis. Changes may still be needed when the finalised proposals are published. Those comments were reiterated under each item of the questionnaire.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures/policies	One off changes	14%	50%	36%	100%	74
	Recurrent changes	37%	39%	24%	100%	67
Training	One off changes	22%	49%	29%	100%	72
	Recurrent changes	33%	58%	9%	100%	67
Staffing	One off changes	45%	45%	10%	100%	69
	Recurrent changes	54%	38%	8%	100%	65
Risk management	One off changes	55%	29%	16%	100%	69
	Recurrent changes	62%	29%	9%	100%	65
Monitoring	One off changes	25%	40%	35%	100%	72
	Recurrent changes	26%	41%	33%	100%	69
IT	One off changes	32%	28%	40%	100%	72
	Recurrent changes	36%	39%	25%	100%	67
Other areas	One off changes	73%	7%	20%	100%	30
	Recurrent changes	76%	3%	21%	100%	29

2. Information about investment of advice

Draft Technical Advice: Consultation Paper, Section 2.13, p 94- 98

In its draft advice, ESMA proposed a set of requirements relating to the information to be provided to clients as to whether investment advice is independent or not, on the broad or restricted analysis of different types of financial instruments, and on the periodic assessment of suitability.

Three questions were asked in this area.

Firms providing investment advice were asked whether they currently provide their client with a periodic assessment of suitability.

A majority of respondents answered that their firm never or rarely provide their clients with such periodic assessment of suitability. However, answers are highly variable, depending on the firm's size and country. The percentage of respondents who declared that their firm "always" conduct such assessment decreases and symmetrically the answer "never" increases when the size of the firm increases. An overwhelming majority of respondents based in Germany declared they did not run periodic assessments of suitability, while on the opposite, an overwhelming majority of respondents in France, and 100% of the respondents based in the UK declared they were "always" or "often" providing periodic assessment of suitability.

Question: How frequently does the investment advice service you provide include a periodic assessment of suitability?

<i>Always</i>	<i>Often</i>	<i>Rarely</i>	<i>Never</i>	<i>Total</i>	Answers
23%	22%	15%	40%	100%	60

<i>Number of employees</i>	<i>Always</i>	<i>Often</i>	<i>Rarely</i>	<i>Never</i>	Answers
<i>0 - 50</i>	60%	30%	0%	10%	10
<i>51 - 250</i>	22%	56%	0%	22%	9
<i>251 - 1,000</i>	13%	13%	50%	25%	8
<i>1,001 - 10,000</i>	17%	0%	6%	78%	18
<i>10,000</i>	9%	27%	36%	27%	11

Firms were then asked to assess the extent to which they were currently compliant with ESMA's proposal on investment advice. Although the answers were rather split, a relative majority of respondents said that their firm was partly compliant. The level of compliance assessment decreases with the size of the firm. A majority of small firms assessed they were

already compliant, while a majority of the large firms (1,001-10,000 employees) and more than one third of the largest firms (more than 10,000 employees) said they were only partly compliant.

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
19%	20%	36%	25%	100%	59

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	50%	17%	17%	17%	12
<i>51 - 250</i>	22%	56%	11%	11%	9
<i>251 - 1,000</i>	17%	17%	33%	33%	6
<i>1,001 - 10,000</i>	11%	6%	50%	33%	18
<i>10,000</i>	0%	27%	36%	36%	11

Firms were finally asked to assess the areas and significance of changes that would be needed to comply with the obligations proposed by ESMA in the draft advice. Answers were rather split across the three possible ratings. The area most frequently mentioned was "Monitoring" with 47% of answers considering minor one-off and recurrent changes and around one third considering these changes would be significant. Compliance procedures/policies was the area where one-off significant changes are anticipated by the largest number of respondents.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures/policies	One off changes	15%	42%	43%	100%	53
	Recurrent changes	34%	50%	16%	100%	50
Training	One off changes	19%	43%	38%	100%	53
	Recurrent changes	39%	33%	27%	100%	51
Staffing	One off changes	56%	30%	14%	100%	50
	Recurrent changes	54%	31%	15%	100%	48
Risk management	One off changes	43%	33%	24%	100%	49
	Recurrent changes	46%	29%	25%	100%	48
Monitoring	One off changes	19%	47%	34%	100%	53
	Recurrent changes	22%	47%	31%	100%	51
IT	One off changes	31%	31%	38%	100%	52
	Recurrent changes	36%	38%	26%	100%	50
Other areas	One off changes	82%	0%	18%	100%	11
	Recurrent changes	75%	8%	17%	100%	12

3. Information on costs and charges

Draft Technical Advice: Consultation Paper, Section 2.14, p 99- 117

In the draft technical advice, ESMA addressed the information obligations on costs and charges to professional clients and eligible counterparties, the conditions to be met for providing aggregated information about costs, the details of costs and charges to be aggregated, the timing of disclosure of information, the methodology of calculation used for ex-ante figures and the illustration to be provided to clients showing the cumulative effect of costs and charges on returns.

Firms were asked to what extent they currently comply with this set of proposed obligations. Very few respondents (7%) answered that their firm was currently fully compliant and around one third answered they were not compliant, even partially. The degree of compliance indicated by respondents decreases as the size of the firm increases.

It was noted that the obligation to provide retrospective costs to clients would be especially demanding unless proxy measures are accepted. Allocation of retrocessions to clients were also identified as hardly achievable while the very significant changes resulting from the broad interpretation of the scope and content of the cost and charges disclosure obligations were highlighted.

In all the jurisdictions surveyed, a majority of respondents assessed they were “partly” compliant.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
7%	18%	41%	34%	100%	76

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	21%	29%	36%	14%	14
<i>51 - 250</i>	14%	36%	36%	14%	14
<i>251 - 1,000</i>	0%	23%	46%	31%	13
<i>1,001 - 10,000</i>	0%	5%	32%	63%	19
<i>10,000</i>	0%	0%	67%	33%	12

Respondents expect significant changes will be needed to meet the proposed obligations, in particular with respect to one-off IT changes, compliance procedure/policies, training and risk management. Moreover, several firms mentioned additional changes in client handling, form editing and printing, back-office procedures and liaison with product providers.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures/policies	One off changes	5%	27%	68%	100%	74
	Recurrent changes	26%	32%	42%	100%	65
Training	One off changes	10%	34%	56%	100%	73
	Recurrent changes	23%	56%	21%	100%	66
Staffing	One off changes	33%	47%	20%	100%	64
	Recurrent changes	56%	32%	13%	100%	63
Risk management	One off changes	27%	25%	48%	100%	63
	Recurrent changes	31%	44%	25%	100%	61
Monitoring	One off changes	10%	34%	56%	100%	70
	Recurrent changes	18%	29%	52%	100%	65
IT	One off changes	12%	8%	80%	100%	74
	Recurrent changes	20%	26%	55%	100%	66
Other areas	One off changes	43%	9%	48%	100%	23
	Recurrent changes	48%	4%	48%	100%	23

4. Reporting to clients

Draft Technical Advice: Consultation Paper, Section 2.20 p 99- 117

Firms were asked to what extent they currently comply with ESMA’s proposal that investment firms and eligible counterparties determine contractually between themselves the timing and nature of the information due and that the content of reports to professional clients on portfolio management and execution of orders be aligned with those applicable to non-professional clients. ESMA also proposed, inter alia, that investment firms that operate a retail client account that includes or is likely to include leveraged financial instruments or other contingent liability transactions or provide the service of portfolio management should agree with their retail clients on loss thresholds that should trigger a specific reporting obligation. The quarterly statements to clients on their financial instruments and funds would include a clear indication of the assets or funds which are subject to MiFID protections and those that are not.

More than one third of respondents answered that they were currently “partly compliant” with the proposed requirements, while another third declared they were not compliant. As regards country allocation, “partly compliant” was the prevailing answer from firms based in France and in the UK, while more than half of the respondents based in Ireland assessed they were “mostly compliant”.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
13%	18%	39%	30%	100%	71

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	23%	46%	23%	8%	13
<i>51 - 250</i>	31%	23%	38%	8%	13
<i>251 - 1,000</i>	0%	17%	58%	25%	12
<i>1,001 - 10,000</i>	11%	6%	22%	61%	18
<i>10,000</i>	0%	0%	64%	36%	11

As regards the areas and magnitude of changes in processes anticipated to meet the proposed requirements, significant one-off and recurrent IT changes are mentioned by a majority of respondents. Significant one-off changes are expected by more than 40% of respondents in compliance procedures and policies, in training and in monitoring. Additional

changes were expected by respondents, especially in the areas of custody, client service, documentation and clients' agreement.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	11%	43%	46%	100%	70
	<i>Recurrent changes</i>	29%	52%	19%	100%	63
<i>Training</i>	<i>One off changes</i>	18%	35%	46%	100%	65
	<i>Recurrent changes</i>	36%	31%	34%	100%	59
<i>Staffing</i>	<i>One off changes</i>	37%	32%	32%	100%	63
	<i>Recurrent changes</i>	35%	53%	12%	100%	60
<i>Risk management</i>	<i>One off changes</i>	33%	54%	13%	100%	61
	<i>Recurrent changes</i>	35%	58%	7%	100%	57
<i>Monitoring</i>	<i>One off changes</i>	15%	42%	43%	100%	65
	<i>Recurrent changes</i>	24%	47%	29%	100%	62
<i>IT</i>	<i>One off changes</i>	16%	16%	68%	100%	69
	<i>Recurrent changes</i>	24%	26%	50%	100%	62
<i>Other areas</i>	<i>One off changes</i>	57%	10%	33%	100%	21
	<i>Recurrent changes</i>	67%	0%	33%	100%	18

5. Investment Advice on independent basis

Draft Technical Advice: Consultation Paper, Section 2.16 p 126-130

Firms were asked to what extent they currently comply with ESMA's proposed obligations to be met by investment firms when providing investment advice on an independent basis. ESMA proposed a list of elements to be taken into account in the selection process to assess and compare a sufficient range of financial instruments available on the market. ESMA also proposed specific requirements for firms providing investment advice on an independent basis and focussing on certain classes or a specified range of financial instruments. Finally, ESMA set out proposals for firms providing both independent and non-independent advice under which adequate organisational requirements and controls would have to be in place to ensure that both types of advice services and advisers are clearly separated from each other.

The number of answers to the questions on this topic was lower than for other questions, possibly because some firms do not intend to provide investment advice on an independent basis. It should be noted as well that "independent advice" is a new topic under MiFID II and that many firms probably do not know if they will provide the service or not. A majority of respondents said they were already fully or mostly compliant with the proposed requirements. However, one third said they were not compliant. The most frequent "not compliant" answers came from the smallest firms (0-50 employees) and from the largest ones (more than 10,000).

