



European Securities and
Markets Authority

Final Report

Peer review on certain aspects of the compliance function under MiFID I

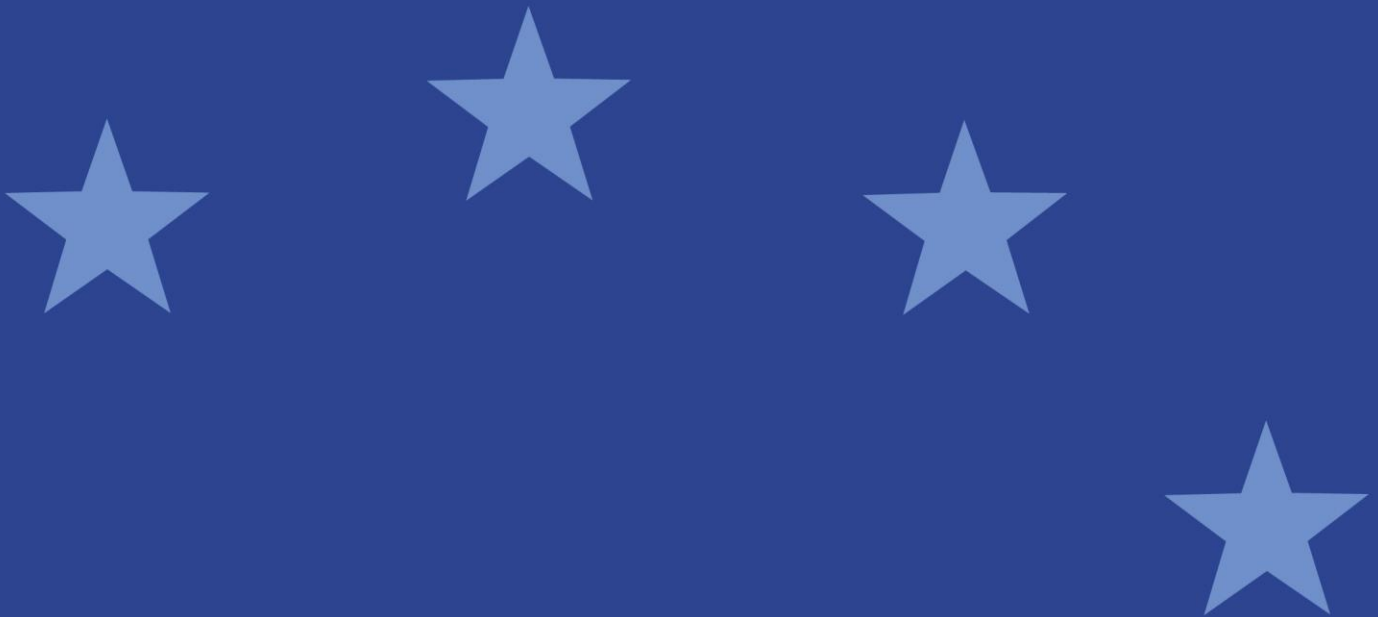


Table of Contents

1	Executive Summary	4
2	Introduction	14
3	Peer Review Assessment	17
3.1	Overview	17
3.2	Peer Review Findings	19
	3.3.1 – Guideline 1 – Compliance Risk Assessment	25
	3.3.2 – Guideline 2 – Monitoring Obligations of the Compliance Function	31
	3.3.3 – Guideline 3 – Reporting Obligations of the Compliance Function	37
	3.3.4 – Guideline 4 – Advisory Obligations of the Compliance Function	44
4	Annexes	52
4.1	Annexe 1 – The Mandate	52
4.2	Annexe 2 – The Questionnaire	60
4.3	Annexe 3 – Statements from NCAs	79



List of Acronyms and Terms Used

AG	Assessment Group
BoS	Board of Supervisors
CFD	Contract for difference
EEA	European Economic Area
EU	European Union
MiFID	Markets in Financial Instruments Directive (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC)
NCA	National competent authority
Q&A	Questions and Answers
UCITS	Undertakings for Collective Investment in Transferable Securities

1 Executive Summary

1. The compliance function is a key source of information for supervisors on the firm's compliance with MiFID requirements. The compliance function is responsible for identifying, assessing, advising, monitoring and reporting on the risk that a firm fails to comply with its obligations under MiFID and the respective national laws, as well as the related standards set out by ESMA and the NCAs. For this reason, ESMA decided to perform a peer review on the Guidelines on certain aspects of the MiFID compliance function requirements. The peer review aims at enhancing supervisory convergence in the application of the Guidelines and helping NCAs to enhance their supervisory approach towards the compliance function.
2. While the AG concluded that there is high-level of compliance with the Guidelines among NCAs, it has also found quite some diversity in the supervisory approaches applied by NCAs. For each of the guidelines in the scope of this peer review, certain NCAs applied a more robust process than others relating to certain aspects of the guidelines. Different emphasis observed at NCAs often originated from national market specificities. For these reasons, the country visits were informative in that they informed the AG in more detail on the particular approach of a NCA. For instance, one NCA focused on the licensing of the compliance officer and frequent interactions with this officer as a key point of contact for the NCA. It is also worth noting that for many NCAs the compliance function was generally not the main objective of a supervisory review but an ancillary target of supervision of firms' obligations under MiFID.

Findings on guidelines 1 to 4

3. NCAs are expected to check that the compliance function at supervised investment firms performs **compliance risk assessments** as part of its risk-based approach (guideline 1). It appears that the majority of NCAs checked that firms have adequate policies and procedures in place and regularly perform such a compliance risk assessment. However, insufficient application of the guideline was identified for four NCAs: CY, IS, NL and SI.
4. NCAs are expected to check that the compliance function ensures the **monitoring of the compliance obligations** (guideline 2). Most NCAs reviewed both during the authorisation phase and as part of ongoing supervision that the investment firms' compliance procedures, organisation and control measures are effective and appropriate and that the compliance function performs verifications that are not limited to desk-based ones. However, insufficient or partial application of the guideline was identified for some NCAs. Regarding the supervision of the use of the compliance risk-assessment for the monitoring programme (A), insufficient application was identified for five NCAs: CY, EL, IS, NL and SI. Regarding the evaluation of the content of the monitoring programme and the priorities it established (B), partial application was identified for CY and insufficient application for EL, IS and NL. With respect to the supervision of whether the compliance function has access to all customer complaints received by the firm and whether these are used in the monitoring programme (C), partial application was identified for CY and insufficient application for IS and NL. Finally, regarding the need for NCAs to check that the compliance monitoring programme is appropriately amended

when there is an event that may influence the risk profile of the firm (D), partial application was identified for CY and insufficient application for IS and NL.

5. Regarding the **reporting obligation of the compliance function** (guideline 3), nearly all NCAs confirmed that they check that the senior management of firms receives regular and ad hoc compliance reports from the compliance function as well as that it takes action in light of a failure or a weakness identified therein. Most NCAs also confirmed that they verify that the compliance function acts independently when reporting to senior management. NCAs checked if documentation on the existence of conflicts of interest is maintained, if the compliance function has access to information in the firm, where power resides to appoint or replace the compliance officer and whether senior management has deviated from recommendations issued by the compliance function. However, insufficient or partial application of the guideline was identified for some NCAs. Regarding the check that senior management receives regular and ad hoc reports as required (A), insufficient application was identified for IS and NL. For the supervision of the independence of the compliance function (B), partial application was identified for DK and NL and insufficient application for IS and SI. With respect to the monitoring of the content of the compliance report (C), partial application was identified for CY and EE and insufficient application for IS and NL.
6. Finally with regard to the **advisory obligations of the compliance function** (guideline 4), most NCAs assessed whether the investment firm's compliance function fulfils this role. Regarding the supervision of the compliance function advisory responsibilities (A), partial application was identified for CY, FR and MT and insufficient application for EL, IS and NL. With regards to checking that the compliance function is engaged in training support for the staff of investment firms (B), partial application was noted for EL, FR, SE and insufficient application was identified for four NCAs i.e. CY, IS, NL, SI. With respect to checking that the compliance function considers internal policies, procedures, organisational structure, MiFID and national laws, as well as guidelines and standards (C), partial application was identified for PT and insufficient application for IS, NL and SI.
7. A summary table of the compliance level per jurisdiction and guideline, including a break down per key question (indicated above and identified with (A), (B), (C) and (D)) is set out below.

Good practices

8. Following the analysis and the on-site visits, the AG has identified good practices with regard to the Guidelines. The most relevant practices are indicated below.
9. The AG noted that many NCAs operate a 'fitness & probity' or 'pre-approval' process for senior positions in the compliance function. It was observed that in jurisdictions where proposed **compliance officers are subject to a formal pre-approval or to pre-screening** (including calling officers in for interviews), there was stronger adherence to the Guidelines in the supervisory approach. In addition, it was noted that one jurisdiction in particular, FR, has developed a dedicated licensing regime for the compliance officers that includes a dedicated training programme and a formal interview by a panel of industry and regulatory representatives.
10. The AG observed that several NCAs issue an **annual compliance questionnaire** that seeks information from the firm or the compliance function. Such an approach facilitates the identification of risks by NCAs as the compliance function offers a central point of information on the firm's compliance with MiFID requirements. Depending on the jurisdiction, handling the compliance questionnaire may require an IT tool in order to automate the management of information.
11. In addition, in cases where NCA's **have incorporated the Guidelines into the local supervisory framework**, there was a clear indication of an increased focus given by the NCAs to adherence with the Guidelines and their content. It was observed that in such situations, NCAs tend to include more often the compliance function in the scope of their supervisory activities and establish a closer relationship with the compliance officer.
12. The point of initial authorisation of firms is considered as a critical point for NCAs to communicate their expectations to regulated entities and to ensure that firms recognise the implications of operating within a regulated environment. The AG observed that where an NCA has an **authorisation process that has clear and transparent requirements published online, including specific requirements for the compliance function**, that this facilitates a better understanding of regulatory requirements and promotes adherence to the Guidelines.
13. Several NCAs conducted inspections of all newly authorised investment firms. Several of these inspections included consideration of how the compliance function was being embedded in the organisation of the firm. It was noted that an **assessment of the firm's compliance function shortly after authorisation** strengthens the firms' adherence to the Guidelines and their content. As any supervisory activity, this one would be subject to the risk based approach of NCAs, and may have to be prioritised for instance for firms with a complex business model leading to specific challenges for the compliance function.
14. The AG noted that several NCAs have conducted a **dedicated inspection or a thematic inspection/review of the compliance function of investment firms**. Where such a dedicated inspection or thematic review occurred, the AG noted that a strong commitment was

placed by the NCA on the adherence by investment firms to the content of the Guidelines and on the key role of the compliance function.

15. The majority of NCAs place a strong focus on the training and development of their staff and some NCAs have developed detailed training for supervisory staff on the role and responsibilities of the compliance function in investment firms. It was observed that in the jurisdictions where NCAs actively commit resources to **training supervisory staff** on the understanding of the role of the compliance function, the Guidelines were more directly embedded into the supervisory approach.

On-site visits

16. The on-site visits to NCAs played an important role in enabling the AG to enhance its understanding of the NCAs' supervisory approaches. In order to gain a thorough understanding, the AG looked into supervisory practices in relation to the application by investment firms of guidelines 1 to 4 in the context of the authorisation stage, day-to-day supervision and enforcement. The AG wishes to both stress that all visited NCAs engaged openly and constructively with the AG and expresses its gratitude as a result.

FMA (Austria)

17. The FMA has included the Guidelines in a Circular and was found to have adequate framework and procedures in place to conduct the authorisation and ongoing supervision of investment firms as well as enforcement.
18. It is worth noting that the FMA has access to the audit report that covers certain aspects of the compliance function. Regarding the audit reports, it is important to keep in mind that they are prepared in accordance with the audit methodology and the AG noted that the FMA had identified issues that were not identified in the audit report. It is therefore of paramount importance for the NCA to consider external audit report as a source of information among others and to perform other checks and analysis.
19. The AG has not identified findings that should be acted upon but instead made several suggestions for enhancing the overall approach of the FMA. In the scope of the authorisation phase, the review of the organisation manual should cover the requirement to have a compliance risk assessment and the obligation of the compliance function should be sufficiently described. In the scope of enforcement, the FMA should analyse the benefit of publishing its decisions on its website.
20. Amongst the FMA's good practices, the AG notes the compulsory compliance training for all personnel of the FMA as well as other training available in cooperation with the Austrian National Bank and the Vienna University. In addition, for each newly authorised firm the FMA carries out an on-site visit within the year following the authorisation. Furthermore, an annual online questionnaire covering the compliance function is addressed to all investment firms

and branches of investment firms. Answers to that questionnaire provide the FMA with a snapshot of the firms' key corporate data and business activities, details on assets and clients of the firms, as well as organisational information, allowing the FMA to plan subsequent supervisory measures.