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
9%	46%	14%	32%	100%	57

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	0%	40%	20%	40%	10
<i>51 - 250</i>	44%	33%	22%	0%	9
<i>251 - 1,000</i>	0%	63%	0%	38%	8
<i>1,001 - 10,000</i>	0%	69%	6%	25%	16
<i>10,000</i>	0%	27%	27%	45%	11

Significant changes in processes are expected by the highest proportion of respondents in the area of monitoring, followed by compliance procedures and policies and by IT.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures/policies	One off changes	15%	43%	43%	100%	40
	Recurrent changes	30%	38%	33%	100%	40
Training	One off changes	18%	45%	38%	100%	40
	Recurrent changes	33%	33%	35%	100%	40
Staffing	One off changes	39%	21%	39%	100%	38
	Recurrent changes	41%	38%	22%	100%	37
Risk management	One off changes	32%	29%	39%	100%	38
	Recurrent changes	35%	38%	27%	100%	37
Monitoring	One off changes	20%	32%	49%	100%	41
	Recurrent changes	25%	43%	33%	100%	40
IT	One off changes	40%	18%	43%	100%	40
	Recurrent changes	48%	20%	33%	100%	40
Other areas	One off changes	100%	0%	0%	100%	10
	Recurrent changes	100%	0%	0%	100%	10

6. Suitability

Draft Technical Advice: Consultation Paper, Section 2.17 p 131- 135

Firms were asked to what extent they currently comply with the requirements proposed in ESMA’s draft advice. The draft advice suggested that article 35 of the MiFID Implementing Directive on information which investment firms should obtain from clients as part of undertaking the suitability assessment was a good basis to start from. However, this article had to be updated to reflect that MIFID II now explicitly requires investment firms, when undertaking a suitability assessment, to assess, among other things, both a client’s ability to bear losses and a client’s risk tolerance.

ESMA also considered appropriate to expand provisions of the Implementing Directive in a number of key areas and to better reflect expectations on firms previously communicated in ESMA’s guidelines on certain aspects of the MIFID I suitability requirements. A list of items to be included in the suitability report foreseen in MiFID II was proposed as well.

Answers were almost evenly split between the “fully/mostly” compliant category, the “partly compliant” category and the “not compliant” one. The proportion of “not compliant” answers was found to be the highest for large firms (more than 1,000 employees). The most frequent answer from firms based in France and Ireland was “mostly compliant” and “partly” for UK firms. However, at the same time, the proportion of “fully compliant” answers from UK firms was significantly higher than in other countries.

Question: To what extent are you currently compliant with this part of ESMA’s draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	<i>Answers</i>
7%	28%	30%	34%	100%	67

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Answers</i>
<i>0 - 50</i>	8%	42%	25%	25%	12
<i>51 - 250</i>	20%	50%	30%	0%	10
<i>251 - 1,000</i>	0%	30%	50%	20%	10
<i>1,001 - 10,000</i>	11%	6%	17%	67%	18
<i>10,000</i>	0%	42%	25%	33%	12

The most frequently quoted areas where significant process changes would be needed to become compliant with the draft advice are IT and training, followed by compliance procedures and policies.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	5%	42%	53%	100%	64
	<i>Recurrent changes</i>	16%	38%	46%	100%	61
<i>Training</i>	<i>One off changes</i>	11%	30%	59%	100%	64
	<i>Recurrent changes</i>	21%	28%	51%	100%	61
<i>Staffing</i>	<i>One off changes</i>	38%	26%	36%	100%	61
	<i>Recurrent changes</i>	42%	44%	14%	100%	59
<i>Risk management</i>	<i>One off changes</i>	26%	34%	40%	100%	62
	<i>Recurrent changes</i>	32%	37%	31%	100%	59
<i>Monitoring</i>	<i>One off changes</i>	11%	35%	54%	100%	63
	<i>Recurrent changes</i>	18%	56%	26%	100%	62
<i>IT</i>	<i>One off changes</i>	25%	14%	60%	100%	63
	<i>Recurrent changes</i>	27%	28%	45%	100%	60
<i>Other areas</i>	<i>One off changes</i>	71%	0%	29%	100%	17
	<i>Recurrent changes</i>	75%	0%	25%	100%	16

7. Appropriateness

Draft Technical Advice: Consultation Paper, Section 2.18, p 136- 139

Firms were asked to what extent they were currently compliant, when providing execution-only services, with the two criteria ESMA proposed to add to Article 38 of the MiFID Implementing Directive that would have to be met by an instrument not included explicitly in Article 25(4)(a) of MiFID II to qualify as non-complex.

As some responding firms do not offer execution-only services, fewer answers to this question were received. However, it should be noted that this question is the one for which the share of respondents saying that their firm is currently fully compliant with the proposed requirement was the highest (46%).

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
46%	21%	16%	18%	100%	57

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	33%	33%	11%	22%	9
<i>51 - 250</i>	30%	30%	20%	20%	10
<i>251 - 1,000</i>	50%	25%	13%	13%	8
<i>1,001 - 10,000</i>	71%	6%	6%	18%	17
<i>10,000</i>	30%	30%	30%	10%	10

Consistently with the answers provided to the previous question, the proportion of respondents expecting significant changes in processes would be needed to adjust to additional criteria is relatively low in all areas. However, one third of the respondents anticipate significant one-off changes in the areas of compliance procedures and policies, IT and training. It was noted that the new rule will have an impact on product referential data, as all products will have to be tagged as complex products/non-complex products.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
Compliance procedures/policies	One off changes	24%	43%	33%	100%	46
	Recurrent changes	43%	40%	17%	100%	42
Training	One off changes	33%	36%	31%	100%	45
	Recurrent changes	47%	44%	9%	100%	43
Staffing	One off changes	64%	18%	18%	100%	44
	Recurrent changes	71%	20%	10%	100%	41
Risk management	One off changes	48%	25%	27%	100%	44
	Recurrent changes	54%	32%	15%	100%	41
Monitoring	One off changes	26%	43%	30%	100%	46
	Recurrent changes	42%	42%	16%	100%	43
IT	One off changes	47%	20%	33%	100%	45
	Recurrent changes	54%	29%	17%	100%	41
Other areas	One off changes	100%	0%	0%	100%	13
	Recurrent changes	100%	0%	0%	100%	13

8. Remuneration

Draft Technical Advice: Consultation Paper, Section 2.11, p 88-90

Firms were asked to what extent they currently comply with the requirements proposed by ESMA in the area of governance, design of remuneration policies and variable remuneration. ESMA's draft advice was largely based on the ESMA guidelines on remuneration under MiFID I. ESMA suggested that those principles should apply broadly to all relevant persons who can have a material impact on the ability of the firm to comply with its overarching obligations to act fairly, honestly and professionally in accordance with the best interest of the clients, both retail and professional..

A majority of respondents said their firm was "mostly compliant" with the proposed requirements. This was consistent across countries, except in Ireland where 80% of the respondents assessed their firm was "fully compliant".

Question: To what extent are you currently compliant with this part of ESMA's draft advice?

<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	<i>Total</i>	Answers
28%	52%	19%	1%	100%	75

<i>Number of employees</i>	<i>Fully</i>	<i>Mostly</i>	<i>Partly</i>	<i>Not compliant</i>	Answers
<i>0 - 50</i>	64%	29%	7%	0%	14
<i>51 - 250</i>	54%	31%	15%	0%	13
<i>251 - 1,000</i>	15%	69%	15%	0%	13
<i>1,001 - 10,000</i>	11%	74%	16%	0%	19
<i>10,000</i>	9%	45%	36%	9%	11

38% of respondents said that the new rule would require significant one-off changes in monitoring, and almost a similar percentage in compliance procedures and policies. However, in that latter area, a larger number of respondents (45%) anticipated that the changes would be minor. In addition to the potential areas of change suggested in the questionnaire, several respondents said that the new rule would entail significant recurrent changes in human resources policy.

Question: In which area will you need to change your processes to meet the requirements set out above?

Please rate: 1 = no change / 2 = minor changes / 3 = significant changes

		No change	Minor changes	Significant changes	Total	Answers
<i>Compliance procedures/policies</i>	<i>One off changes</i>	18%	45%	37%	100%	67
	<i>Recurrent changes</i>	31%	41%	28%	100%	58
<i>Training</i>	<i>One off changes</i>	36%	32%	32%	100%	66
	<i>Recurrent changes</i>	42%	47%	11%	100%	57
<i>Staffing</i>	<i>One off changes</i>	53%	21%	26%	100%	62
	<i>Recurrent changes</i>	58%	37%	6%	100%	52
<i>Risk management</i>	<i>One off changes</i>	70%	23%	7%	100%	61
	<i>Recurrent changes</i>	72%	26%	2%	100%	54
<i>Monitoring</i>	<i>One off changes</i>	35%	26%	38%	100%	65
	<i>Recurrent changes</i>	36%	27%	37%	100%	59
<i>IT</i>	<i>One off changes</i>	49%	43%	8%	100%	63
	<i>Recurrent changes</i>	67%	24%	9%	100%	55
<i>Other areas</i>	<i>One off changes</i>	68%	26%	5%	100%	19
	<i>Recurrent changes</i>	72%	0%	28%	100%	18

9. Legitimacy of inducements to be paid to/ by a third person

As explained above, and due to a tight deadline for the submission of the technical advice to the Commission, the data gathering exercise was conducted based on ESMA's draft advice, as set out in the Discussion Paper published on 22 May 2014. Considering the responses received to the public consultation, ESMA has amended its initial proposal and the final advice to the Commission differs from the draft advice.

Some of the answers and comments provided below may no longer be of relevance. It was deemed however that they could still be of interest.

Draft Technical Advice: Consultation Paper, Section 2.15, p 118-125

In its draft advice to the Commission, ESMA proposed to introduce an exhaustive list of non-monetary benefits that would qualify as minor and could therefore be received and retained by investment firms providing advice on an independent basis or portfolio management. With respect to research, ESMA proposed that for financial analysis to be considered as a minor non-monetary benefit and therefore to be acceptable, it would need to be intended for distribution so that it is, or is likely to become, accessible by a large number of persons, or for the public at the same time.

For investment services other than independent advice and portfolio management, ESMA advised the Commission to introduce a non-exhaustive list of circumstances and situations to be considered in determining when the quality enhancement test is not met.

Different sets of questions were asked to firms providing individual portfolio management services, to brokers with in-house research, to independent research firms, and to firms providing investment services other than independent advice and portfolio management.

Questions for firms providing individual portfolio management services

Seven questions were asked to firms providing individual portfolio management.

Firms were first asked how they paid for the financial research they receive and were asked to asset the % of research received through each those payment means. 37 firms answered that question with multiple response choice. .

13 respondents said they pay for research through bundled execution arrangements; on average, these arrangements accounted for 57% of the research they receive. However, this should be taken with caution as 5 of the respondents basically pay their entire research (between 98% and 100%) through bundled execution arrangements, while, for 3 of them, it represents less than 5%.

11 respondents said they were paying for research through commission sharing agreements (CSAs), which accounted for 72% of the research received on average. However 7 of them basically pay their entire research through CSAs and for 1 of them, CSAs represent only 2% of the research received

16 respondents said they have other payment arrangements, of which 13 said they access research exclusively through these other arrangements, mainly consisting in the purchase of

financial research to third parties, such as external consultants, research units within the same group or data vendors. For 1 of these 16 respondents, other payment arrangements accounted for just 1%.of the research received

Question: How do you pay for the financial research you receive?

- i. through bundled execution arrangements*
- ii. through commission sharing agreements (CSAs)*
- iii. other (please specify)*

In each case, please identify the % of the total research you receive through this payment arrangement

<i>Payment of financial research received</i>	<i>Number of responses mentioning such arrangements</i>	<i>Number of responses not using such arrangements</i>	<i>% of research received from this payment arrangement</i>	Total Answers
<i>through bundled execution arrangements</i>	13	19	57%	32
<i>through commission sharing agreements (CSAs)</i>	11	21	72%	32
<i>through other arrangements</i>	16	17	86%	33

Firms were then asked how many brokers they have bundled execution agreements with and what percentage of their order flow was being passed on to them.

13 firms answered this question. The answers were very heterogeneous, with a number of brokers varying from one to 70 and the percentage of the order flow directed to them between 0.5% and 100%. Average numbers are therefore not significant. There are 3 firms having bundled execution arrangements with one broker only but in that case the percentage of the order flow directed to that broker is very low. 10 firms with bundled execution arrangements have entered into such agreement with 10 brokers or more and 3 of them direct 100% of their order flow to those brokers.

Question: How many brokers do you have bundled execution arrangements with? What percentage of your order flow is being sent to them globally?

	<i>Respondents using bundled execution arrangements</i>	<i>% of respondents using bundled execution arrangements</i>	<i>% of the order flow directed to brokers with bundled execution arrangements</i>
<i>1 broker</i>	3	23%	1.5%
<i>2 to 9 brokers</i>	0	-	-
<i>10 or more brokers</i>	10	77%	63%
Total	13	100%	

Then, firms were asked how many brokers they have commission sharing agreements with and what percentage of their order flow was directed at them.

11 firms, answered this question. 4 respondents answered their firms have CSAs with less than 10 brokers representing around one third of their order flow and two thirds with 10 or more brokers which represent three-fourths of their order flow on average. However, individual responses are rather heterogeneous, with the percentage of order flow directed at CSA brokers varying from less than 10% to close to 100%.

Question: How many CSAs brokers do you have? What percentage of your order flow is being sent to them globally?

	<i>Number of respondents using such arrangements</i>	<i>% of respondents firms using such arrangements</i>	<i>% of the order flow directed at CSAs brokers</i>
<i>1 broker</i>	0	0%	-
<i>2 to 9 brokers</i>	4	36%	32%
<i>10 or more brokers</i>	7	64%	77%
Total	11	100%	

In the next question, firms were asked about their number of execution-only brokers and the percentage of their order flow going to them globally.

40% of the 38 firms which answered this question said they had execution-only brokers. 8 of them transmit 100% of their order flow to execution-only brokers, of which 2 respondents with only 1 broker, 3 respondents with 2 to 9 brokers and 3 respondents with 10 or more brokers).

Question: How many execution- only brokers do you have? What percentage of your order flow is being sent to them globally?

	<i>Number of firms with execution only brokers</i>	<i>% of firms with execution only brokers</i>	<i>% of the order flow going to execution only brokers</i>
<i>1 broker</i>	4	18%	54%
<i>2 to 9 brokers</i>	8	36%	52%
<i>10 or more brokers</i>	10	46%	45%
Total	22	100%	

The following question asked firms how many independent research provider firms they have access to through CSAs. 9 firms answered this question and said they had access to a number of provider that varies between 2 and 47.

Question: How many independent research providers do you have access to through CSAs ?

Average number of providers (if >0)	19
Median number of providers (if >0)	11

As concerns were expressed in the answers to the Consultation Paper on the potential impact of the draft advice on research, and more specifically on research devoted to small and medium enterprises (SMEs), questions were asked to try and assess the significance of SME research received by firms.

Two questions were asked to firms providing portfolio management services about the percentage of research covering SMEs received through bundled execution arrangements and through CSAs.

As regards bundled execution arrangements and SME research, 22 answers were received. 6 firms said they receive research on SMEs through bundled execution arrangements SME research accounts for 27% on average of the overall research received under such arrangements.

As regards CSAs and SME research, 18 answers were received. 9 respondents said the research received included SMEs, but SME research accounted for 5% only on average. The highest percentage reaches 20%.

Question for brokers with in-house research

One question was asked to brokers with in-house research, concerning the share of SMEs in their research. 9 responses were received. 6 of the brokers who answered the question, mostly large companies with approximately 10,000 employees (4 respondents), said they included SMEs in their coverage and that SME research accounted for 10% of the overall equity research.

Questions for firms providing investment services other than independent advice and portfolio management

Three questions were asked to firms providing investment services other than independent advice and portfolio management.

The questions were asked in relation to ESMA’s draft advice concerning the quality enhancement test qualifying a service for receiving inducements (fees commissions or non-monetary benefits). ESMA considered that such commissions or non-monetary benefits are

acceptable if it enables the client to receive access to the provision of non-independent advice on an on-going basis or if it enables the client to receive access to a wider range of suitable financial instruments, as long as such service is provided without bias or distortion as a result of the inducement.

Two questions thus aimed at assessing to what extent non-independent advice currently provided on an on-going basis and/or the range of products offered would meet the quality enhancement test.

This first question asked firms whether or not they were currently providing investment advice on an on-going basis. 54 firms answered that question. 13 said they were providing investment advice on an on-going basis, 28 said they did not and 13 said the question was not applicable to them.

Question: If you currently provide investment advice, do you currently provide investment advice on an on-going basis?

	<i>Respondents providing Investment advice on an ongoing basis</i>	<i>Respondents not providing Investment advice on an ongoing basis</i>	<i>«Not applicable»</i>	Total
<i>Number of responses</i>	13	28	13	54

The next question aimed at assessing to what extent the range of products currently offered would meet the quality enhancement test. 41 answers were received, half of them from German banks. A majority of respondents answered that their firm was offering a large range of products and some of them listed the products offered but the answers cannot be summarized in a standard quantitative table. . Some respondents, especially from Germany, specified that their offer was not limited to financial instruments produced in their own group, a characteristic that would probably contribute to meet the quality enhancement test.

Finally, firms were asked to indicate the magnitude of the impact expected on their revenue if the inducements they currently receive were considered as not meeting the quality enhancement test, based on the non-exhaustive list of circumstance and situations provided in the draft advice.

48 answers were received to this question. 32 respondents said that three categories of circumstances would have a high impact on their revenues if they prevented them from receiving inducements:

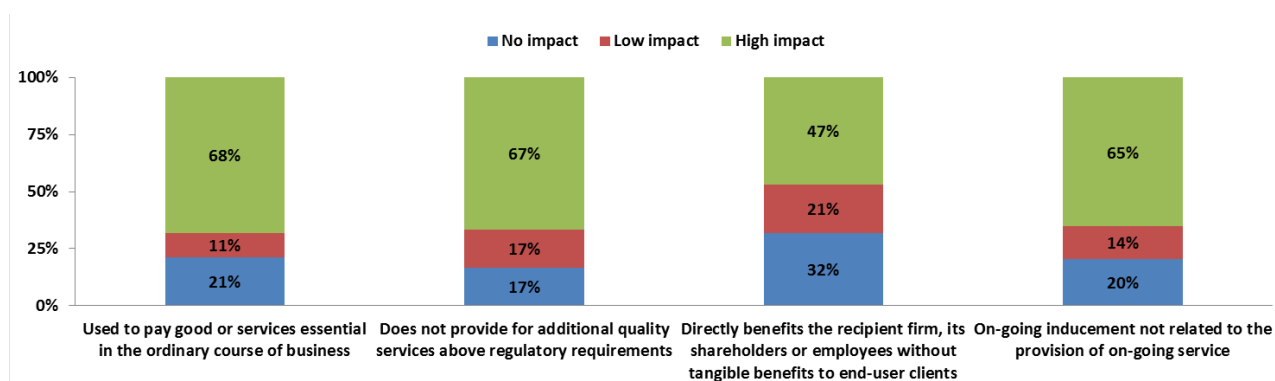
- The fact that fees, commissions or non-monetary benefits would be used to pay good or services essential in the ordinary course of business

- The fact that fees, commissions or non-monetary benefits do not provide for additional quality services above regulatory requirements
- The fact that on-going inducement do not relate to the provision of on-going service.

The situation where inducements would not be acceptable if they benefit the recipient firm, its shareholders or employees without tangible benefits to end-user clients is the only one which attracted a majority of “low” or “no impact” answers.

In additional comments, several respondents, especially from Germany, considered that the conditions proposed by ESMA for inducements to meet the quality enhancement test would lead to a de-facto ban on inducements and thus the end of inducement-based investment advice. It should be noted however that, as emerged from the ESMA’s consultation, the interaction of negative and positive situations described in the ESMA’s consultation paper was not clear to a number of respondents.

Question: Please rate the potential impact on your revenues of each example provided in the Draft Advice of fees, commission and/or non-monetary benefits that would not meet the quality enhancement test



10. Conclusion

As a form of wrap-up and conclusion, three questions were eventually asked to firms to assess the potential impact, challenges and costs associated with the implementation of the proposals made by ESMA in the nine areas considered above.

However, it should be noted that, in many areas, it is difficult to disentangle the potential impact of MIFID II /MIFIR, i.e. of the Level 1 text, on the one hand, and of ESMA’s advice for the Level 2 provisions on the other hand. As a consequence, firms may have included some costs attributable to the Framework Directive when responding to the questions below. The indications of costs provided are therefore to be taken as an upper bound.

Surveyed firms were first asked how challenging ESMA’s proposals would be to implement.

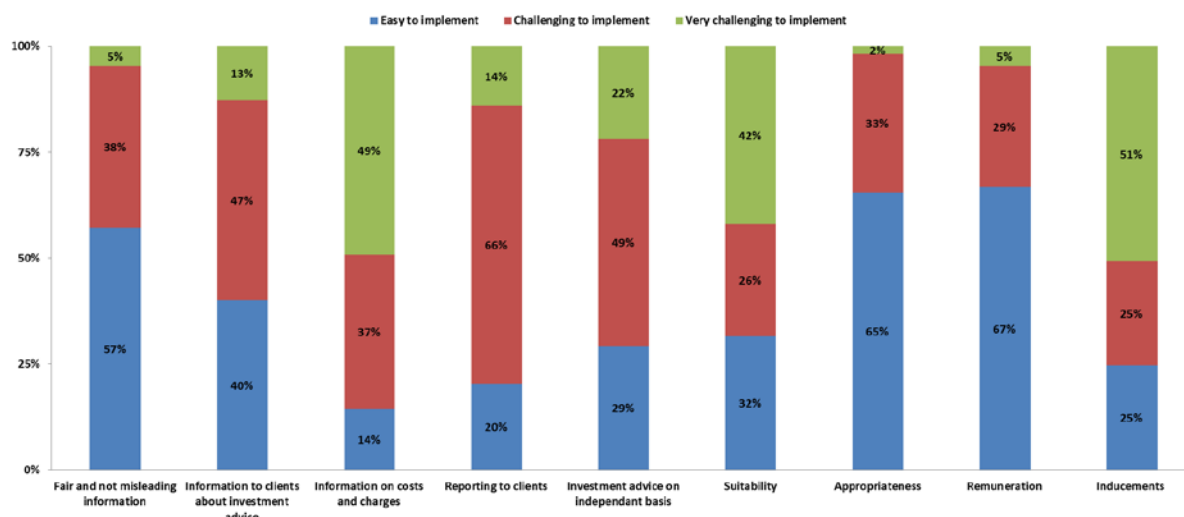
Half of the respondents anticipate that ESMA’s proposals will be very challenging to implement in the area of inducements and in the area of Information on costs and charges. A strong proportion of respondents (42%) considered that the draft advice on Suitability would be very challenging to implement.