CySEC (Cyprus)

21. Cyprus is a very small country with a large international securities market. Currently 215 investment firms are subject to CySEC supervision, which was found to have limited resources. The firms target mostly retail clients and have complex business models.
22. The AG has identified several important findings and made several recommendations in relation with the compliance function.
23. Regarding the authorisation process, the AG recommends that CySEC broadens and deepens the information required from applicants on the compliance function. It should apply a rigorous analysis of the information received and challenge the applicant robustly in order to fully understand the investment firm's application and potential risks associated with its provision of investment services. A more substantial assessment of the organisation and procedures should be performed in accordance with the Guidelines. It is also necessary to perform a deep assessment of whether the compliance function has adequate personnel and resources.
24. Given that the majority of investment firms are seeking authorisation to provide CFDs and other speculative products to retail clients across the EU under Article 31 of MiFID, for its supervisory approach with regard to the compliance function CySEC should particularly consider sections 1 and 10 of ESMA's Q&As relating to the provision of CFDs and other speculative products to retail investors under MiFID.¹
25. With regard to the supervision phase, the AG considers that an increase in CySEC's supervision resources would be required in order to properly address the supervision of investment firms' compliance function. Indeed, during the visit a necessity to broaden the range of supervisory tools, to extend the scale of supervision and to assess the impact of the supervisory approach on firms' compliance culture has been detected. The AG also found that it constitutes a challenge for CySEC to conduct intensive supervision in high-risk and high/medium-risk investment firms considering its resources. The AG recommends that CySEC considers increasing resources dedicated to supervision and specifically train new staff in order to enhance on-site supervision of investment firms. These actions are important from the perspective of the proper application of the Guidelines.

¹ In this respect, CySEC has informed the AG that as of February 2017, they have revised the Application Form as well as the related Checklist for the Internal Procedures Manual, in order to take ESMA Q&As into account.

26. The AG also found that CySEC did not check whether issues they had identified when carrying out supervision had also been identified by the firm's compliance function in the compliance report. When carrying out supervisory work, CySEC did not assess whether there had been improvements in how firms subsequently drafted their compliance reports having previously made findings of a serious lack of compliance in this area. The AG found that the lack of assessment of the compliance report raises concerns around the level of value CySEC places on the annual compliance reports.
27. Regarding the enforcement phase, the AG also identified a need for CySEC to enhance its organisation through either more regular interactions between the two departments responsible for enforcement or by entrusting responsibility for enforcement to only one department. The AG also recommends CySEC to assess the framework for enforcement and to reconsider the level of pecuniary sanctions with regard to the MiFID requirements related to the compliance function in order to act as a real deterrent to breaches by firms.
28. The AG has identified good practices. In particular, CySEC has a certification exam in place open to all employees of financial firms that aims to ensure that employees of financial institutions have a common minimum basis of knowledge. Additionally, enforcement measures decided by CySEC Board and communicated to firms are published on the CySEC's website. This approach incentivises compliance by firms.

FSA (Denmark)

29. The on-site visit at the FSA shows that in general the NCA has adequate procedures in place to conduct the authorisation and ongoing supervision of investment firms, including in relation to the Guidelines. The AG noted that the FSA faces resourcing challenges deriving from the relatively high staff turnover figures. It also noted the peculiarity of the structure of the financial sector in Denmark, where the investment services sector is not as material as the banking sector or the pension market.
30. The AG has identified one finding for action and made a few suggestions in order to enhance the FSA approach.
31. The finding for action identified by the AG relates to the reporting of the compliance function to the executive management only and not to the Board. Although the Danish FSA identified the issue and addressed an order to the Executive Board of the firm so that the compliance function would report annually to the Board of Directors, the FSA did it in verbal form and the order was not included in the written report on the inspection addressed to the Board of Directors of the firm. The reporting to the Board of Directors is considered as particularly relevant by the AG in order to ensure the independence of the compliance function and having the order in the written report would allow direct information to the Board of Directors and strengthen the impact of the order.

32. The AG noted that the FSA utilises the principles established in the Guidelines both in the authorisation and in the supervision of investment firms, although these are not embedded into the supervisory framework or internal policies and procedures. The AG suggests that the reference to the Guidelines requirements be effectively formalised in order to ensure that a particular emphasis is placed on the compliance function and to set a stronger incentive to organise it adequately at the application stage.
33. Finally, as pecuniary sanctions can only be imposed by the police and the courts and the FSA did not report cases to the police during the review period, the AG suggests that the FSA considers proactively the possibility to refer cases to the police as part of its toolkit in order to broaden its means of action.

AMF (France)

34. The AMF was found to have adequate framework and procedures in place to conduct authorisation, ongoing supervision as well as enforcement. In addition, the AG considers that the AMF has made a considerable effort in order to promote and enhance a compliance culture across the industry.
35. The AG has not identified any findings that should be acted upon but has made one suggestion for enhancing AMF's overall approach, i.e. to consider publishing (on an anonymous basis) its supervisory findings and any positions expressed in follow-up letters to firms so that the rest of the industry could benefit from understanding the issues raised and the required corrective measures.
36. Regarding good practices, the AMF is committed to enhance and promote a compliance culture. In particular, it has set up a strong compulsory licensing procedure for all compliance officers. In addition, it considers the compliance officer as a key contact person in the firm and organises regular training and meetings for them. Furthermore, the AMF requires the compliance officers to answer an annual compliance questionnaire in order to gather information on the standing of compliance of the firm.

NBS (Slovakia)

37. The NBS approach to the authorisation, supervision and enforcement of investment firms in relation to the guidelines was considered appropriate for the nature, scale and complexity of the investment firms market. The supervisory approach, and in particular the on-site inspection regime, demonstrated that the compliance function in general and the ESMA Guidelines in particular are considered by the NBS.
38. The AG identified one finding for action and made a few suggestions to enhance the approach of NBS. The finding for action refers to the fact that the public registry of supervised entities on the NBS's website does not distinguish between firms authorised to perform activities and

those that are awaiting permission to commence operations.² The other findings for consideration relate to the formalisation of the pre-application and application process and a strengthening of the risk-based approach to supervision.

39. The AG identified some good practices. In the authorisation phase, the persons responsible for the compliance function are screened for professional competence but also professionalism and trustworthiness. In addition, as part of the authorisation process an on-site visit takes place before authorising the investment firm to provide investment services. Finally, as part of the ongoing supervisory process, it is worth mentioning that a detailed action plan to remedy the identified deficiencies was issued to each firm with deadlines agreed for the completion of the required actions.

AFM (Netherlands)

40. Following its non-compliance statement, the AFM provided further explanation and an action plan is set out below.
41. The AFM acknowledges the value added of the Guidelines that are part of its regulatory framework applicable to supervised firms.
42. As the focus of the peer review is on the Guidelines and as the AFM did not use them nor took them as a starting point during its investigations during the review period, the AFM does not fully comply with the Guidelines. In this context, the BoS agreed that an on-site visit at the AFM by the AG would not be beneficial in terms of exchange of knowledge and experiences on the specific guidelines.
43. The AFM has a risk based and thematic approach towards investment firms. During the review period, the AFM had some supervisory actions in respect to the compliance function but these actions were not based on the Guidelines. The AFM Account Supervision Team of the AFM is in regular contact with the compliance officers of investment firms and considers them as key persons within the firm. A firm can be put under 'intensive supervision' by the Account Supervision Team if the AFM receives signals that the firm is not compliant with the legal requirements (e.g. not compliant with MiFID).
44. The AFM will complement its current practices and risk based supervision with the Guidelines in its contacts with compliance officers. It will also consider good practices identified in this report. Furthermore, the AFM has already initiated training sessions for its staff on MiFIDII and on the compliance function requirements, covering the Guidelines. In addition, in the scope of investor protection, the AFM drafted a factsheet for market participants that covers the compliance function including a direct reference to the Guidelines.

² During the closing meeting, ESMA's BoS member and one member of the NBS's Board agreed with the open finding and committed to address this issue without delay. As of the date of this report, NBS has modified its approach and indicates in the register on its website when the firm is not active.



ESMA follow-up actions

45. In accordance with the Peer Review Methodology, a follow up will take place regarding the points of insufficient compliance and partial compliance with the relevant NCAs.

2 Introduction

1. The ESMA Supervisory Convergence Work Programme 2016 provided that a peer review on the Guidelines on certain aspects of the MiFID compliance function requirements³ (Guidelines) was to be initiated in order to assess compliance by the national competent authorities (NCAs) with the Guidelines, identify good practices and potential areas for improvement.
2. This peer review was conducted in accordance with Article 30 Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 (ESMA Regulation) and the Review Panel Methodology (ESMA/2013/1709) (Methodology).
3. In line with the ESMA Regulation and the Methodology, the peer review is required to include a review of the degree of convergence of NCAs in the application of law and supervisory practices, as well as the extent to which the practices achieve the objectives. It also covers the capacity of NCAs to achieve high quality supervisory outcomes, including the adequacy of resources, the effective application of the Guidelines and the capacity of the NCAs to respond to market developments. The mandate was approved by the Board of Supervisors (BoS) in September 2016.
4. In accordance with the Methodology, the peer review was carried out by an independent assessment group (AG) identified in the mandate. All EEA NCAs, listed in Table 2 below, were subject to this peer review.
5. The peer review focused on the compliance risk assessment of the compliance function, as well as its monitoring, reporting and advisory obligations. These are set out in guidelines 1, 2, 3 and 4 of the Guidelines that apply to investment firms (as defined in Article 4(1)(1) of MiFID), including credit institutions that provide investment services, and UCITS management companies when they are providing investment services of individual portfolio management or investment advice⁴).
6. The questionnaire was followed by on-site visits to a number of NCAs selected by the BoS in accordance with the mandate. The jurisdictions subject to on-site visits for the purpose of this peer review are Austria, Cyprus, Denmark, France and Slovakia. Although the AG proposed to include the Netherlands for an on-site visit, the BoS decided that the AFM, further to its request, should not be subject to the on-site visit following its statement of non-compliance with the Guidelines. An action plan and explanation was prepared by the AFM and is available in paragraph 43 of the Executive Summary and followings.

³ ESMA/2012/388

⁴ Within the meaning of Article 6(3)(a) and (b) of the UCITS Directive

7. The period under review covered 1 July 2014 to 30 June 2016. All questions to NCAs were related to that period and answers were requested to cover that period unless otherwise specified in the questionnaire.