In contrast, “Fair and not misleading information”, “Appropriateness”, “Remuneration” are areas where a majority of respondents expected an easy implementation of the proposals.

As regards “Information to clients about independent advice” and “Reporting to clients”, “challenging to implement” was the answer most frequently given.

Several respondents also mentioned that, even though the proposed rules could be relatively easy to implement, the large number of them and the interactions between the different requirements increase the challenge and difficulties of implementation.

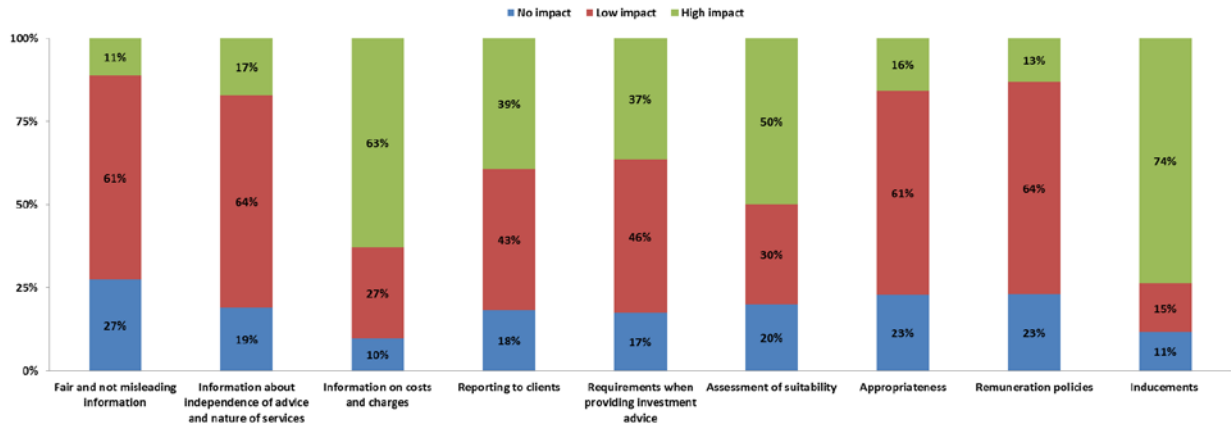
Question: For each area of ESMA’s proposal, please mention how challenging the implementation would be:



The second question aimed at assessing to what extent the proposals made by ESMA would have an impact on the business activity or the business model of the firm. Three-quarters of respondents said that the proposals on inducements would have a high impact on their business activity or business model. Two-thirds of the firms anticipated a high impact of the proposals on Information on costs and charges, and half of them, a high impact of the proposal on Assessment of Suitability. In contrast, more than 80% of respondents anticipated no impact or a low impact of the proposals in the area of Fair and not misleading information, Information to clients on investment advice, Remuneration and Appropriateness. In the area of Reporting to clients and Investment advice on an independent basis, the most frequent answer was that the proposals would have a low impact.

Similar comments were reiterated regarding the joint and combined impact of the new requirements on business activity.

Question: To what extent would the proposals made by ESMA in its draft advice to the Commission impact your business activity or your business model?



The third question was about implementation costs. The proposal on Inducements was mentioned by the highest number of respondents (54%) as being the most costly to implement, followed by Information on costs and charges. In contrast, no respondents quoted Fair and not misleading information, Information to clients about investment advice, Appropriateness or Remuneration as the most costly proposal to implement.

Suitability and Reporting to clients were the areas most frequently mentioned as being among the three most costly proposals to implement, in addition to Inducements and Information on costs and charges

Several respondents stressed that their answers on the proposals most costly to implement were just an initial estimate and that they might change depending on the final specifications of level 2 measures. They added that their answers were based on the assumption that existing services will continue to be offered to clients.

Question: Among the proposals made by ESMA in its draft Advice to the Commission mentioned above, please identify and rate from 1 to 3 the top 3 area that would be most costly to implement (1 being the most costly to implement),

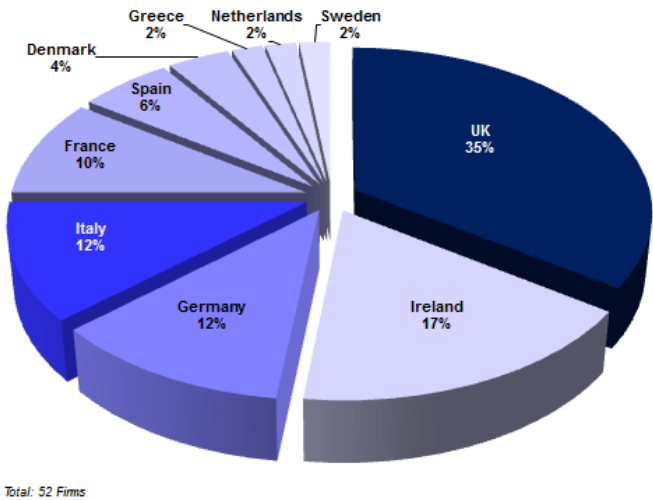
	<i>Proportion of respondents citing the proposal as being the most costly to implement</i>	<i>Proportion of respondents citing the proposal as being among the three most costly to implement</i>
<i>I- Fair and not misleading information</i>	0%	10%
<i>II- Information to clients about investment advice</i>	0%	10%
<i>III- Information on costs and charges</i>	23%	83%
<i>IV- Reporting to clients</i>	12%	35%
<i>V- Investment advice on independent basis</i>	2%	19%
<i>VI- Suitability</i>	10%	48%
<i>VII- Appropriateness</i>	0%	8%
<i>VIII- Remuneration</i>	0%	10%
<i>IX- Legitimacy of Inducements</i>	54%	73%

Best Execution

Methodology

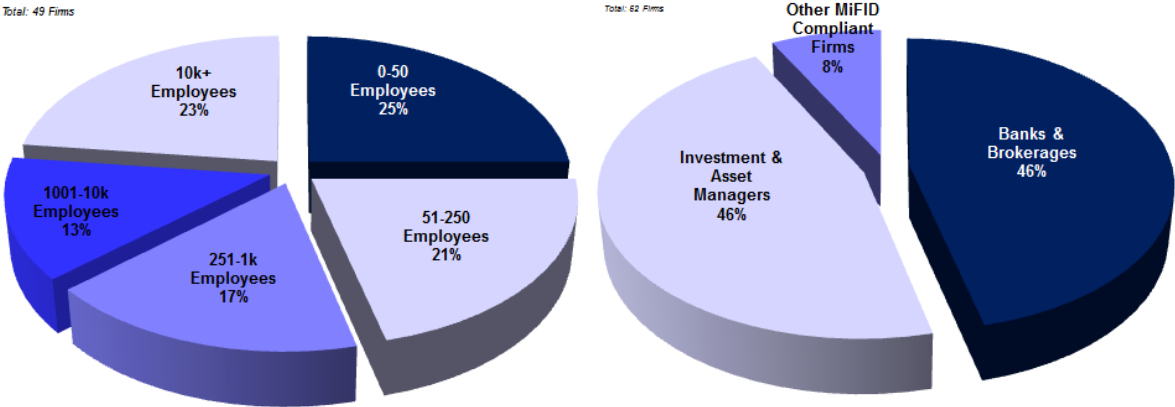
52 answers were received to the questionnaire on best execution as set out in the Consultation Paper published by ESMA on 22 May 2014. Those answers came from firms based in ten out of the twelve jurisdictions⁸ surveyed. Given the limited number of overall responses, only those countries with five responses or more have been used for comparison purposes which include authorised firms based in the United Kingdom, Ireland, Germany, Italy and France (see exhibit 1).

Exhibit 1: Geographical Split of responses received



The sample of respondents is not homogeneous across each of the jurisdictions. For instance, German savings banks account for a large number of German respondents while investment firms providing mainly portfolio management services prevail in the answers received from the UK. However the split between the size of the firm relative to the number of employees plus the buy and sell side was evenly represented (see exhibits 2 and 3).

Exhibits 2 and 3:– Responses received by Firm Size and Type



⁸ Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, United Kingdom, Spain and Sweden. No answers were received from Luxembourg and Poland.

1. Introduction

Under Article 27, MiFID II seeks to establish rules regarding the obligation to execute orders on terms most favourable to the client, in particular;

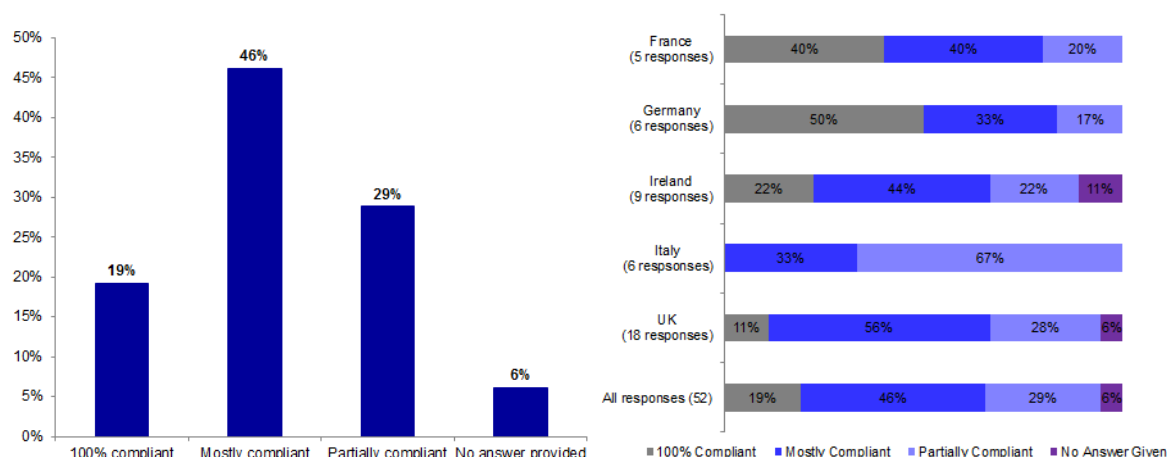
- a. **Criteria for determining the relative importance of the different factors that may be taken into account for determining the best possible result taking into account the size and type of order and retail or professional nature of the client;**
- b. **Factors that may be taken into account when reviewing execution arrangements and the circumstances under which changes to such arrangements may be appropriate. In particular the factors for determining which venues enable investment firms to obtain on a consistent basis the best possible result for executing client orders;**
- c. **The nature and extent of information to provide to clients on their execution policies.**

Draft Technical Advice - Consultation Paper, Section 2.21, p150-160

According to the MiFID II Consultation Paper released in May, ESMA proposed that Investment firms should set out in their execution or RTO/placing policy the list of factors used to select an entity or venue for execution (including qualitative factors such as clearing scheme, circuit breakers), and the relative importance of each factor. The list should specify, when appropriate, which venues are used for each category of financial instruments.

Firms were first asked about the extent to which they were currently compliant with the draft technical advice on best execution; only 20% believed that they were compliant, just under half believed they were mostly compliant with the balance only partially compliant (see exhibit 4), none of the firms indicated that they were not compliant but three respondents did not provide an answer.

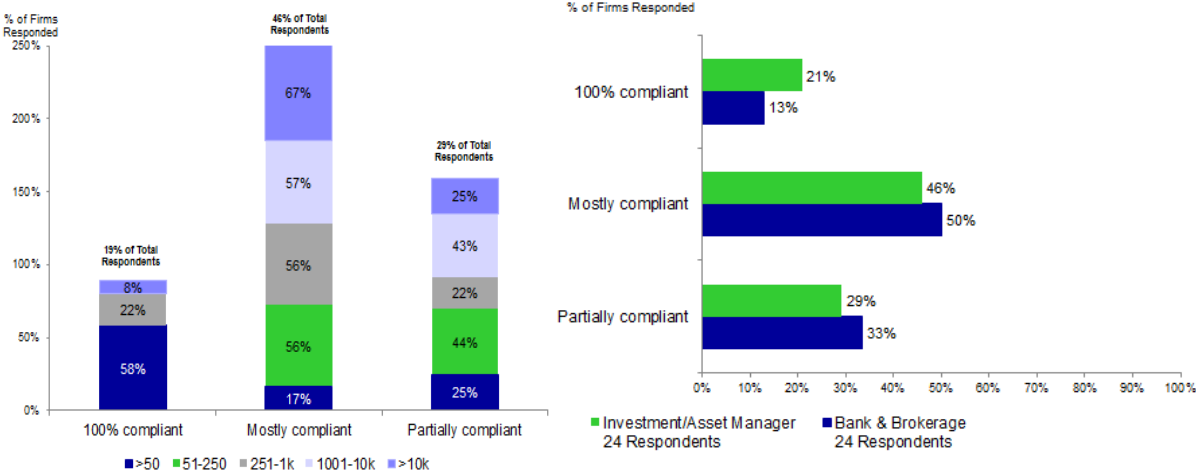
Exhibits 4 and 5: To what extent are you currently compliant with the proposals for rules regarding the obligation to execute orders on terms most favourable to the client (Article 27, MiFID II)? All participants and Split by Country with 5 or more respondents



Given the increase in unbundling of commissions and focus on best execution in the UK in recent years, only 2 out of 18 firms in the UK (11% of respondents) believed they were currently 100% compliant with the provision of Best Execution compared with 40% of respondents in France and 50% in Germany. The majority of UK respondents believed they were only mostly compliant (see exhibit 5). The responses from Ireland broke out in a similar fashion to the UK, with the majority of respondents believing they were mostly compliant (44%) versus 22% fully compliant and 22% only partially compliant. Italian firms had the highest level of partial compliance and no firms were 100% compliant.

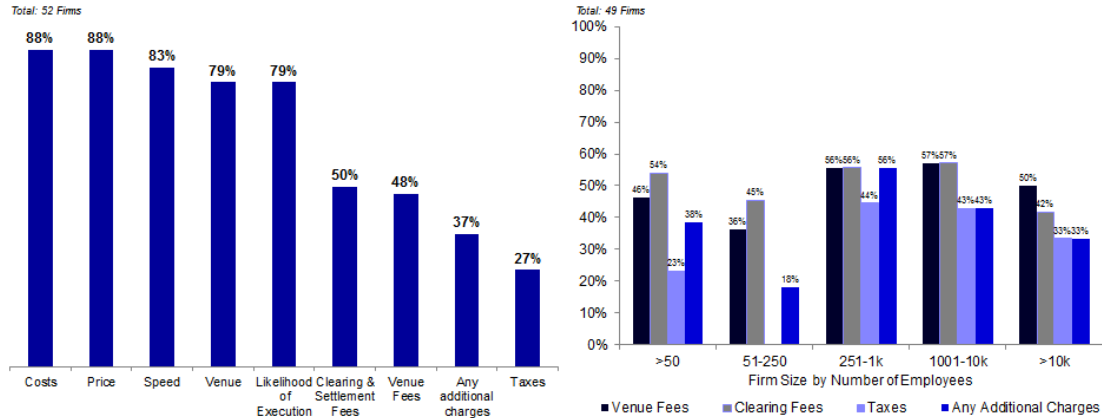
Although the identity questionnaire had three size indicators, as previously, the number of employees was the only indicator most respondents completed and is therefore the one used in the analysis of the answers per size. The majority of the largest firms answered they were mostly compliant (67%), while the proportion of the smallest firms replying they were fully compliant (54%) far exceeds the proportion for all answers (20%). The percentage of firms “fully compliant” decreases as the size of the firm increases with just 8% of large firms answering that they were fully compliant; although it should be noted that of the three firms who chose not to respond, all three had employee numbers of 250 or less (see exhibit 6). A higher proportion of buy side (investment firms) perceived they were fully compliant versus sell-side firms, with an equal number of respondents (see exhibit 7).

Exhibits 6 and 7: To what extent are you currently compliant with the proposals for rules regarding the obligation to execute orders on terms most favourable to the client – By Firm Size/% of respondents and by Firm Type



A high proportion of respondents cited costs, price, speed, venue and likelihood of execution as criteria already included in their current best execution policies; however this figure deteriorated sharply once any venue or clearing and settlement fees, taxes and/or charges were taken into consideration (see exhibit 8).

Exhibits 8 and 9: Which elements are already included in your best execution policy/disclosure to clients?/ Does your Best execution policy/disclosure to clients currently include venue and clearing fees, taxes and/or any other charges – by firm size



There was little difference between the size of the firms in terms of the first and second tranche of elements included in best execution policies, covering costs, price, speed, venue and likelihood of execution; however there was a significant drop in the number of firms who included additional charges such as venue and clearing fees. Only 48% of respondents included venue fees, 50% clearing fees and only 27% taxes and 37% any additional charges overall. When looking at the size of firms, small mid-tier firms were less likely to include this information in current best execution policies, with just 36% of this sized firm including venue fees, 45% including clearing fees, no firms including taxes and 18% including additional charges (see exhibit 9). It should be noted for those firms acting as agent, clearing fees would be directly incurred by the client with their clearer/settlement agent and not from charge incurred by the intermediary broker.

When looking at the breakdown of each element by geography, price was included by the majority of countries. The differences were more stark when considering speed of execution; just 44% of Irish firms (out of the 9 who responded) included this in their execution policies (see exhibit 10). When looking at fees and taxes per country, for those with five responses or more, France, Ireland and Italy are the least compliant with current proposals registering less than a quarter of respondees as compliant in one or more categories of fees and charges. Firms did note however that while fees and taxes are not addressed specifically in current policies, they would be considered as among the other relevant factors towards achieving best execution.

Exhibit 10: Which elements are already included in your best execution policy/disclosure to clients – by country (with 5 respondees or more)

Country	# of Responses	Price	Cost	Speed	Venue	Likelihood of Execution	Venue Fees	Clearing & Settlement Fees	Taxes	Any Other Charges
France	5	80%	100%	100%	80%	80%	20%	40%	40%	40%
Germany	6	100%	100%	83%	83%	83%	100%	83%	33%	50%
Ireland	9	78%	78%	44%	56%	56%	22%	11%	22%	22%
Italy	6	83%	83%	83%	67%	83%	50%	33%	17%	17%
UK	18	94%	94%	94%	94%	94%	44%	56%	28%	36%

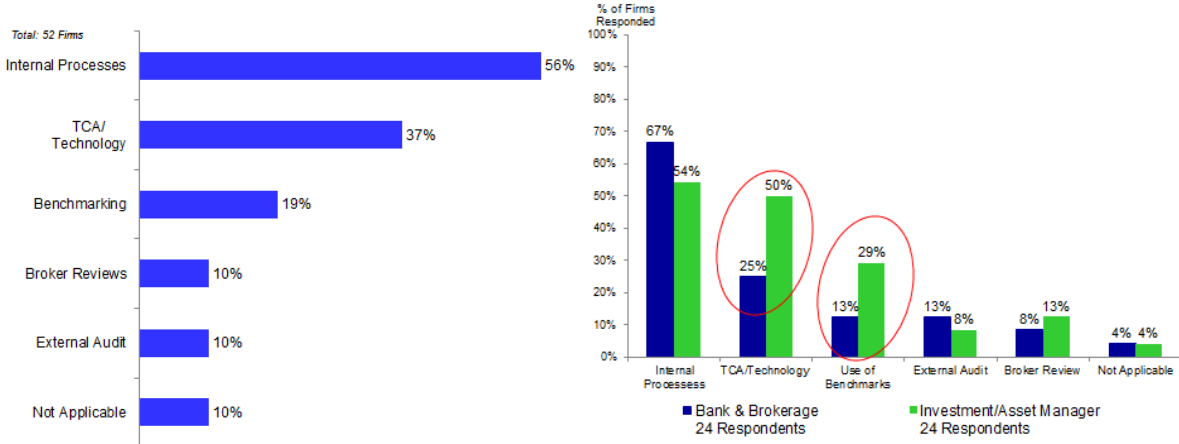
Firms noted that for professional clients, traders have to take into account a multitude of factors such as speed, likelihood of execution, settlement, size and nature of the order and any other considerations relevant for achieving the best possible result for the client. As such firms noted that their best execution policies will be assessed on many additional factors such as the relevant security, the size of trade relative to overall existing volume, the trading venue chosen, any current market volatility, a brokers' willingness to provide capital, the clients need for anonymity or whether technology is used. The characteristics or suitability of the underlying client, risk management systems and controls, likelihood of settlement, the accuracy and timeliness in the delivery of confirmations as well as the nature of the trade (i.e. to meet subscriptions/redemptions) may also be taken into consideration in the selection of executing counterparties. Whereas the provision of "best execution" for retail clients focuses greater emphasis on price and costs in order to achieve the best possible result.

2. Monitoring Delivery of Best Execution

In the main, firms choose to rely on internal processes in order to monitor delivery of best execution processes to clients (see exhibit 11). This often is based on firms undertaking to provide proof that the orders have been executed in compliance with Execution Policies and against an approved list of brokers/counterparties. Periodic due diligence reviews of the counterparties selected to execute order flow are also conducted which may also include the use of external auditors in some cases. As execution has historically been tied to the provision of research, many European firms still assess and select counterparties most likely to provide the best possible result for the execution of orders in tandem with the portfolio managers' decision to deal in certain financial instruments on behalf of its clients.

Firms may choose to distribute counterparty lists and policy documents as a matter of course or alternatively publish best execution policies on company websites. Unsurprisingly, the content and breadth of the policy documents are also varied, some in-depth, others with considerable caveats such as the need to take into consideration any factor "relevant to the execution of the order".