Table 2: Country codes and acronyms of NCAs participating in the ESMA survey

Country Code	Country	Competent Authority	Acronym
AT	Austria	Finanzmarktaufsicht	FMA
BE	Belgium	Financial Services and Markets Authority	FSMA
BG	Bulgaria	Financial Supervision Commission	FSC
CY	Cyprus	Cyprus Securities and Exchanges Commission	CySEC
CZ	Czech Republic	Czech National Bank	CNB
DE	Germany	Bundesanstalt für Finanzdienstleistungsaufsicht	BaFin
DK	Denmark	Finanstilsynet	Finanstilsynet/ FSA
EE	Estonia	Estonian Financial Supervision Authority	EFSA
EL	Greece	Hellenic Capital Market Commission	HCMC
ES	Spain	Comisión Nacional del Mercado de Valores	CNMV
FI	Finland	Finanssivalvonta	FIN-FSA
FR	France	Autorité des Marchés Financiers	AMF
HR	Croatia	Hrvatska Agencija za Nadzor Financijskih Usluga	HANFA
HU	Hungary	Magyar Nemzeti Bank	MNB
IE	Ireland	Central Bank of Ireland	CBol

IS	Iceland	Financial Supervisory Authority	FME
IT	Italy	Commissione Nazionale per le Società e la Borsa	Consob
LT	Lithuania	Lietuvos Bankas	LB
LI	Liechtenstein	Finanzmarktaufsicht	FMA
LU	Luxembourg	Commission de Surveillance du Secteur Financier	CSSF
LV	Latvia	Financial and Capital Markets Commission	FCMC
MT	Malta	Malta Financial Services Authority	MFSA
NL	Netherlands	Autoriteit Financiële Markten	AFM
NO	Norway	Finanstilsynet	Finanstilsynet
PL	Poland	Polish Financial Supervision Authority	KNF
PT	Portugal	Comissão do Mercado de Valores Mobiliários	CMVM
RO	Romania	Financial Supervision Authority	FSA
SE	Sweden	Finansinspektionen	Finansinspektionen
SI	Slovenia	Securities Market Agency	SMA
SK	Slovakia	National Bank of Slovakia	NBS
UK	United Kingdom	Financial Conduct Authority	FCA

3 Peer Review Assessment

8. The Guidelines on the compliance function include 11 guidelines covering the responsibilities and the organisational requirements of the compliance function, as well as the review of the compliance function by the NCAs. The peer review covered the responsibilities of the compliance function i.e. the 4 first guidelines, as they describe the core expectations on matters the compliance function should cover. It therefore has a focused scope and the outcome of the peer review should be read within this framework.
9. As a general remark, we note that the questionnaire for the peer review followed the order and structure of the guidelines, i.e. the compliance risk assessment, the monitoring obligations, the reporting obligations and the advisory obligations, covering the authorisation phase, the supervision phase and enforcement. The on-site visits were structured in reverse, considering the supervisory process i.e. the authorisation phase, the supervision phase and enforcement for each of the four guidelines in order to stick to the supervisory process and ease preparation for those NCAs that were visited.

3.1 Overview

10. The questionnaire was mainly focused on the guidelines as noted above, however there was also a number of general questions. These were included in order to provide a general context to, inter alia, the scale of the sector, resources allocated to supervision of the compliance function and the NCA's approach to authorisation, supervision and enforcement.
11. All NCAs responded to the questionnaire but not all questions were answered in full. In this respect, it is important to note that IS did not answer all questions asked and was therefore considered non-compliant for questions where no answer was provided. IS clarified it had not incorporated the Guidelines in its regulatory framework but issued its own set of guidelines on the status and responsibilities of the compliance function of investment firms in 2011.⁵
12. In total, more than 11.050 investment firms are currently authorised across the responding member countries. Over 54% of authorised investment firms are located in just two countries (Germany and the UK). Italy, Austria, and France are the countries with the next largest MiFID populations accounting for a further 18%.
13. Approximately 4.031 (36%) currently authorised firms are passporting into another Member State. 56% of all firms passporting under MiFID are authorised in the UK.
14. On average 36% of firms authorised in each jurisdiction passport into other Member States. However it is also notable that in some Member States the proportion of passporting firms is significantly greater than the average. For example, 82% of MiFID firms authorised in Cyprus

⁵ IS informed the AG about its intention to revoke its set of guidelines and incorporate the ESMA Guidelines in its regulatory framework in the coming months.

are passporting to another Member State, 74% of firms authorised in Ireland, 69% in Liechtenstein and 63% of UK authorised firms.

15. 1.051 firms were authorised in the two-year period from 1 July 2014 to 30 June 2016. This represents 10% of the total number of firms currently authorised. The five countries with the highest number of new firms authorised were the UK (505), Cyprus (63), Germany (60), Spain (53), Luxembourg (42) and the Netherlands (36). It is worth noting that in Cyprus, on 30 June 2016, 28% of the country's MiFID population had been authorised within the previous two years, which is reflective of the growth in the sector in Cyprus.
16. The percentage of investment firms examined by the NCAs and covering the compliance function ranged from 100% (Cyprus, Liechtenstein) to 0% (Slovenia). The majority of NCAs had inspected a cross section of up to 33% of the firms under their supervision in the two-year period. However it should be noted that the time and staff devoted to these examinations varied.
17. An average of 18% of inspections relating to the compliance function undertaken during the period under review resulted in an enforcement action. However this varied across the NCAs, with nine countries reporting that none of the inspections resulted in any enforcement action.
18. In general NCAs were unable to quantify the headcount allocated specifically to the compliance function, with this responsibility tending to form part of a broader role. This was consistently the case across authorisation, ongoing supervision and enforcement.
19. In most instances regular training is provided to staff across authorisation, supervision and enforcement. In general, more training is provided to supervision staff than to staff involved in authorisation or enforcement activities.

3.2 Peer Review Findings

Table 3: Assessment table

The assessment table⁶ provides an overview on NCAs' compliance, partial compliance or insufficient compliance with the key topics identified for each of the four guidelines under review. The detailed assessment for each topic and NCA is available in the analysis of findings for each guideline below.

Guideline1: Compliance Risk Assessment	
Supervision of regular performance of the compliance risk-assessment	Application: AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SE, SK, UK
	Partial application: N/A
	<p>Insufficient application: CY, IS, NL, SI</p> <p>CY: level of information on the business model of investment firms does not seem to be in line with what is needed for the efficient supervision of complex instruments. This limited information does not allow to challenge on the substance the compliance function's risk assessment.</p> <p>IS: had not examined this area.</p> <p>NL: did not conduct standardised supervision into the compliance risk assessment based on the Guidelines.</p> <p>SI: indicated that they did not check that firms regularly perform a compliance risk assessment.</p>

⁶ IS did not respond to all questions and was therefore considered non-compliant for questions where no answer was provided.

Guideline 2: Monitoring Obligations of the Compliance Function	
A. Supervision of the use of the compliance risk-assessment for the monitoring programme	Application: AT, BE, BG, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IE, IT, LT, LI, LU, LV, MT, NO, PL, PT, RO, SE, SK, UK
	Partial application: N/A
	Insufficient application: CY, EL, IS, NL, SI CY, EL, NL, SI: did not check whether the compliance risk assessment was used by investment firms in order to determine the monitoring programme. IS: no response to the question.
B. Evaluation of the content of the monitoring programme and priorities it established	Application: AT, BE, BG, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IE, IT, LT, LI, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK, UK
	Partial application: CY CY: checks were performed on a limited and ad hoc basis
	Insufficient application: EL, IS, NL EL, NL: did not evaluate the content of the compliance function's monitoring programme and priorities that it established IS: no response to the question.
C. Supervision of the access to all customer complaints received by the firm and use in the monitoring programme	Application: AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LI, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK, UK
	Partial application: CY CY: did not evaluate the content of the monitoring programme and its priorities.
	Insufficient application: IS, NL NL: did not check if the compliance function had access to all customer complaints received by the firm and used them in its monitoring programme. IS: no response to the question.
D. Check that the compliance monitoring programme is appropriately amended when the NCA becomes aware of an event that may influence the risk profile of the firm	Application: AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LI, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK, UK
	Partial application: CY CY: level of information on the business model of investment firms does not seem to be in line with what is needed for the efficient supervision of complex instruments. This limited information does not allow the NCA to have an adequate view on events that may influence the risk profile of the firm.
	Insufficient application: IS, NL IS: no response to the question. NL: did not check that the compliance monitoring programme is amended in these circumstances.

Guideline 3: Reporting Obligations of the Compliance Function	
A. Check that senior management receives regular and ad hoc reports as required	Application: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LI, LV, LU, LT, MT, NO, PL, PT, RO, SE, SI, SK, UK
	Partial application: N/A
	Insufficient application: IS, NL IS: no response to the question. NL: undertook no such checks because of its risk-based approach.
B. Supervision of the independence of the compliance function	Application: AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SE, SK, UK
	Partial application: DK, NL DK: To address the issue of the compliance function reporting only to the executive management of the firm, the FSA issued a verbal order that was not included in the written report. In view of the importance of the independence of the compliance function, the order should be in the written report addressed to the Board of Directors. NL: checks only if there is a conflict of interest in the responsibilities that the compliance function is entrusted with.
	Insufficient application: IS, SI IS: no response to the question. SI: has not undertaken checks in this respect.
C. Monitoring of the content of the compliance report	Application: AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK UK
	Partial application: CY CY: the on-site visit did not allow to fully confirm that CySEC monitored the content of the compliance function considering that it did not check whether reports were regularly provided to senior management and whether reports were submitted or approved by other departments before being delivered.
	Insufficient application: IS, NL IS: no response to the question. NL: did not monitor the content of the compliance report due to its risk based-approach.

Guideline 4: Advisory Obligations of the Compliance Function	
A. Supervision of the compliance function advisory responsibilities	Application: AT, BE, BG, CZ, DE, DK, EE, ES, FI, HR, HU, IE, IT, LI, LT, LU, LV, NO, PL, PT, RO, SE, SI, SK, UK
	Partial application: CY, FR, MT CY, FR, MT: no checks were undertaken on a systematic basis.
	Insufficient application: EL, IS, NL EL: did not perform such check. IS: no response to the question. NL: does not check in general but when the NCA has multiple signals that the compliance function does not fulfil its role, it may investigate the compliance function of a firm.
B. Check that the compliance function is engaged in training support for the staff	Application: AT, BE, BG, CZ, DE, DK, EE, ES, FI, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SK, UK
	Partial application: EL, FR, SE EL, FR, SE: conducted such checks on a more incidental basis and in most cases only during on-site inspections.
	Insufficient application: CY, IS, NL, SI CY, NL, SI: did no verification on whether the investment firm's compliance function was engaged in training to support the investment firm's staff. IS: no response to the question.
C. Check that, in relation to its advisory obligations, the compliance function considers internal policies, procedures, organisational structure, MiFID, national laws as well as guidelines and standards set by ESMA and the NCA	Application: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, RO, SE, SK, UK
	Partial application: PT PT: performed verification on an incidental basis and such verification did not cover internal policies, procedures and organisational structure of the firm.
	Insufficient application: IS, NL, SI IS: no response to the question. NL: when the NCA has multiple signals that the compliance function does not fulfil its role, it may investigate the compliance function of a firm, but this is not a standard procedure. SI: no checks during the review period.

Table 4: Table of good practices

The table of good practices aims at enhancing supervisory convergence among NCAs by identifying practices that should be considered by all NCAs for their supervisory approach.

Supervisory phase	Good practice
Pre-authorisation	Implementing the Guidelines in the supervisory framework and/or supervisory practices of the NCA help NCAs to focus on the content of the Guidelines and enhances the compliance by firms.
Pre-authorisation	Having a pre-approval process (including for instance the provision of information on the authorisation process and application form available on the website of the NCA) allows NCAs to provide information to firms on expectations including with regard to the compliance function requirements. This clearly sets out the importance attached to the function by the supervisor and incentivizes the firms' governing bodies to establish a strong compliance function.
Authorisation	Seeking confirmation , at the authorisation stage, that policies and procedures are in place within the investment firm to ensure that a compliance risk assessment is set up to determine the focus of the monitoring and advisory activities of the compliance function. It incentivise firms to better prepare before starting operations.
Authorisation	Performing an on-site visit shortly following authorisation of the firm , e.g. within the year, especially when specific challenges for the compliance function were identified in the authorisation file (e.g. complex business model).
Authorisation and supervisory	Pre-screening of the person in charge of the compliance function. For instance, this could be set up by having a compliance officer licensing procedure that allows NCAs to check the fitness and probity, the expertise of the compliance officer and therefore that requirements be applied at a good standard.
Authorisation and supervisory	Analysing the firm's organisational structure and procedures in order for firms to establish an appropriately independent compliance framework.
Supervisory	Performing supervisory activities (such as on-site visits, thematic reviews, desk-based reviews,...) on the compliance function including the Guidelines incentivises firms to comply with the requirements.
Supervisory	Publishing supervisory priorities of NCAs in order to incentivise firms to ensure compliance.
Supervisory	Considering the compliance officer as a key contact person for the NCA in order to respond to any question about risks within the firm.
Supervisory	Requiring the compliance officer to attend regular trainings or workshops in order to maintain the level of knowledge and awareness.
Supervisory	Organising training for the staff of the NCA in order to ensure an adequate level of expertise on the compliance function requirements and understanding of the financial markets.
Supervisory	Requesting firms (or their compliance officers) to fill out an annual compliance questionnaire in order to support NCAs in the identification of

	risks. This may require an IT tool in order to automate the analysis of answers.
Supervisory	Using an analytical risk map including indicators on the compliance function to support the risk-based approach of the NCAs regarding the compliance function.
Supervisory	Using a database providing a view on the examination programmes (on-site visit, management talks, follow up inspections,...) and supervisory measures and milestone to be achieved for supervised firms in order to support the NCA in the performance of its supervisory mission
Supervisory	Publication of an anonymised summary of relevant findings following on-site inspections in order to clarify requirements for the industry and incentivise compliance.
Supervisory	Protocols to deal with poor practices such as detailed action plan with deadline to address deficiencies and regular assessment report.
Enforcement	Publication of enforcement measures in order to inform the industry of the consequences of findings and incentivise compliance.