Exhibits 11 and 12: How do you currently monitor delivery of best execution to clients – All respondents and by Firm Type



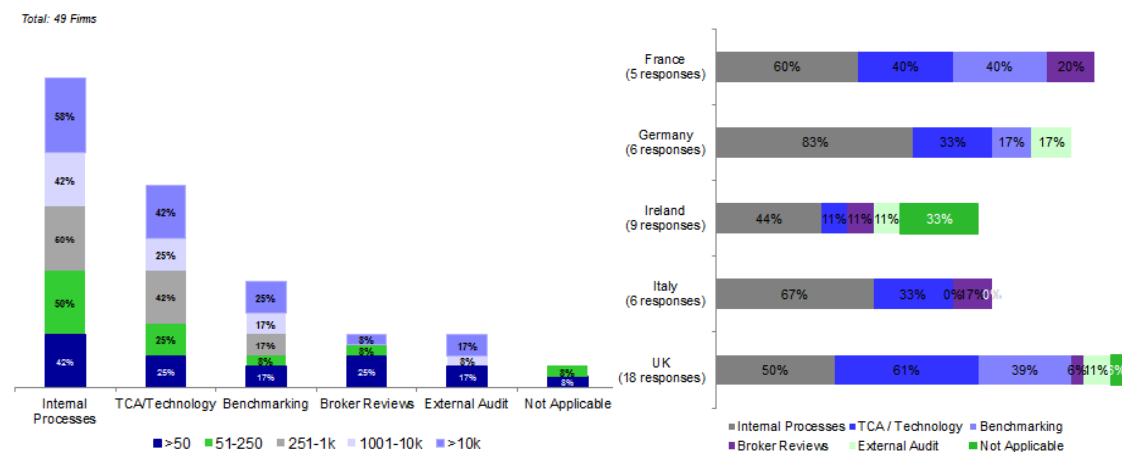
Data and Technology

Increasingly firms were making use of Transaction Cost Analysis (TCA) to monitor the effectiveness of executions in certain instruments, notably equities and FX trading with 37% of respondents citing their use of TCA and technology in monitoring delivery of best execution to clients. However while sell side firms remained focused on proprietary internal processes, asset and investment managers are increasingly turning to third party standardised technology in order to monitor their delivery of best execution (see exhibit 12).

There are a growing number of external vendors who are able to provide cost effective independent solutions which enable buy side firms to analyse total costs and timings against other market participant activity as well as their own. Real-time metrics can now be aggregated into end of day reports which external vendors are able to analyse in greater detail, incorporating peer data and a variety of benchmarks to highlight any abnormalities. Daily post-trade back testing enables firms to compare each order execution including venue costs against other alternative venues where the execution could have occurred. This data can then be incorporated into the review process to further enhance execution decisions and investigate any underperforming areas.

Firms that were larger in size typically have multiple methods to ensure delivery of best execution to clients whereas smaller firms were more weighted towards internal processes or broker reviews. Some smaller firms took the view that best execution was the duty of the counterparties to which they sent the orders for execution – though not exclusively (see exhibit 13). Larger firms often include “Execution Committees” to meet the regulatory obligation to treat customers fairly by developing trading policies and procedures, oversight, document review and escalation of breaches in procedures if necessary.

Exhibits 13 and 14: How do you currently monitor delivery of best execution to clients – by percentage of firms according to firm size/by country (with five responses or more)



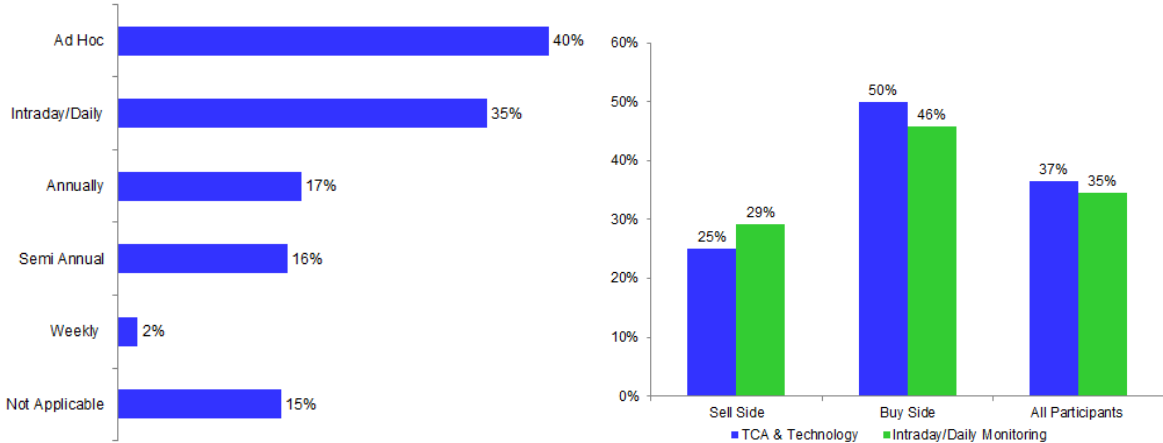
Following the FCA's recent thematic review of Best Execution, firms in the UK have been reviewing policies and practices to ensure appropriate coverage by both first and second line departments by reviewing compliance with policies and procedures and measurement of outcomes against benchmarks. Unsurprisingly the UK had the highest proportion of responses with 61% of responding firms citing the use TCA and technology to monitor the delivery of best execution to clients whereas French, German and Italian firms relied more in internal processes – 60%, 83% and 67% respectively. Irish firms relied on a variety of

processes, but had the highest percentage of firms who perceived there was no obligation to monitor delivery of best execution to clients (see exhibit 14).

3. Frequency of monitoring

Increasingly firms are using multiple strategies to ensure effective monitoring of best execution to clients. Dealing desks will then feed reports into weekly, monthly and/or quarterly internal reviews, which will be supplemented by ad-hoc monitoring by compliance departments, the results of which will feed into global management teams and the annual broker review process. However, this is not yet standard practice for all firms; monitoring of best execution can remain reliant on periodic reviews (annual or bi-annual) and adjustments to counterparty lists only if and when necessary. 15% of the respondents indicated that they perceived monitoring of delivery of best execution to clients was not applicable to them (see exhibit 15). However, the recent growth in fiduciary responsibilities and demand from trustees for evidence of best execution is driving behavioural change on the buy side to demonstrate their ability to achieve best execution for end investors, as such the proportion of buy side participants monitoring best execution on a daily basis was higher than the average (see exhibit 16).

Exhibits 15 and 16: *How frequently do you currently monitor delivery of best execution to clients (all respondents)/by firm type*



4. Challenges across the Asset Classes

Firms noted that while their approach to seeking Best Execution is applicable to all types of transactions, evaluating the quality of trades is more easily achieved for instruments with reliable and readily available comparative data and/or where a third party can provide a specialised TCA service. As such a wide variety of trading benchmarks are being adapted from equities markets to measure execution performance in other asset classes such as Futures and, most notably of late, FX markets⁹.

Where fixed interest instruments can be traded on an execution platform, the data generated can identify trading savings relative to the estimated market rate, and produce execution

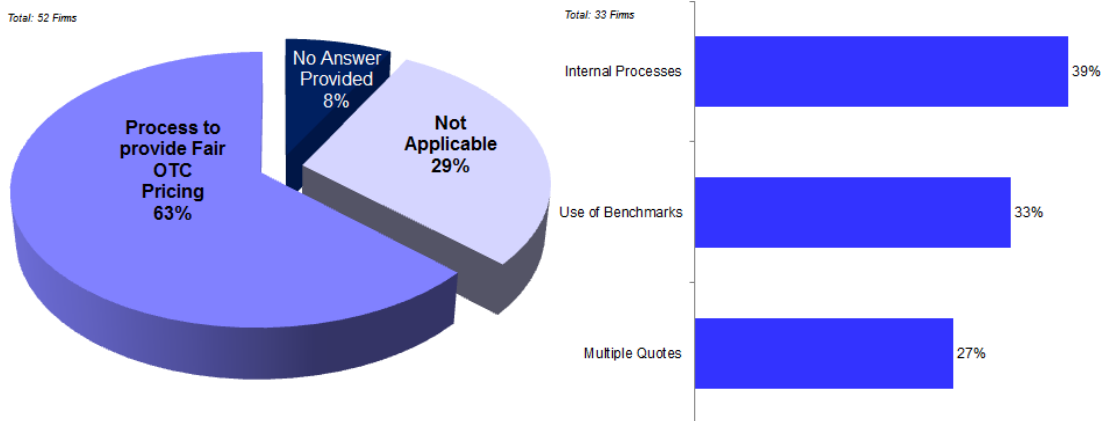
⁹ TABB Group – *FX in Transition (2012)*

quality reports to review bid-offer spreads relative to market spreads and trading times relative to the available market liquidity. However in the main, firms are reliant on capturing competing quotes to evaluate the effectiveness of execution for fixed interest instruments to attempt to identify any potential issues requiring further investigation. As such firms endeavour to deliver best execution, but as price conditions are determined by overall liquidity and the provision of risk, some firms indicated there may be exemptions within the execution policy for certain instruments such as OTC products.

5. Fairness in OTC Pricing

Providing pricing for OTC products is particularly problematic and depends on the liquidity and information surrounding the asset at the time of purchase and for subsequent valuation, as well as the respondents’ ability to lay-off or warehouse related risks and costs, including those incurred by the counterparty. It was noted that while firms may deem fairness of pricing an important topic, they do not consider this relevant to the provision of best execution given that the price at which bespoke OTC products are sold have to incorporate additional costs such as hedging the risks evaluated at the time of the trade. Where the execution policy states that where it is asked to provide a quote in an OTC instrument and the client accepts such a quote, for some firms, this is considered “best execution”. As such, only 33 out of the 52 firms responded that they had a process in place to ensure the provision of fair OTC pricing, 15 firms believed this was not relevant to their business model and 4 firms declined to answer (see exhibit 17).

Exhibits 17 and 18: Do you currently ensure fairness of pricing in the case of bespoke OTC products? / By what method do you achieve this?

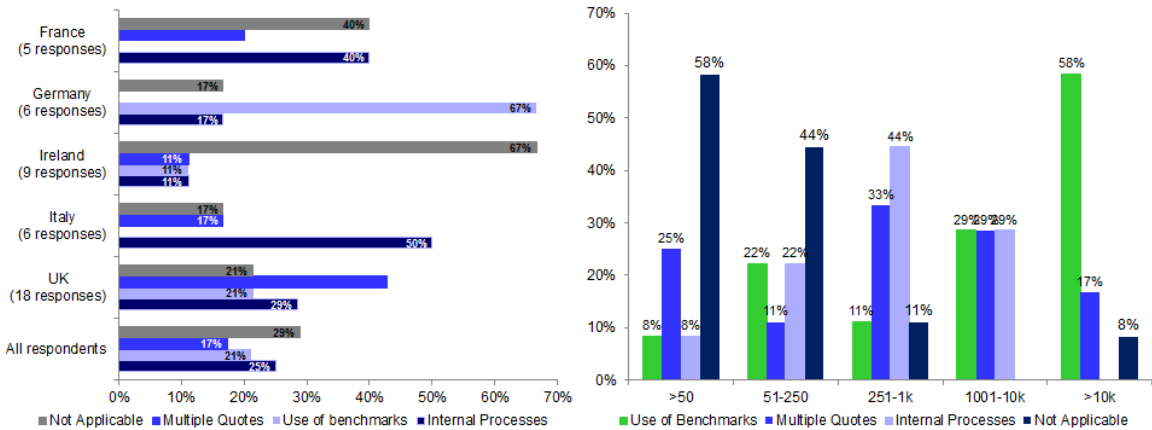


When asking how fairness of OTC pricing is ensured, firms in the main still rely on internal processes, rather than requesting multiple quotes (see exhibit 18). This may be more dependent on ensuring bi-lateral OTC trades are only executed with known creditworthy and reputable counterparties rather than electing to focus on the best available quote in the market at any one time. Firms noted that in some circumstances releasing the information necessary to obtain a comparative quote in fact impeded their ability execute the trade at the best price. However some firms have established pre-trade pricing models in order to demonstrate value consistently across OTC products which are then reviewed regularly to assess current market convention such as including a discounting methodology or to ensure that stale price points are not used. Again the provision of equity OTC pricing is easier due to the growing number of third party products available, such as RFQ Hub, recently acquired

by ITG. This enables firms to seek competitive prices from one or more counterparties depending on the level of concern about information leakage.