3.3.1 – Guideline 1 – Compliance Risk Assessment

General Guideline

Investment firms should ensure that the compliance function takes a risk-based approach in order to allocate the function's resources efficiently. A compliance risk assessment should be used to determine the focus of the monitoring and advisory activities of the compliance function. The compliance risk assessment should be performed regularly to ensure that the focus and the scope of compliance monitoring and advisory activities remain valid.

Supporting Guidelines

MiFID requires investment firms to establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the investment firm to comply with its obligations under MiFID. As part of this, the compliance function should identify the level of compliance risk the investment firm faces, taking into account the investment services, activities and ancillary services provided by the investment firm, as well as the types of financial instruments traded and distributed.

The compliance risk assessment should take into account the applicable obligations under MiFID, national implementing regulation and the policies, procedures, systems and controls implemented within the firm in the area of investment services and activities. The assessment should also take into account the results of any monitoring activities and of any relevant internal or external audit findings.

The compliance function's objectives and work programme should be developed and set up on the basis of this compliance risk assessment. The identified risks should be reviewed on a regular basis as well as ad-hoc when necessary to ensure that any emerging risks are taken into consideration (for example, resulting from new business fields or other changes in the investment firm's structure)

3.3.1.1 – Summary of Findings

Authorisation of Investment Firms

20. The level of review of policies and procedures relating to the compliance risk assessment at the authorisation stage varied markedly across the NCAs. While the majority of NCAs either require confirmation that internal policies and procedures are in place to conduct a compliance risk assessment or expect investment firms to submit these procedures (or both), a limited number of NCAs do not consider this at this stage. The majority of NCAs did require investment firms to submit policies and procedures at the authorisation stage for assessment of the

entities approach to the compliance risk assessment, as part of their application. Some NCAs require investment firms to confirm that appropriate policies and procedures are in place, but do not require these to be submitted. In some cases, this confirmation was required in addition to the policies and procedures being submitted. However, a small number of NCAs did not consider the existence or appropriateness of internal policies and procedures relating to the compliance risk assessment at the authorisation stage.

21. Some NCAs commented that a high-level (“light”) assessment of these policies and procedures is completed at the authorisation stage, with the primary responsibility for this area of focus falling to the team responsible for ongoing supervision, post-authorisation. They consider that a review of policies and procedures is better undertaken during the supervisory phase.
22. As these requirements apply from the time the firm is authorised, it is considered however, that it is good practise for NCAs to at least confirm that appropriate policies and procedures are in place before authorising an investment firm. Indeed, it gives NCAs a good indication of the risk profile of the investment firm and the investment firm’s proposed approach to mitigating these risks.

Compliance Risk Assessment

23. As part of ongoing supervision, the majority of NCAs actively verified, using a variety of methods, that investment firms had adequate policies and procedures in place in relation to the compliance risk assessment.
24. Most NCAs also endeavour to establish the regularity with which a compliance risk assessment is undertaken using a range of methods, including interviews, on-site inspections, thematic reviews and desk-based reviews.
25. During the review period, the majority of NCAs verified that investment firms have appropriately identified their level of compliance risk. NCAs examined whether investment firms have considered a range of factors, including the investment services provided, relevant financial instruments, emerging risks and results of internal audits and/or monitoring completed. Most NCAs have sought to ensure that a broad range of factors have been considered by investment firms. However, a limited number of NCAs did not examine this area to the same level of detail, considering only one risk factor. In a limited number of instances, the review did not seek to verify that investment firms had considered specific areas called out in the guidelines, and which have the potential to significantly impact the firm’s compliance risk profile, including investment services and financial instruments offered by the investment firm.
26. Given that the supporting guideline states that the risk assessment should take into account the investment services, activities and ancillary services provided, as well as the types of financial instruments traded/distributed, these should be the minimum criteria considered by

investment firms. NCAs should in turn ensure that each of these areas forms part of the risk assessment process.

27. Regarding the guideline on the compliance risk assessment, CY and NL are in a particular situation. For CY⁷, following the on-site visit, it was noted that CySEC had limited information on the business model of investment firms that specialise in the sale and distribution of complex financial instruments, which did not allow an adequate evaluation of the compliance risk assessment. For NL, the AFM did not consider the Guidelines but the way compliance is embedded in the firm more generally. In addition, they only focus on compliance for firms under intensive supervision, i.e. a limited number of firms compared to the total firm population.

3.3.1.2 – Analysis of Findings

Authorisation of Investment Firms

28. At the authorisation stage, NCAs took varying approaches in order to understand whether firms seeking authorisation had internal policies and procedures in place to complete a compliance risk assessment. Seven NCAs (CY, EL, ES, HU, IE, NO⁸, UK) sought confirmation that investment firms had internal policies in place in relation to the completion of a compliance risk assessment. Twelve NCAs required submission of policies and procedures (BG, CZ, DE, EE, FI, LT, LU, LV, PL, PT, RO, SI). Five NCAs did both (AT, DK, IT, LI, SK).
29. Two NCAs (FR, MT) required firms applying for authorisation to have internal policies and procedures to undertake a compliance risk assessment but indicated that they neither require these policies and procedures to be submitted, nor request investment firms to confirm their existence. FR noted that while the focus at authorisation was the organisation of the compliance function, they did ensure that the main compliance risks were considered. MT commented that this was assessed by supervisors post-authorisation.
30. Four NCAs did not require firms applying for an authorisation to have internal policies and procedures to undertake a compliance risk assessment (BE, HR, NL, SE⁹). BE noted that supervisors considered this matter post authorisation. HR commented that at authorisation stage, the primary focus was on the knowledge/competence of the compliance officer, the reporting channels and the establishment of personal transactions records. NL commented that the AFM focused on the way compliance was embedded within the organisation rather

⁷ CySEC informed the AG that in February 2017, CySEC revised the Application Form, as well as the Checklist for the Internal Procedures Manual that accompanies this Application, in order to take into account the provisions of the ESMA's Q&As, which include information on the business model.

⁸ NO clarified that their practise is to ask whether investment firms applying for authorisation have internal policies and procedures to undertake a compliance risk assessment and noted that a detailed assessment of these documents is undertaken by supervision staff post-authorisation.

⁹ SE clarified that they do not check or ask to submit internal policies or procedures to undertake a compliance risk assessment.

than on the requirements of the guidelines. SE commented that they assessed if the compliance function took a risk-based approach through review of alternative documents submitted, citing the investment firm's business plan as an example.

Adequate policies and procedures for compliance risk assessment

31. NCAs used various methods to determine whether investment firms had adequate policies and procedures in place for performing compliance risk assessment. The majority of NCAs indicated that they verified one or more of the following: (1) that investment firms had policies and procedures for the compliance risk assessment, (2) that they regularly reviewed and updated their compliance policies and procedures by checking the written reports to senior management and (3) that the firm performed a compliance risk assessment and operated in line with their documented policies and procedures.
32. Sixteen NCAs used all of the above methods in verifying that adequate policies and procedures are in place (AT, BE, BG, CZ, DE, EE, ES, IE, IT, LI, LT, LV, MT, NO, PL, SK).
33. Four NCAs (DK, EL, RO, SI) verified only that investment firms had policies and procedures in place in relation to the compliance risk assessment. DK performed the check as part of every on-site inspection or thematic review and each review included an examination of whether the firm had completed a compliance risk assessment. DK qualified their response by adding that the level of engagement with firms was determined by the assessment of several risk-based criteria.
34. One NCA (PT) checked that investment firms regularly reviewed and updated their compliance policies and procedures by reviewing the written reports to senior management.
35. Four other NCAs (FI, CY, HR, HU) selected two of the three possible options in different combinations. Two NCAs (FI, HU) verified that investment firms had policies and procedures for the compliance risk assessment as well as verifying that investment firms regularly reviewed and updated their compliance policy and procedures by reviewing written reports to senior management. HR checked that investment firms regularly reviewed and updated their compliance policies and procedures by reviewing the compliance function's written reports to senior management as well as verifying that the investment firm's compliance risk assessment operated in line with documented policies and procedures.
36. Three NCAs (FR, NL, SE) used alternative methods to those outlined to determine whether investment firms have adequate policies and procedures in place for performing compliance risk assessment. FR required firms to submit an annual compliance self-assessment and a global risk assessment. As part of inspections, supervisors considered whether policies and procedures addressed compliance risk. For this purpose, supervisors completed their own compliance risk assessment and challenged compliance officers on that basis, rather than solely considering the firm's own risk assessment. However, the level of engagement with firms was dependent on their size and the level of their risk.

37. In their response, NL distinguished between firms under “intensive supervision” and other investment firms. Where a firm was supervised intensively, they were required to provide (1) their compliance risk assessment, (2) their compliance agenda for the following year and (3) any internal audit reports regarding the monitoring programme. The compliance risk assessment was not considered for other firms. The compliance function was taken into account during general discussion with investment firms or in thematic reviews but without focusing on the adherence of the firm to the Guidelines.
38. SE used surveys as a tool for gathering information and compared the outcome of the assessment with the content of the monitoring plan.
39. Three NCAs (DK, LU, UK) indicated that they perform other checks in addition to one (DK) or all (LU, UK) of those mentioned above.
40. Two NCAs (FR, LU) required firms to submit annual compliance questionnaires and an external audit was performed on these questionnaires in LU.

Ongoing supervision: frequency of the performance of the compliance risk-assessment

41. NCAs utilised various methods to establish that investment firms regularly performed a compliance risk assessment. The main tools utilised were on-site inspections, thematic reviews, desk-based reviews and interviews. Nine NCAs (AT, DE, EE, IE, IT, LI, MT, RO, UK) answered that they use all four options mentioned above.
42. Some NCAs (RO, IT) utilised all of the forms of testing detailed in the question as well as employing additional methodology. RO did not provide further information in this regard, however IT commented that ad hoc requests for data may be submitted to firms which may be relevant to firm’s compliance risk assessment. Such targeted requests may arise from desk-based reviews or from other types of monitoring/enforcement activities.
43. Seven NCAs (DK, ES, HU, LT, LV, PT, SE) used a combination of three of the four different methods suggested, with SE combining them with another tool, namely, a survey. Three NCAs combined on-site inspections, with thematic reviews and desk-based reviews (DK, ES, SE). In ES, two annual desk-based reviews took place that indirectly included the supervision of the compliance function as well as an annual assessment of the internal audit reports. Two NCAs combined on-site inspections with thematic reviews and interviews (HU, LV). Finally, two NCAs combined on-site inspections with desk-based reviews and interviews (LT, PT).
44. Five NCAs (BG, CY, HR, PL, SK) used two of the proposed methods. They all confirmed the use of on-site inspections with four of them also conducting desk-based reviews (BG, CY, HR and PL) and one also undertaking a thematic reviews (SK).

45. One NCA (LU) used two of the suggested methods (on-site inspections and desk-based reviews) in addition to reviewing the external auditor report, which includes a section related to compliance.
46. Several NCAs verified the frequency with which a compliance risk assessment was undertaken using only one method of testing. Three NCAs (BE, CZ, NO) conducted on-site inspections only, while two NCAs (FR, NL) conducted interviews only. One NCA (FI) conducted thematic reviews only and one NCA (EL) conducted desk-based reviews only.
47. One NCA (SI) had not examined this area during the period under review.

Identification of level of compliance risk

48. NCAs considered several criteria set out in guideline 1 to assess if investment firms had appropriately identified their level of compliance risk. The questionnaire set out 10 potential considerations as well as providing the option to select “other” and provide details.
49. The suggested areas which may be considered by NCAs in determining an investment firm’s assessment of their compliance risk were (1) the investment services provided, (2) the types of financial instruments they deal in, (3) the relevant regulations, (4) the policies, procedures, systems & controls in operation, (5) the results of monitoring/audit activities, (6) the emerging risks, (7) the passported activities, (8) other items not specified in guideline 1, (9) the basis upon which the level of risk was determined by the firms and (10) whether firms completed a risk assessment regularly and on an ad hoc basis as necessary.
50. Seven NCAs (DE, DK, ES, IE, LU, NO, PL) checked whether investment firms considered all these criteria as part of their compliance risk assessment. Seventeen NCAs (AT, BE, BG, CY, CZ, EE, HU, HR, IT, LI, LT, LV, MT, PT, RO, SI, SK) considered the majority of the above areas in reviewing firm’s compliance risk assessments.
51. Some NCAs used other approaches. For example, ES assessed if the firm was holding money or securities belonging to their clients and if essential functions were delegated.
52. Three NCAs (EL, FI, SE) checked a combination of one to three points mentioned in guideline 1 as listed above. In each case, ‘authorised investment services’ was considered. One NCA (EL) also checked that investment firms took financial instruments and relevant regulations into consideration. One NCA (FI) also ensured that firms were considering passported activities as part of the compliance risk assessment.
53. As part of their responses, seven NCAs (FR, LU, NL, PT, SE, SI, UK) indicated that they performed other checks, including for example the issuance of an annual compliance questionnaire.

3.3.2 – Guideline 2 – Monitoring Obligations of the Compliance Function

General Guideline

Investment firms should ensure that the compliance function establishes a monitoring programme that takes into consideration all areas of the investment firm's investment services, activities and any relevant ancillary services. The monitoring programme should establish priorities determined by the compliance risk assessment ensuring that compliance risk is comprehensively monitored.

Supporting guidelines

The aim of a monitoring programme should be to evaluate whether the investment firm's business is conducted in compliance with its obligations under MiFID and whether its internal guidelines, organisation and control measures remain effective and appropriate.

Where an investment firm is part of a group, responsibility for the compliance function rests with each investment firm in that group. An investment firm should therefore ensure that its compliance function remains responsible for monitoring its own compliance risk. This includes where a firm outsources compliance tasks to another firm within the group. The compliance function within each investment firm should, however, take into account the group of which it is a part - for example, by working closely with audit, legal, regulatory and compliance staff in other parts of the group.

The risk-based approach to compliance should form the basis for determining the appropriate tools and methodologies used by the compliance function, as well as the extent of the monitoring programme and the frequency of monitoring activities performed by the compliance function (which may be recurring, ad-hoc and/or continuous). The compliance function should also ensure that its monitoring activities are not only desk-based, but that it also verifies how policies and procedures are implemented in practice, for example through on-site inspections at the operative business units. The compliance function should also consider the scope of reviews to be performed.

Suitable tools and methodologies for monitoring activities that could be used by the compliance function include (but are not limited to):

(a) the use of aggregated risk measurements (for example, risk indicators);

(b) the use of reports warranting management attention, documenting material deviations between actual occurrences and expectations (an exceptions report) or situations requiring resolution (an issues log);

(c) targeted trade surveillance, observation of procedures, desk reviews and/or interviewing relevant staff.

The monitoring programme should reflect changes to the investment firm's risk profile, which may arise, for example, from significant events such as corporate acquisitions, IT system changes, or reorganisation. It should also extend to the implementation and effectiveness of any remedial measures taken by the investment firm in response to breaches of MiFID.

Monitoring activities performed by the compliance function should also take into account:

(a) the business area's obligation to comply with regulatory requirements;

(b) the first level controls in the investment firm's business areas (i.e. controls by the operative units, as opposed to second level controls performed by compliance); and

(c) reviews by the risk management, internal control function, internal audit function or other control functions in the area of investment services and activities.

Reviews by other control functions should be coordinated with the monitoring activities performed by the compliance function while respecting the different functions' independence and mandate.

The compliance function should have a role in overseeing the operation of the complaints process and it should consider complaints as a source of relevant information in the context of its general monitoring responsibilities. This does not require compliance functions to have a role in determining the outcome of complaints. In this regard, investment firms should grant the compliance function access to all customer complaints received by the firm.

3.3.2.1 – Summary of Findings

Compliance Risk Assessment

54. As part of NCA's ongoing supervision of investment firms, the majority of NCAs seek to ensure that a compliance risk assessment is used by investment firms in preparing their monitoring programme, with most NCAs also noting that they ensure alignment of the output of the risk assessment and compliance monitoring priorities. A limited number of NCAs elaborated to state that a risk-based approach was used to determine whether to undertake verification work in relation to the compliance risk assessment. This risk-based approach was based on, for example, the size of the firm or the scope and number of internal inspections carried out by the firm.

Internal Compliance Processes and Controls

55. Most NCAs examine a firm's compliance function's structure, processes and controls during the authorisation phase and as part of the ongoing supervision to assess whether the investment firm's internal compliance procedures, organisation and control measures are appropriate to enable the compliance function to operate effectively (including the ability to undertake its monitoring obligations).
56. To ensure that compliance monitoring is effective, a variety of oversight tools should be utilised by the compliance function. In this regard, the majority of NCAs monitor that the compliance functions within investment firms perform reviews other than desk-based checks. Most NCAs verify the extent of compliance monitoring during on-site inspections or through interviewing compliance staff. Other NCAs review available documentation to obtain comfort around the extent of compliance monitoring, such as compliance function reports and relevant internal audit and/or external audit reports.
57. The frequency with which this work is undertaken by NCAs varied, with some NCAs undertaking annual reviews (desk-based or through a questionnaire for example) and others taking a risk-based approach (which means that the review was more frequent for higher risk entities). A limited number of NCAs do not regularly review this.
58. The ESMA Guidelines provide examples of suitable tools and methodologies for monitoring activities that can be used by the compliance function. These include the use of aggregated risk measurements, the use of reports warranting management attention, 'exception' reporting, an issues log, targeted trade surveillance, observation of procedures, desk-based reviews and interviewing relevant staff. In response to the survey, most NCAs confirmed that the investment firms they regulate use more than one of these monitoring tools. The majority of NCAs consider whether the methods employed by firms are appropriate, through for instance, on-site reviews, interviews with compliance staff or reviews of relevant documentation (internal/external audit reports or compliance function reports).
59. Most NCAs check if the compliance function has access to all customer complaints received by the firm and use them in their monitoring programme.
60. Where NCAs become aware of an event that may alter the risk profile of a firm, the majority ask the firm to confirm that their compliance monitoring programme has been amended appropriately or ask for the revised programme to be submitted (or both).

3.3.2.2 – Analysis of Findings

Use of the compliance risk assessment to determine the firm's monitoring programme

61. The majority of NCAs ensure that the compliance risk assessment is considered for the purpose of preparing the compliance monitoring programme or ensure that the monitoring programme is aligned with the outcome of the compliance risk assessment (AT, BE, BG, CZ, DK, IE, FI, DE, EE, ES, FR, HR, HU, IT, LI, LT, LU, LV, MT, NO, PL, RO, SK, PT, SE, UK).
62. Four NCAs (CY¹⁰, EL, NL, SI) did not check whether the compliance risk assessment was used by investment firms in order to determine their monitoring programme, during the review period. Although SI did not consider this during the review period, it initiated the first review of this kind in October 2016 and expressed its intention to incorporate the compliance risk assessment into regular supervisory activities going forward. EL and NL explained that this area was not considered during the period under review because of their risk-based approach.
63. One NCA (IS) did not provide a response.

Content of the monitoring programme and its priorities

64. Twenty-seven NCAs (AT, BE, BG, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK, UK) stated that they evaluate the content of the monitoring programme and priorities it established. The majority check that the monitoring priorities relate to the risk areas identified in the compliance risk assessment. Four NCAs (EE, FR, LU, PT) indicated a different supervisory approach in this area. The different approaches included a review of external audit reports, a review of an investment firm's self-assessment made through an annual compliance questionnaire, a review of compliance reports, on-site inspections and a review of auditor reports relating to client assets.
65. One NCA did not answer this question (IS) and two NCAs (EL, NL) answered that they did not evaluate the content of the monitoring programme and priorities it established during the review period. However, EL explained that they started a desk-based review in 2016 after the review period. NL explained that they have not investigated the compliance function as such during the review period, and the monitoring programme specifically, because of their risk-based approach. CY carried out checks on a limited and ad hoc basis.

¹⁰ As a result of the on-site visit, it was identified as a weakness as no evidence of the performance of the checks was provided.

Effectiveness and appropriateness of internal compliance procedures, organisation and control measures during the authorisation phase and as a part of ongoing supervision

66. Twenty-nine NCAs (AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK, UK) reviewed whether the investment firm's internal compliance procedures, organisational structure and control measures are effective and appropriate during the authorisation phase and/or as part of ongoing supervision. In this respect, NCAs use a variety of sources of information. IS did not answer that question.
67. Regarding the authorisation phase, three NCAs (AT, EE, FR) send a questionnaire to the investment firms on an annual basis. Two NCAs (EL, ES) check whether the organisational chart include a separate compliance function unit and the fitness and probity of the compliance officer. Two NCAs (EL, IE) check whether the rules of procedure include the compliance function unit, taking into account the size and the complexity of the investment services to be provided.
68. With reference to the ongoing supervision, it is noted that four NCAs (AT, DE, LT, LU) use external audit reports. Seven NCAs (AT, BE, DE, EE, FR, LV, MT) interview the compliance officer during on-site inspections. Four NCAs (BE, DE, LT, LU) check compliance function reports. In some other NCAs (IT, LT, LU, PL, RO) these requirements are assessed during desk-based supervision. Three NCAs (DE, LU, NL) check reports from the internal auditor. In particular, one NCA (DE) requests from large investment firms to send a list of internal audits conducted by the investment firm. Three NCAs (AT, EE, FR) send a questionnaire to the investment firms on an annual basis. One NCA (EL) checks whether the organisational chart of the firm includes a compliance function unit and a manager. Two NCAs (EL, IE) check whether the rules of procedure of the firm include procedures for the compliance function unit, taking into account the size and the complexity of the investment services provided by the investment firm. LT reviews the complaints and information from other competent authorities or other internal sources. One NCA (LU) reviews whether the compliance function is sufficiently staffed, whether training is followed on a regular basis and whether the members of compliance function have adequate competences. One NCA (BE) also reviews compliance and checks other reports and/or documentation.
69. In terms of the frequency of these checks, 12 NCAs (AT, BE, CY, DK, DE, IE, IT, LI, MT, SI, SE, UK) determine the frequency of their on-site visits using a risk-based approach, depending on certain factors such as firm size, business model and past findings in relation to the specific entity. Some NCAs (AT, HR, HU, SK) conduct on-site supervision of investment firms every three years. Four NCAs (FI, HU, LV, NL) conduct thematic reviews in this area. Two NCAs (FI, HU) conduct ad hoc inspections on a reactive basis where there are suspicions/allegations of non-compliance with legal requirements.
70. One NCA (IS) did not provide a response.

Performance of other reviews than desk-based checks

71. The majority of NCAs (AT, BE, BG, CY11, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SK, SE, UK) monitor that the compliance function performs other reviews than desk-based checks. This was verified mainly during on-site visits, with some NCAs interviewing the compliance function and others reviewing the compliance functions' reports.
72. Three NCAs (EL, NL, SI) noted that they did not consider this area. NL explained that its risk-based approach resulted in no inspections of the compliance function as such during the review period. In EL, it was explained that although no such checks were performed during the review period, a desk-based review for 2016 is currently being conducted.
73. One NCA (IS) did not provide a response.