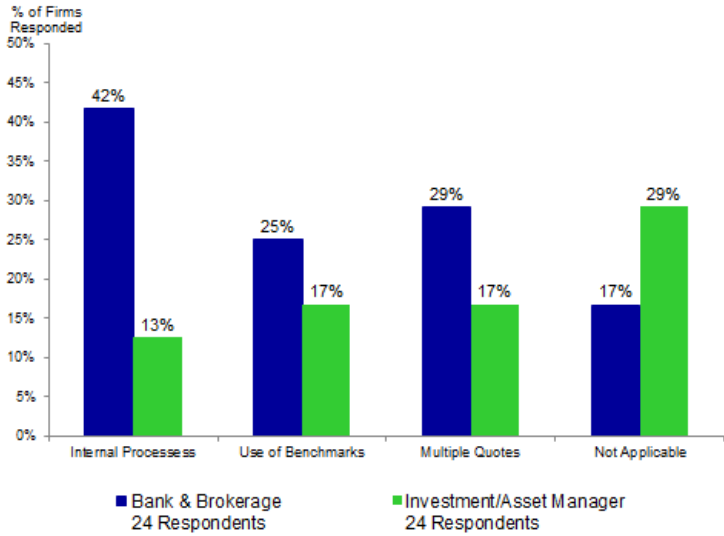
When looking at the differences between geography, UK firms relied on a wider variety of methods to ensure fairness of pricing, whereas firms in Germany focussed on greater use of benchmarks alone (see exhibit 19). Firms that were larger in size typically relied on the use of benchmarks to demonstrate fairness when pricing OTC products, whereas some smaller firms took the view that best execution was the duty of the counterparties to which they sent the orders for execution – though not exclusively (see exhibit 20).

Exhibits 19 and 20: How do you currently ensure fairness of pricing in the case of bespoke OTC products – by country (with 5 respondents or more) & by size of firm



Given the opacity in OTC pricing currently the split of responses between buy and sell side participants indicated that the sell-side were more likely to ensure provision of fair OTC pricing via internal processes, rather than the buy side choosing to verify the price provided as noted earlier through the use of TCA and intraday reporting (see exhibit 21).

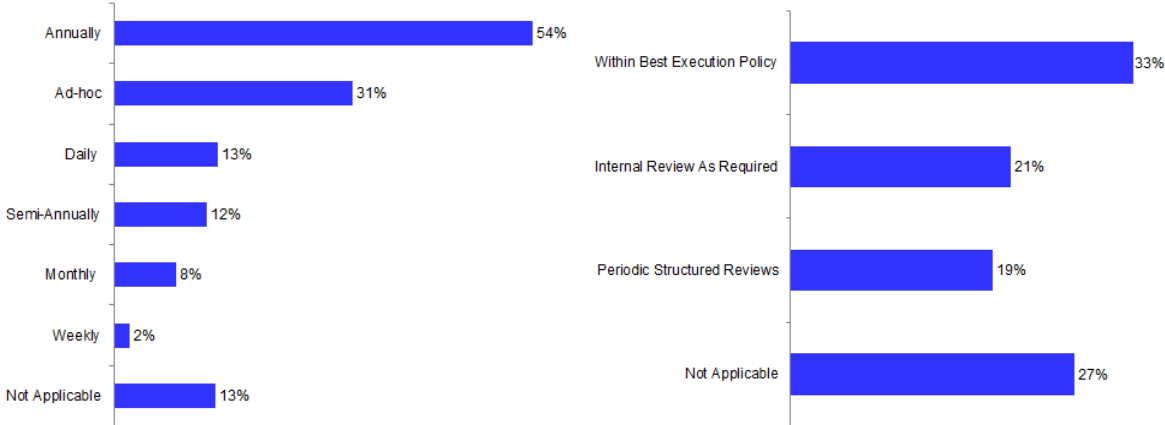
Exhibit 21: How do you currently ensure fairness of pricing in the case of bespoke OTC products (by type of firm)



6. Reviewing Execution Arrangements

The majority of firms currently review execution arrangements on an annual basis (see exhibit 22). However as noted previously with monitoring delivery of best execution to clients, firms are increasingly using multiple strategies where periodic reviews will be supplemented with ad-hoc monitoring to ensure both compliance and overall effectiveness of arrangements. As well as a policy being reviewed annually, this may also occur more frequently as a result of significant business or regulatory change, or even as a result of market events such as a liquidity squeeze.

Exhibits 22 and 23: How often do you currently monitor the effectiveness of your order execution arrangements?/ How do you currently account for the addition or subtraction of an eligible trading venue/entity?



Addition or Subtraction of Venues

In the main firms do not specify all venues or entities which may be accessed or excluded for a variety of reasons. This may be due to the frequency with which these venues may change. However the majority of firms cited that their best execution policy will outline the relevant criteria for the selection of the trading venues rather than specify the underlying venues themselves (see exhibit 23).

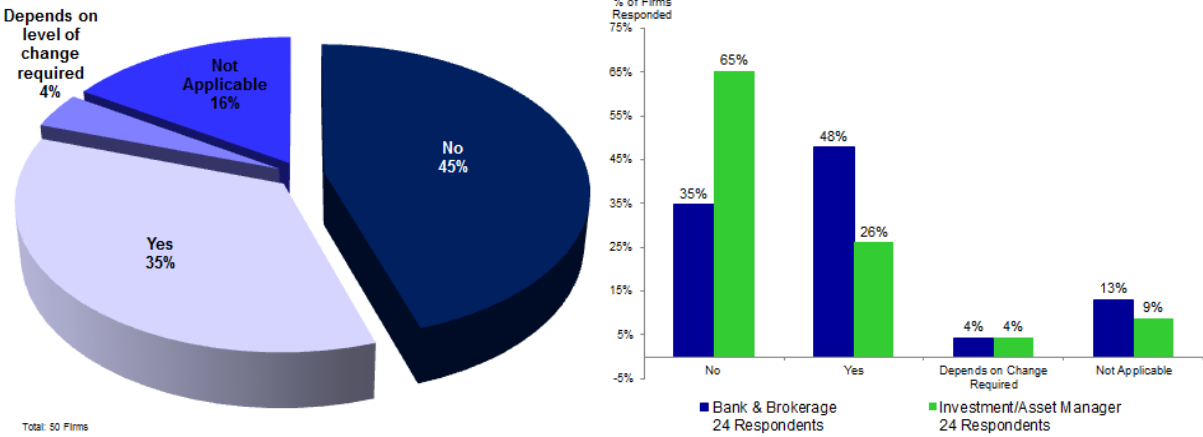
The addition or subtraction of any particular venue may also be regulated by an internal review process, taking into consideration market data, client interests or any other relevant information. These may include an initial assessment of the investment rationale and the business requirements for accessing a new venue which would then need to be approved by an internal committee. Requests to initiate execution or research services with a new broker will require appropriate due diligence to be completed before approval such as information on a brokers reputation, the quality of their research and access to niche markets where applicable. For OTC Counterparties, further analysis is required; this could include a minimum long term credit rating and an internal credit review which considers earnings strength & stability, capital adequacy, debt service capabilities, franchise strength and diversification, management quality, risk management and the operating environment(s).

Other firms noted that they perceived this not to be relevant for their organisation as they only executed orders with a single entity, although annual due diligence reviews would still be conducted. Also for firms who left selection of an eligible trading venue to the discretion

of the eligible trading entities they use for brokerage services, none of the above practices would be considered relevant.

If there was any change to venues or brokers accessed, the majority of participants did not consider this a material change to their best execution policy (see exhibit 24). However it was noted that this could also depend on the level of that change required; for example it regards a minor venue the policy update process is a lighter one, otherwise, if the change is judged to be a material one, then the policy is updated following a more complex process.

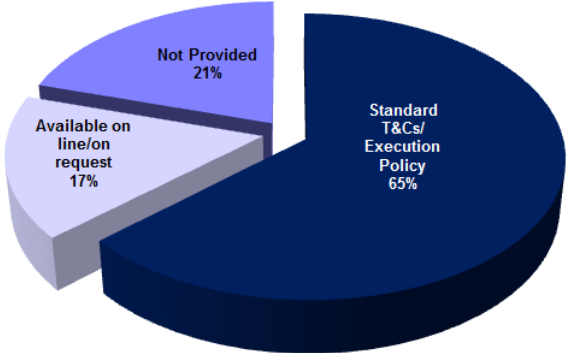
Exhibits 24 and 25: Is the addition or subtraction of an eligible trading venue/entity currently included as a material change in your execution policy?/ Is this currently included as a material change in your execution policy (by firm type)?



In this instance the sell-side were less likely to consider the addition or subtraction of an eligible trading venue/entity as a material change to their execution, compared to buy side firms who were more likely to do so (see exhibit 25).

Typically firms provided this information within standardised generic documentation under either a Transmission of Orders or Best Execution policy (see exhibit 26). This information is in the main provided in written format usually during the on-boarding process but may also be made available on a company’s webpage. Other firms did not provide execution policies for the entities where they transmit orders but take this into consideration during the annual due diligence process.

Exhibit 26: How do you currently inform your clients of an addition or subtraction of an eligible trading venue/entity?

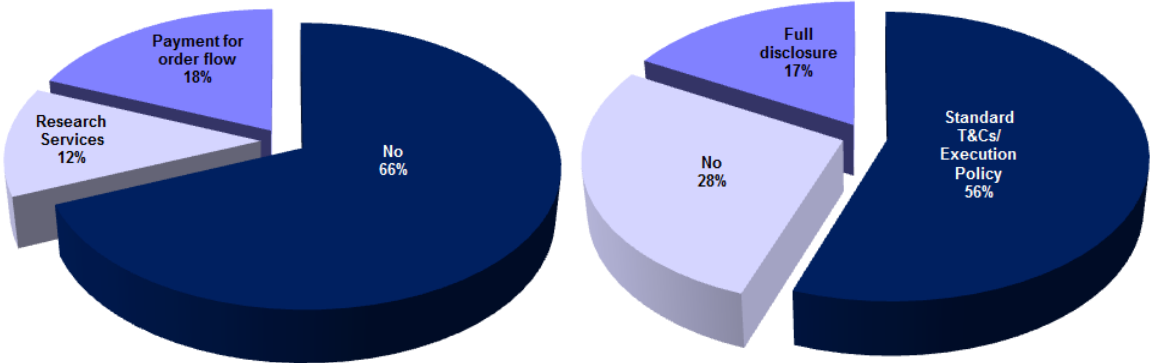


Where an order may currently be executed outside a regulated market or MTF, this may or may not be indicated in the information provided to clients. Some firms obtain prior written consent from clients in relation to trading conducted away from RMs of MTFs in advance. Where there are specific preferences (on dark pools for example) these are slowly becoming more transparent through the use of increased standardisation of data.