Identification of tools used by the compliance function for monitoring activities of the investment firm in the NCA's jurisdiction

74. It was identified that various tools are used by the compliance function in investment firms to undertake monitoring activities. The tools that compliance functions used most frequently across the various jurisdictions are targeted trade surveillance, observation of procedures, desk reviews, staff interviews, a review of complaints data and reports warranting management attention. Fourteen NCAs (AT, CY, CZ, DE, FI, EE, ES, IE, LI, LT, LU, NO, PL, SE) stated that in their jurisdiction the compliance function used all four tools suggested in the guidelines, those being (1) aggregated risk measurements; (2) reports warranting management attention; (3) targeted trade surveillance, observation of procedures, desk reviews, staff interviews and (4) complaints data. Four additional NCAs (FR, IT, PT, UK) used all four of these tools plus additional ones such as IT tools and whistle-blowing channels. Eight NCAs (BE, BG, DK, EL, HU, MT, RO, SI) mentioned that in their countries the compliance function used a combination of 3 of the tools referred in the guidelines. Three NCAs (HR, LV, SK) stated that the compliance function in their country used 2 of the tools listed in the guidelines and one NCA (SK) also uses other tools which were not specified in the guidelines. One NCA (NL) said that they have not investigated specifically how the compliance function of firms performs its monitoring activities because of their risk-based approach.
75. One NCA (IS) did not provide a response.

¹¹ On an ad hoc limited basis

NCA's supervisory approach towards checking that the compliance function has access to all customer complaints received by the firm and uses them in their monitoring programme

76. Twenty-two NCAs (AT, BE, BG, CY, DK, EE, EL, FI, FR, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, RO, SI) asked the investment firm to confirm if the compliance function has access to all customer complaints received by the firm and uses them in their monitoring programme and many of them also performed sample checks. Ten NCAs (CZ, DK, DE, ES, IE, LU, PL, PT, SE, UK) indicated other supervisory practices. One NCA (NL) did not check if the compliance function had access to all customer complaints received by the firm and used them in their monitoring programme.
77. One NCA (FR) indicated that this check is performed regularly through an annual compliance questionnaire. In addition, supervision teams are informed of the complaints sent to an online 'Investor Portal' and may liaise with the compliance officer in order to increase understanding.
78. One NCA (IS) did not provide a response. Although CY responded that it performed the checks, the on-site visit did not allow full confirmation of this approach and therefore CY is assessed as partially compliant in this regard.

NCA's supervisory approach in a situation when the NCA is aware of an event that may influence the investment firm's risk profile and procedure towards checking that the compliance monitoring programme is appropriately amended

79. Sixteen NCAs (AT, BG, CZ, EE, FI, FR, HR, IE, IT, LI, LT, LU, NO, RO, SI, SK) asked the investment firm to confirm that the compliance monitoring programme has been appropriately amended in the event of a change/potential change in the firm's risk profile. Fourteen NCAs (AT, BG, EE, IE, IT, LI, LT, LU, LV, MT, NO, PL, RO, SK) asked for the revised compliance programme. 13 NCAs (AT, BE, DE, DK, EL, ES, FR, HU, LU, PL, PT, SE, SI) checked whether the compliance monitoring programme had been appropriately amended, but also indicated different supervisory approaches. The UK stated if an event occurred that may affect a firm's risk profile, the supervisors may proactively seek to mitigate this risk depending on the size of the risk and whether the event is likely to affect multiple firms or a single firm in isolation. One NCA (NL) did not consider this during the review period.
80. One NCA (IS) did not provide a response. Although CY responded that it adopted this approach, the on-site visit did not allow for full confirmation and CY is assessed as partially compliant on this point.

3.3.3 – Guideline 3 – Reporting Obligations of the Compliance Function

General Guideline

Investment firms should ensure that the regular written compliance reports are sent to senior management. The reports should contain a description of the implementation and effectiveness of the overall control environment for investment services and activities and a summary of the risks that have been identified as well as remedies undertaken or to be undertaken. Reports must be prepared at appropriate intervals and at least annually. Where the compliance function makes significant findings, the compliance officer should, in addition, report these promptly to senior management. The supervisory function, if any, should also receive the reports.

Supporting guidelines

The written compliance report to senior management should cover all business units involved in the provision of investment services, activities and ancillary services. Where the report does not cover all of these activities of the investment firm, it should clearly state the reasons.

The following matters should be addressed in these written compliance reports, where relevant:

- (a) a description of the implementation and effectiveness of the overall control environment for investment services and activities;
- (b) a summary of major findings of the review of the policies and procedures;
- (c) a summary of on-site inspections or desk-based reviews performed by the compliance function including breaches and deficiencies in the investment firm's organisation and compliance processes that have been discovered and appropriate measures taken as a result;
- (d) risks identified in the scope of the compliance function's monitoring activities;
- (e) relevant changes and developments in regulatory requirements over the period covered by the report and the measures taken and to be taken to ensure compliance with the changed requirements (where senior management has not previously been made aware of these through other channels);
- (f) other significant compliance issues that have occurred since the last report; and
- (g) material correspondence with competent authorities (where senior management has not previously been made aware of these through other channels).

The compliance function should report to senior management, in a timely manner, on an ad-hoc basis when significant compliance matters have been discovered, such as material breaches of MiFID and the respective national requirements. The report should also contain advice on the necessary remedial steps.

The compliance function should consider the need for additional reporting lines to any group compliance function.

ESMA notes that some competent authorities require investment firms to provide them with compliance function reports on a regular or ad hoc basis. One competent authority also requires senior management to provide it with an annotated version of the report containing explanations of the compliance function's findings. These practices provide competent authorities with first-hand insight into an investment firm's compliance activities, as well as any breaches of regulatory provisions.

3.3.3.1 – Summary of Findings

Compliance reporting

81. The vast majority of NCAs check that the compliance function complies with its reporting obligation. The review of the compliance function's reporting obligations is in general carried out in the course of the ongoing supervision, while at the authorisation stage NCAs usually only verify that reporting lines are effectively in place.
82. In particular, most NCAs ask for copies of the compliance function's reports. Nevertheless, the approaches differ among NCAs, where some require a review of such documents only in the course of on-site inspections or thematic reviews, while others have put in place a regular reporting requirement.
83. Few NCAs adopt a different approach depending on whether or not a large investment firm/major market participant is concerned. Indeed, the NCAs check the content of the compliance report of large investment firms on a regular basis, while for other firms this is done on an ad hoc basis.

Compliance's independence

84. In order to determine if the independence of the compliance function had been compromised, more than half of the NCAs first considered if reports produced by compliance functions had been reviewed or approved by other stakeholders before they were issued. The results of this work varied. Some NCAs commented that such a review may not impair independence, noting that it can be standard practice within a firm for a member of the management team to review the report. Only one NCA noted that they had observed an instance where the review of the compliance function's reporting by another function compromised their independence.
85. With the exception of one respondent, all NCAs confirmed that they assess whether the compliance function acts independently when reporting to senior management. The majority

of NCAs utilised several methodologies in making this assessment and in all cases assessed whether there are any conflicts of interest in the compliance officer's responsibilities.

86. Approximately a quarter of NCAs commented that at the authorisation stage, an analysis of a firm's organisational structure, internal regulations and the compliance functions procedures is used to assess the independence of the compliance function.
87. Other tools utilised to assess the independence of the compliance function include analysis of the compliance functions report, use of internal auditors' reports, interviews with the compliance function and review of the basis for the remuneration of the compliance function.
88. In terms of best practice, the analysis during the authorisation phase of the investment firm's organisational structure, procedures and internal regulation would ensure that an appropriately independent compliance framework is established from the commencement of operations.

Follow up to the compliance function's findings

89. Regarding the review of the adoption of an action plan to address the findings identified by the compliance function, NCAs can be divided into two categories, with some of them carrying out an effective monitoring on a periodic basis (generally, this is done at least once a year, in the review of the compliance reports sent to them by supervised firms) while others use the on-site inspections as their main tool. In the latter category, if a firm is not visited (for instance, because it has a low risk profile in accordance with the internal rating system which could also be based exclusively on the size) it may be that the consequences of the deficiencies identified and unaddressed are not detected in a timely fashion by the NCAs. This could result in any potentially unaddressed shortcomings identified in the compliance reports materialising.

3.3.3.2 – Analysis of Findings

Transmission of regular and ad hoc written compliance reports to senior management

90. Nearly all the NCAs confirmed that they check that senior management receives regular and ad hoc reports, primarily by asking for copies of the reports submitted to senior management either during ad-hoc regulatory visits, thematic reviews or investigations. Seven NCAs (CY, FR, IT, LI, LT, LU, RO) have provided for a regular reporting requirement in this respect, asking that reports be submitted to them on an annual basis. One NCA (NL) did not check that point because of its risk-based approach although it could request and check the compliance reports from the compliance function to senior management in case of intensive supervision for a period of three years. In UK, both the FCA (in relation to a group of selected firms for which a regular supervision is ensured – so called fixed firms) and the PRA review

the so-called Management Information (MI), including reports provided to the board by internal control functions, as part of the NCAs' ongoing supervisory assessment; however, in relation to flexible firms, the FCA reviews the management information only on an ad hoc basis.

91. Twenty-six NCAs (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SE, SI, SK) reported that they also seek confirmation that the senior management receives regular and ad hoc reports as required from the compliance function, either during ad hoc regulatory visits by reviewing documents, reports and Board of Directors' meetings minutes or on a periodic basis (annually or in accordance with a three-year cycle).
92. In the course of the above-mentioned checks, 15 NCAs (BE, BG, CY, CZ, DE, FI, HR, IE, IT, LT, LI, LV, NO, SI, SK) stated that no situations were encountered where compliance reports were not prepared or not sent to senior management, or with substantial delay, while eleven NCAs (AT, DK, EE, EL, ES, FR, HU, LU, MT, PL, SE) reported situations where compliance reports were not prepared and submitted. One NCA (PT) did not answer this question. Another NCA (UK) reported that such a situation may occur, although it is not common and instances were not recorded on an aggregate basis.
93. IS did not respond to these questions.

Ensuring the independence of the compliance function

94. The approach to verify the independence of the compliance function varies across Member States.
95. Eighteen NCAs (AT, BE, BG, CY, DE, DK, EE, EL, ES, HR, IT, LT, LU, NO, PL, RO, SK, UK) stated that they perform checks on whether the compliance function reports are reviewed or approved by other functions before being sent, while twelve NCAs (CZ, FI, FR, HU, IE, LI, LV, MT, NL, PT, SE, SI) reported that they do not.
96. However, only a few NCAs (LU, NO, PL, RO) provided detailed reasons on how such checks are performed. In particular, these NCAs carry out this analysis when performing on-site inspections, where internal reporting lines are reviewed. In one case (PL), the NCA reported that this is also done through off-site investigations, by checking the content and completeness of the reports. In one case, the NCA (BE) made reference to a general analysis of the independence of the compliance function within the investment firm. Regarding the UK, particularly in the case of fixed firms, supervisors will look at the compliance reports which will usually have the list of firm stakeholders who have been engaged in the process or if there is a business line sponsor.

97. In the review period only one NCA (ES) observed cases where the reports were reviewed or approved by other functions. In those cases, the organisational structure of the investment firms could compromise the independence of the compliance function.
98. Most of the NCAs confirmed that they assess if the compliance function and the compliance officer act independently when reporting to senior management. In order to do so, seventeen NCAs (AT, BE, CY, CZ, DE, DK, EE, FI, FR, LT, LU, MT, NO, PL, RO, SE, UK) performed 4 cumulative assessments: 1) if there is any conflict of interest in the compliance officer's responsibilities; 2) if the compliance officer has access to all relevant information; 3) who has the right to appoint or replace the compliance officer; 4) if senior managements' deviation from recommendations issued by the compliance function is documented.
99. Some NCAs (BG, EL, ES, HR, HU, IE, IT, LI, LV, NL, PT, SK) reported to conduct different combinations of 2 or 3 assessments, although all these NCAs assess at least if there is any conflict of interest in the compliance officer's responsibilities. Some NCAs carry out additional checks. Indeed, further to the above, four NCAs (BG, ES, HR, LV) conducted the assessment on whether the compliance officer has access to all relevant information and who has the right to appoint or replace the compliance officer. Two NCAs (LI, PT) performed the checks on whether the compliance officer has access to all relevant information and whether senior managements' deviation from recommendations issued by the compliance function is documented. One NCA (HU) conducted assessments relating to who has the right to appoint or replace the compliance officer and whether senior managements' deviation from recommendations issued by the compliance function is documented. Three NCAs (IE, IT, SK) checked an additional point i.e. if the compliance officer has access to all relevant information for IE and SK, and the allocation of the compliance function in the organisational structure of the firm for IT. In NL, the NCA only checked if there is any conflict of interest in the compliance officer's responsibilities.
100. In general, the majority of NCAs conducted such checks primarily in the authorisation phase and when a new compliance officer was appointed. However, with regards to CY, the NCA did not perform such checks at the authorisation stage, and in the course of supervision, the aspect mentioned above was assessed only in the course of a thematic review and the few on-site inspections carried out during the review period.
101. One NCA (SI) did not carry out these checks or assessment during the review period. However, it confirmed that it initiated the process during the on-site visit performed in the last quarter of 2016. In DK, the on-site visit revealed that in a firm where the compliance function was reporting only to the executive management and not to the Board, the FSA only issued a verbal order that was not in the written report. Given the importance of the independence of the compliance function, the order should be documented and communicated to the Board of Directors of the firm. DK was therefore assessed as partially compliant.

Monitoring of the content of the compliance reports

102. All NCAs, with the exception of two (IS, NL), reported that they monitor the content of the compliance report. However, the scope and the frequency at which such monitoring is carried out is not the same among Member States. These different supervisory practices may lead to divergent supervisory outcomes, as further detailed below.
103. Thirteen NCAs (AT, FI, FR, HR, IE, IT, LI, LT, LU, MT, PL, RO, UK) stated that they monitor the content of the reports on a periodic/regular basis. Among these NCAs, some conduct these checks at least once a year, when supervised firms submit the reports in accordance with the applicable domestic requirements (FR, IT, LT, LU, MT, PL, RO) or during the SREP assessment (PL). These seven NCAs also performed ad hoc checks, for instance in the course of on-site inspections.
104. Eight NCAs (AT, CY, DE, EE, IE, LI, LT, UK) performed an analysis of the compliance reports in accordance with their risk-based supervisory approach. In this regard, it is noted that in the UK, the risk-based approach identifies a group of firms (fixed firms), for which the NCA conducts regular reviews on a monthly basis of all the information submitted to the management, including if the case may also include particular reports (e.g. on compliance) in preparation for a proactive engagement meeting, or as part of a cross-firm review, according to the firm's individual risk mitigation programme. However for the rest of supervised firms, the flexible firms), these checks are not conducted on a routine basis but on an ad hoc basis. Regarding CY, it is noted that during the review period the risk-assessment used for the risk-based approach was not very developed.
105. In HR and SK, although the monitoring is carried out only through on-site inspections, the NCAs reported that reports are reviewed on a 2-3 year cycle.
106. Fourteen NCAs (BE, BG, CZ, DK, EL, ES, HU, LV, NL, PT, SE, SI, SK) performed monitoring mainly in the course of on-site inspections, as part of a specific thematic review and/or following the receipt of complaints or the identification of weaknesses in the investment firms' conduct. One NCA (EL) intends to require firms to send their report annually.
107. Furthermore, the main missing items identified by NCAs in their activity of monitoring vary and seemingly there are no outstanding or missing items to be highlighted.
108. In this respect, it is noted that in FR the NCA has put in place an IT system that prevents the submission of incomplete reports. Indeed, if the annual compliance questionnaire is not complete an anomaly message pops up and the report cannot be uploaded onto the NCA intranet.
109. Only a few NCAs (BG, ES, RO) provided statistics of the percentage of the investment firms whose reports are not complete. In particular, in BG, the NCA identified one incomplete compliance report for five on-site inspections. In ES it was two for 17 on-site inspections and in RO, the NCA reported 70% of incomplete reports.

110. IS did not respond to this question and NL indicated that they did not cover this aspects because of their risk based approach.

Review of the adoption of follow up action plans to the compliance function's findings

111. All NCAs reported that they review that investment firms adopt follow up action plans to address the compliance function's findings indicated in the reports. Some NCAs (AT, BG, FI, FR, IE, IT, LI, LT, LU, LV, MT, PT, RO, UK) also conduct regular checks on this aspect, while others (BE, CY, CZ, DE, DK, EE, EL, ES, HR, HU, NL¹², NO, PL, SE, SI, SK) do this on an ad hoc basis, for instance in the course of on-site inspections.
112. In RO the NCA also reported that if the NCA investigators consider that there are suitable measures which can be implemented, in addition to those identified by the compliance function, the NCA may directly issue an action plan for the investment firm and programme the related follow ups.
113. The frequency of the controls performed by the NCAs (IE, RO, UK) may differ on the basis of the risk profile of the firm. In particular, it is noted that in the UK, regular controls are scheduled for fixed firms, while for flexible firms no periodic engagement with the firms in this respect is provided.
114. In BG there is also an obligation for investments firms to inform the NCA's Vice-Chairman of any discrepancies identified by the compliance function in the course of inspections carried out the previous month, as well as the measures taken to address them.

3.3.4 – Guideline 4 – Advisory Obligations of the Compliance Function

General Guideline

Investment firms should ensure that the compliance function fulfils its advisory responsibilities including: providing support for staff training; providing day-to-day assistance for staff and participating in the establishment of new policies and procedures within the investment firm.

Supporting guidelines

¹² For firms under intensive supervision or in thematic review.

Investment firms should promote and enhance a ‘compliance culture’ throughout the firm. The purpose of the compliance culture is not only to establish the overall environment in which compliance matters are treated, but also to engage staff with the principle of improving investor protection.

The investment firm needs to ensure that its staff are adequately trained. The compliance function should support the business units in the area of investment services and activities (i.e. all staff involved directly or indirectly in the provision of investment services and activities) in performing any training. Training and other support should focus particularly, but not exclusively, on:

- (a) the internal policies and procedures of the investment firm and its organisational structure in the area of investment services and activities; and
- (b) MiFID, the relevant national laws, the applicable standards and guidelines set out by ESMA and competent authorities, and other supervisory and regulatory requirements that may be relevant, as well as any changes to these.

Training should be performed on a regular basis, and needs-based training should be performed where necessary. Training should be delivered as appropriate – for example, to the investment firm’s entire staff as a whole, to specific business units, or to a particular individual.

Training should be developed on an ongoing basis so that it takes into account all relevant changes (for example, new legislation, standards or guidelines issued by ESMA and competent authorities, and changes in the investment firm’s business model).

The compliance function should periodically assess whether staff in the area of investment services and activities hold the necessary level of awareness and correctly apply the investment firm’s policies and procedures.

Compliance staff should also provide assistance to staff from the operative units in their day-to-day business and be available to answer questions arising out of daily business activity.

Investment firms should ensure that the compliance function is involved in the development of the relevant policies and procedures within the investment firm in the area of investment services, activities and ancillary services. In this context, the compliance function should be enabled, for example, to provide compliance expertise and advice to business units about all strategic decisions or new business models, or about the launch of a new advertising strategy in the area of investment services and activities. If the compliance function’s advice is not followed, the compliance function should document this accordingly and present it in its compliance reports.

Investment firms should ensure that the compliance function is involved in all significant modifications of the organisation of the investment firm in the area of investment services, activities and ancillary services. This includes the decision-making process when new business lines or new financial products are being approved. In this context, the compliance function should be given the

right to participate in the approval process for financial instruments to be taken up in the distribution process. Senior management should therefore encourage business units to consult with the compliance function regarding their operations.

Investment firms should ensure that the compliance function is involved in all material non-routine correspondence with competent authorities in the area of investment services and activities.

3.3.4.1 – Summary of Findings

115. In general, NCAs were aware of the advisory obligations of the compliance function of their supervised investment firms authorised under MiFID. However, all the elements of the advisory obligations of the compliance function mentioned in Guideline 4 were not supervised by all NCAs on a regular basis. The frequency and the means of the NCAs' assessment differed. The NCAs generally perform supervisory actions as a result of its risk-based approach, following its analysis of the audit reports or compliance reports.
116. The AG has not observed major divergences in the supervisory approach adopted by NCAs for assessing the advisory obligations of the compliance function. Some NCAs indicated that this assessment was usually ancillary to another supervisory activity.
117. Most NCAs verified on a regular basis that the compliance function engaged in the training support of investment firms' staff, whereas very few do so on an ad hoc basis. Most of the NCAs also checked that the firms' compliance function is involved in all significant modifications in the organisation as well as the decision making process in each of the following areas: new business models, and distribution methods, new financial products, advertising strategy.
118. When the advice of the compliance function is not followed, most NCAs review those situations and ask firms for explanations. However some NCAs do not monitor what happens in this situation, although they expect that senior management of the firm are informed.
119. The involvement of senior management is of crucial importance in order to build the compliance culture within a firm e.g. through encouraging business units to consult the compliance function. Two thirds of the NCAs confirmed that they review whether the investment firms' senior management encourage business units to consult the compliance function. In most cases, the NCAs analyse this through on-site inspections or interviews, occasionally accompanied by a review of relevant documents.
120. The approach of NCAs differs regarding the involvement of the compliance function in all material non-routine correspondence with the NCA. Most NCAs monitor this aspect. For

some NCAs the monitoring mainly relates to the correspondence regarding supervisory inspection or supervisory findings. Some NCAs do not monitor that issue in particular, although they would do so in the case that shortcomings are identified.

3.3.4.2 – Analysis of Findings

NCAs' supervisory approach

121. The majority of NCAs (AT, BE, BG, CZ, DE, DK, EE, ES, FI, HR, HU, IE, IT, LI, LT, LU, LV, NO, PL, PT, RO, SE, SI, SK, UK) applied a supervisory process to assess that the investment firms' compliance function fulfils its advisory responsibilities, whereas three did not do so on a systematic basis (CY, FR, MT) and one did so only if it received multiple signals about a firm (NL). Two NCAs (EL, IS¹³) did not perform that check.
122. Most NCAs (AT, BE, BG, CY, CZ, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LI, LU, LV, MT, NL, NO, PL, PT, RO, SE, SK, UK) responded that in general they performed the assessment in the course of on-site inspections, during thematic reviews, interviews with the compliance function, or in the event of suspected shortcomings. One NCA (DE) responded that usually the assessment is performed in the course of the annual audit which encompasses MiFID conduct of business rules and organisational requirements. Two NCA's (IS, SI) did not provide a response to this question. Some of the NCAs based their approach on their risk-based management supervision framework (CY¹⁴, DK, EL, IT, NL, UK¹⁵).

Compliance function's engagement in training support of investment firms' staff

123. Most NCAs (AT, BE, BG, CZ, DE, DK, EE, ES, FI, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SK, UK) verify if investment firm's compliance function is engaged in training support for investment firm's staff. Three NCAs (CY, NL, SI) do not verify if the compliance function is engaged in training support for the firm's staff. Three NCAs (EL, FR, SE) conduct the checks on a more incidental basis and in most cases during on-site inspections. One NCA (IS) did not provide a response.
124. Half of the NCAs (AT, BE, BG, CZ, DE, EE, ES, HU, IE, IT, LT, LV, NO, PL, SK) responded that they specifically check 1) that training is organised on a regular and/or need-based basis where necessary, 2) that training is delivered to staff according to identified training needs i.e. entire staff, depending on specific business units or particular members of staff, and 3) that training is developed on an ongoing basis and takes into account all relevant changes (for example new legislation, standards or guidelines issued by ESMA and themselves,

¹³ Although IS did not provide a response to this question specifically, it indicated that due to lack of resources the FME did not conduct on-site or thematic inspections with the sole focus on compliance function of investment firms during the review period.

¹⁴ However, in CY the new risk based approach was not yet fully developed and implemented.

¹⁵ UK's FCA applies fixed and flexible supervision with three pillars for each of fixed and flexible supervision. For most MiFID firms, it applies flexible supervision.

changes in the investment firms' business model). Some NCAs performed checks on two of these points (EL, LI, LU, MT, PT). Few NCAs (DK, HR, RO) checked only one point.