7. Third Party Payments

It is the view of ESMA that the execution or RTO/placing policy should include clear information about any inducements that may be received by the firm from the venues, market makers, or entities to which the orders are transmitted. In the main, firms responded that they currently do not receive any remuneration (see exhibit 27). However where non-monetary benefit includes dealing commission used to pay for investment research, 12% of participating firms acknowledged they received research services in return for commission payments made when routing client orders. For UK firms it was also noted that these research services are received in accordance with the FCA's rules on the use of dealing commissions, Conduct of Business section 11.6.

Exhibits 27 and 28: Do you currently receive any remuneration, discount or non-monetary benefit when routing client orders? If so what?/ Do you relay this information to your end clients?



Payment for Order Flow

56% of participants believed they provided sufficient disclosure to their clients through standard documentation, and only 17% of participants provided full disclosure of fees (see exhibit 28). Over a quarter of firms indicated that at present this information would not be communicated in any detail.

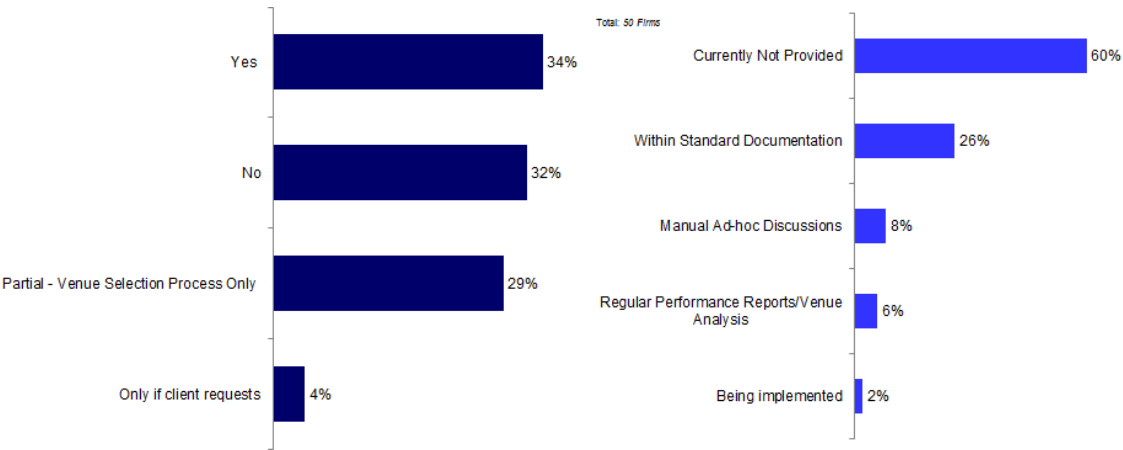
For sell side firms, the routing of a client's order may result in providing liquidity to a venue with a maker taker model which would generate revenues. Some firms highlighted that they did not receive explicit remunerated benefit for routing order flows, but instead benefited from cost economies of scale when routing order flow. Discounts would not be received or applied on the transaction level but would contribute to lowering the overall execution costs which would be passed onto end clients through lower commission fees. As such firms were of the opinion that the discounts obtained through the make/taker model of liquidity provision did not affect their selection process and therefore there was no necessity to disclose this information to end clients.

8. Transparency of Venue Selection

The information regarding the factors used to select an entity or venue for execution and the venues used by the firm should, in ESMA’s opinion be consistent with the controls used by the firm to demonstrate to clients that best execution has been achieved on a consistent basis, to allow the client to understand both the advantages and the disadvantages of choosing one venue or entity over an alternative.

Currently respondent firms are evenly split in whether they do or do not provide end clients with information regarding the advantages or disadvantages of selecting a particular venue or entity, with just under a third of respondents citing that they provided partial information only (see exhibit 29).

Exhibits 29 and 30: Do you currently provide clients with information regarding venue selection including clearing fees, any other known fees or charges?/ How do you ensure that the client receives sufficient information to understand both the advantages and disadvantages of choosing a particular venue or entity?



When reviewing whether a firm believes their client receives sufficient information to understand both the advantages and disadvantages of choosing a particular venue or entity, the vast majority of firms did not provide this level of detail (see exhibit 30). Either because as a discretionary portfolio manager the firm would select the brokers to execute with rather than the client or because the firm only deals with eligible counterparties, and as such, are of the opinion that end clients should assess for themselves the advantages or disadvantages of a particular venue. Other firms indicated that as they are governed by best execution policies they would analyse the relative merits any venues accessed; if there were concerns about venue performance, alternations to the selection would be made, but this would not necessarily be discussed with the end client.

Those that did provide the information predominantly did so through standard execution policy documents listing the top brokers or venues used globally in the previous year with no specific information on individual orders (see exhibit 31). The reason for this may be that as the largest component of trading costs is due to insufficient size being available at the point when an order is received, the choice of venue(s) may be based on expectation informed by prior experience, rather than available market data. Where clients are consulted, information

can be provided which may then result in direct conversations to discuss an individual selection to satisfy the firm in question that the client understands the risks involved.

Again there were differences noted due to the financial instrument. For equities, the primary consideration of cost is execution commission which is currently disclosed and reported when required; whereas for non-equity instruments the insufficient data available prevented sufficient analysis.

Product Intervention

Draft Technical Advice: Consultation Paper, Section 2.24, p 166-173

Articles 40 to 43 of MIFIR introduce a framework for product intervention in order to enable National Competent Authorities (NCAs) and ESMA (in accordance with, and within the scope of, Article 40) or EBA (in accordance with, and within the scope of, Article 41) to prohibit or restrict the marketing, distribution or sale of certain financial instruments or structured deposits or financial instruments or structured deposits with certain specified features or a type of financial activity or practice. Under Articles 40(8), 41(8) and 42(7) of MIFIR, the Commission is required to adopt delegated acts specifying criteria and factors to be taken into account by ESMA, EBA and NCAs in determining when there is a significant investor protection concern, or a threat to the orderly functioning and integrity of financial markets or commodity markets and to the stability (of the whole or part) of the financial system (of the Union or within at least one Member State, respectively).

In the Consultation Paper published on 22 May 2014, ESMA suggested, as draft advice, a non-exhaustive list of factors and criteria to be taken into account by ESMA or a NCA when considering the possibility to exercise their product intervention powers.

Data gathering

1. A short questionnaire was prepared for the attention of national competent authorities, empowered by MIFIR to implement product intervention rules. The purpose of the questionnaire was to gather information on product intervention rules that may already be in place in the Member States surveyed¹⁰, and on the circumstances where such product intervention may have been used in the past.

2. The questionnaire was sent to twelve national competent authorities. Eight responses were received. Out of those eight responses, four national competent authorities answered that there was currently no regulatory framework for product intervention similar to the one introduced by MIFIR in their jurisdiction.

3. The information below was gathered from the more substantial responses provided by four competent authorities.

3.1 One competent authority is able to exercise product intervention rule-making power in response to an identified product-centred issue in circumstances similar to the ones set out in the draft advice.

This competent authority is normally obliged to consult the public before making any rules. However, a general exemption is provided to this requirement if the competent considers that the delay involved in complying with this requirement would be prejudicial to the interests of consumers. In addition to this general exemption, a specific exemption to the consultation

¹⁰ Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Spain, Sweden, United Kingdom.

requirement is provided in relation to the making of temporary product intervention rules if the competent authority considers that it is necessary or expedient not to comply with such requirement to advance a) the consumer protection objective, b) the competition objective; or c) if the Treasury makes so an order, the market integrity objective. The specific exemption to use temporary product intervention rules without prior consultation is limited to one year.

In general terms, the competent authority will consider a product intervention rule where it identifies a risk of consumer detriment arising from a particular product, type of product, or practices associated with a particular product or type of product. In deciding whether the rule should be made as a temporary (or permanent) product intervention rule, the competent authority's will generally consider factors such as :

- i. the potential scale of detriment in the market – issues involving products with a large or potentially large customer base are more likely to require product intervention;
- ii. the potential scale of detriment to individual customers – issues that may lead to high detriment for individual customers are more likely to require product intervention;
- iii. the social context – issues that may lead to detriment for particular groups of customers (such as, in particular, vulnerable customer groups) are more likely to require product intervention;
- iv. the market context – market mechanisms such as information disclosure and competition do not always work to protect consumers; and
- v. possible unintended consequences – whether the use of product intervention rules or the timing of the intervention would in itself create undue risk of further consumer detriment, including harm to existing customers in the market (although this will not necessarily comprise a full cost benefit analysis).

In its response, the competent authority stresses that its product intervention rule-making power can be used to do more than just ban products. Other types of intervention may, for instance focus on problematic product features or inappropriate market or selling practices. The factors taken into account are similar to the ones set out in the draft technical advice for use of the MIFIR product intervention power. However, the exact factors and criteria that underpin a particular exercise of power will depend on the specific circumstances of the case.

This competent authority has only once made use of the power to make product intervention rules without prior consultation. On 1 October 2014, new rules took effect that restrict the ability of firms to distribute contingent convertible securities to retail clients:

From the list of factors set out in the draft technical advice above, the most relevant drivers for action were: i) the degree of complexity of the instrument; ii) the type of clients involved; iii) the lack of transparency in this market; iv) the particular features of the instruments; v) the ease and cost for investors to switch out of the instruments if they convert; vi) the pricing of the instruments which suggests that risks are not being taken into account sufficiently; and vii) the highly innovative nature of the instruments, which ordinary retail clients are unlikely to be able to assess or price correctly.

3.2 One competent authority explained that its intervention powers do not focus on “products” specifically but aim more generally at addressing any “undesirable developments which may adversely affect the orderly conduct of trading with financial instruments or the provision of investment services or ancillary services or which may result in serious disadvantages for the financial market”. In consultation with the Central Bank, the competent authority may issue orders that are appropriate and necessary to eliminate or prevent undesirable developments that may be detrimental to the stability of financial markets or undermine confidence in the proper functioning of financial markets. Those powers include, but are not limited to, suspension of trading in a financial instrument.

There is no specific list of criteria and factors setting out the circumstances under which those intervention powers may be exercised. However, the competent authority stresses that the exercise of those powers are strictly bound by the principle of proportionality and will be based on individual circumstances. These powers have never been used in the context of product- intervention as introduced by MIFIR.

3.3 Two competent authorities responded that a regulatory framework for product intervention similar to the one provided for under MIFIR was already in place but quoted provisions referring to trading suspension in a financial instrument admitted to trading on a regulated market. One of those competent authorities explained that trading suspension rules “should have a similar effect”.

4. The conclusion to be drawn from this data gathering exercise is that MIFIR- like product intervention rule-making powers are uncommon today across EU national competent authorities; although some competent authorities are of the views that trading suspension powers can be considered as product intervention powers. In the one jurisdiction where the competent authority is explicitly empowered to make product intervention rules, the factors to be taken into account are similar to the ones set out in the draft technical advice. As product intervention powers represent a real novelty for most competent authorities, the level 2 measures specifying the circumstances under which such powers can be exercise are of particular importance to guide an harmonised implementation.