Compliance function and internal policies, procedures, organisational structure

125. Most of the NCAs (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HR, HU, IE, IT, LI, LT, LU, LV, MT, NO, PL, RO, SE, SK, UK) took into consideration the internal policies and procedures of the investment firm and its organisational structure as well as MiFID, the relevant national laws, standards and guidelines set out by ESMA and the NCAs. One NCA (PT) took into consideration only MiFID, the relevant national laws, standards and guidelines as set out by ESMA and itself, and performed the verification on an incidental basis. FR stated that ad hoc checks and assessments do take place in particular during on-site inspections. NL (AFM) indicated that when they have many signals that the compliance function does not fulfil its role they may investigate the compliance function of a firm, but this is not a standard procedure.
126. One NCA (IS) did not provide a response and SI indicated that they applied the supervisory process for their October 2016 review.

Day to day assistance and participation in new policies and procedures and review of investment firms' compliance function advisory responsibilities

127. Most of the NCAs (AT, BE, BG, CZ, DE, EE, ES, HR, HU, IE, IT, LI, LU, LV, MT, NO, PL, PT, RO, SK, UK) checked that investment firms' compliance function 1) periodically assesses whether staff in the area of investment services and activities hold the necessary awareness and correctly apply the investment firms' policies and procedures, 2) provides assistance to staff from operative units in their day-to-day business and is available to answer questions arising out of daily business activity, 3) is involved in the development of relevant policies and procedures within the investment firm in the area of investment services, activities and ancillary services, and 4) is involved in all significant modifications in the organisation and in the decision making process in each of the following areas: new business models and distribution methods, new financial products and advertising strategy.
128. Some NCAs performed verifications on three points (DK, LT, FI, NL) or two points (EL, SE) whereas a few NCAs did not perform such verification during the review period (FR16, NL17, SI18).
129. One NCA (IS) did not provide a response.

¹⁶ FR may carry out checks, in particular on whether the compliance function is involved in the development of the relevant policies and procedures within the firms, where deemed appropriate depending on the circumstances and it may also be discussed during ad hoc meetings with firms and their compliance officers.

¹⁷ Due to their risk-based approach..

¹⁸ SI initiated the process during an on-site visit in October 2016 where it checked point 2.

Situations when advice of the investment firms' compliance function is not followed

130. Most of the NCAs (AT, BE, BG, CZ, DE, DK, EE, ES, FI, HR, HU, IE, IT, LT, LU, LV, MT, NO, PL, PT, RO, SE, SK, UK) review the situations arising when the advice of the investment firms' compliance function is not followed.
131. Some NCAs (CY, EL, FR, LI, NL, SI) declared they did not review such situations. NL explained that it is due to their risk-based approach. SI confirmed that they initiated that process after the review period in an on-site visit. EL focused its attention on the annual report drafted by external auditors and related to MiFID organisation requirements (including the compliance function), assessed its findings and, if necessary, requested the investment firm take the necessary measures. Two NCAs (LI, FR) explained they review the situation whenever they became aware of an issue. In CY, the NCA would perform such checks on an ad hoc basis when performing on-site inspections.
132. IS did not respond to this question.

Documentation of the refusal to follow the advice of the compliance function

133. Most of the NCAs (AT, CY, DE, DK, ES, FI, IE, IT, LT, LU, LV, MT, NO, PL, RO) required the investment firm to document the situation when the advice of the compliance function is not followed and to present it in the compliance report.
134. Some NCAs (BE, BG, CZ, EE, EL, FR, HR, HU, LI, SE, SK, UK) did not impose such a requirement. Nevertheless, BE considered that those events should be reflected in the compliance report but could also be reported to the management in different ways and not systematically through the annual compliance report. In FR and HR this is not a requirement but a recommendation and UK perceives it as a good practice.
135. Four NCAs (IS, NL, PT, SI) did not provide a response to this question.

Senior management encouragement to the business units to consult the compliance function

136. Most of the NCAs (AT, BE, BG, CY, CZ, DE, EE, EL, FR, IT, LI, LT, LU, LV, MT, NO, PL, PT, RO, SK, UK) reviewed and ensured that the investment firms' senior management encourages business units to consult the compliance function. In most jurisdictions the review took place during on-site inspections or through interviews supported by relevant documents, and it could be followed by reports/letters indicating shortcomings. Some NCAs (CZ, LT, PL) check internal policies and procedures, e.g. whether they include information for staff to consult on the matter with the compliance officer in particular cases. In BG, the NCA

solely asked the investment firms for confirmation and in SK, the NCA reviewed the minutes from the management board meetings. In CY, the NCA suggested a deeper involvement of the compliance function for those firms which were subject to on-site inspections during the review period.

137. Some NCAs (DK, EL, ES, FI, HR, HU, IE, NL, SE, SI) did not carry out this review. However, some of them answered no to the question because they did not perform this review on a regular basis, but indirectly and through non-explicit recommendations, they supported the involvement of the compliance function. In IE, the supervisors would encourage and query the compliance role in certain matters such as changes in business model or in authorisation and complaints handling. In ES, the compliance function must be involved in the design of policies and procedures that the senior management of the firm must approve.

138. One NCA (IS) did not provide a response.

Involvement of the compliance function in all material non-routine correspondence with the NCA

139. Many jurisdictions (AT, BE, DE, EE, ES, FR, HR, HU, IT, LT, LV, MT, NO, PL, RO) confirmed that the NCA monitors whether investment firms ensure that their compliance function is involved in all material non-routine correspondence with their NCA, including in relation to the verification of compliance reports, the analysis of compliance function internal rules and follow-up of on-site interviews with the compliance function.

140. Few NCAs (BG, CZ, DK, PL¹⁹, PT, SK) monitored whether investment firms ensure compliance function involvement in part of material non-routine correspondence with the NCA. This mainly relates to correspondence deriving from the conducting of inspections or their respective findings.

141. Some NCAs (CY, EL, FI, IE, LI, LU, NL, SE, SI, UK) did not monitor the issue. However, most of them had means of verifying this as needed. LI explained that an assessment may be derived from combining evidence from different sources such as compliance reports, minutes of board meetings or past correspondence with the NCA. In LU, all correspondence sent by a supervised entity to the NCA should be addressed by the compliance function. In SE, the NCA would further investigate if it had indications that the compliance function has been (deliberately) excluded from the communication. The UK does not do so directly, but expects to be able to have a bilateral communication channel with compliance staff in any firm without intermediation through the business senior management (except for smaller firms where senior management may perform a number of functions).

142. One NCA (IS) did not provide a response.

¹⁹ For investment funds



4 Annexes

4.1 Annexe 1 – The Mandate

MANDATE FOR A PEER REVIEW ON GUIDELINES ON CERTAIN ASPECTS OF THE MiFID COMPLIANCE FUNCTION REQUIREMENTS (ESMA/2012/388)

Background

1. MiFID²⁰ and its Implementing Directive²¹ were adopted in order to provide a degree of harmonisation needed to offer a high level of protection to investors and ensure the uniform application of the requirements. Recital 2 of MiFID provides that: "...it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the community, being a Single Market,...", and Recital 7 of the Implementing Directive adds that "in order to ensure the uniform application of the various provisions of [MiFID], it is necessary to establish a harmonised set of organisational requirements and operating conditions for investment firms."
2. In particular, Article 13 of MiFID sets the organisational requirements for investment firms and Article 6 of the Implementing Directive sets requirements related to compliance. In order to promote greater convergence in the related interpretation and supervisory approaches, ESMA complemented Article 13 of MiFID and Article 6 of the MiFID Implementing Directive with guidelines i.e. the ESMA Guidelines on certain aspects of the MiFID compliance function requirements (ESMA/2012/388) ("Guidelines").
3. The Guidelines are divided in three sections. The first section relates to the responsibilities of the compliance function, the second to the organisational requirements of the compliance function and the third one to the competent authority review of the compliance function. Regarding the responsibilities of the compliance function, the guidelines develop guidance on the risk assessment (guideline 1), the monitoring obligation (guideline 2), the reporting obligation (guideline 3) and the advisory obligation (guideline 4). For the organisational requirements, the guidelines explain the approach for the effectiveness (guideline 5), the permanence (guideline 6), the independence of the function (guideline 7), the exemption (guideline 8), the combination of the compliance function with other internal control functions (guideline 9) and the outsourcing of the compliance function (guideline 10). Finally, the Guidelines expand on the review of the compliance function by the competent authority (guideline 11).

²⁰ Directive 2004/39/EC of 21 April 2004 on markets in financial instruments

²¹ Directive 2006/73/EC of 10 August 2006 implementing MiFID as regards organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive

4. The Guidelines were published on 28 September 2012 and the published ESMA compliance table for the Guidelines, ESMA/2013/923, indicates that all NCAs have communicated that they comply or intend to comply with them.
5. In view of its mission to enhance customer protection²², the 2016 Supervisory Convergence Work Programme provides that in 2016, ESMA may initiate a peer review on the compliance function guidelines in order to assess compliance by NCAs with the Guidelines, identify good practices and potential areas for improvement.
6. This peer review would be timely, as sufficient time has elapsed since publication in order for the Guidelines to be embedded in the supervisory approach of NCAs, and it would assist the implementation of MiFID II and MiFIR.
7. In order to perform the peer review within a reasonable timeframe and in view of resources available, the peer review will focus on topics that appeared the most relevant for our purpose. These topics relate to the responsibilities of the compliance function and are made up of guideline 1 (covering the compliance risk assessment), guideline 2 (on the monitoring obligations of the compliance function), guideline 3 (on the reporting obligation of the compliance function) and guideline 4 (related to the advisory obligations of the compliance function). The peer review will cover the period from July 2014 to June 2016.

Legal basis

8. This peer review will be conducted in accordance with Article 30 Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 (ESMA Regulation).
9. The peer review will be governed by the methodology of the former Review Panel (ESMA/2013/1709) (Methodology), and the guidance note in relation to on-site visits in peer reviews (ESMA/2015/RP/011).

Purpose

10. In line with the Methodology, the peer review will cover the assessment of:
 - 10.1 the independence of the NCAs and capacity to achieve high quality supervisory outcomes²³, including
 - the adequacy of resources and governance,
 - the effective application of the Guidelines,

²² See article 1(f) of ESMA Regulation

²³ In line with Art. 30 and paragraph 41 of the Preamble of the ESMA Regulation

10.2 the capacity of the NCA to respond to market developments.

10.3 the degree of convergence in application of law and supervisory practices

- the extent to which the practices achieve the objectives,
- the determination of good practices.

10.4 the effectiveness and degree of convergence with regard to enforcement of provisions including administrative measures and sanctions.

Scope

11. More particularly, in the context of these Guidelines, the objectives of this peer review will be to assess how NCAs supervise the implementation of the guidelines, during both the authorisation process and the on-going supervision process:

In the context of Guideline 1:

11.1 how often and on what basis or established criteria the compliance function undertook a risk assessment;

In the context of Guideline 2:

11.2 how the findings of the risk assessment were used to determine a monitoring programme;

11.3 the content of the monitoring programme established by the compliance function and the priorities it established;

In the context of Guideline 3:

11.4 the frequency of the compliance report;

11.5 the content of the compliance report, including with regard to indications related to the independence of the compliance function;

In the context of Guideline 4:

11.6 the compliance function's role in the establishment of new policies and procedures and advising the firm in respect of its general business activities including product launches, advertising campaigns.

12. The review should be targeted and sequenced:

12.1 at the first stage, a self-assessment questionnaire should be developed by the Assessment Group and circulated to all NCAs focusing on the following matters to the extent that they are relevant to the responsibilities of the compliance function: market structure, organisational set-up of the NCAs and their resources, decision making processes in the NCAs, selection methods for supervision and enforcement of

the performance of responsibilities by the compliance function of firms. The questionnaire will also seek from NCAs information from the review period relevant to authorisation, supervisory and enforcement activities, etc.

- 12.2 at the second stage, on the basis of criteria outlined below, a number of NCAs (from 5-7) will be selected for the purposes of performing desk based analysis during on-site visits. These visits will take place in order to complement the findings from the questionnaire with the detailed information that will be needed to gain a thorough understanding of the authorisation, supervisory and enforcement practices applied, and for Competent Authorities to demonstrate their compliance. It is intended that over several peer reviews, all NCAs are subject to on-site visits. Information may be required to these NCAs in advance of the on-site-visit and meetings will be arranged between the Assessment Group members and the staff of the NCA such as the national experts in the field, including their management. Each on-site visit shall last for one to three days.
- 12.3 The second stage will include the review of (i) appropriate use of the selection methods and (ii) sample of files examined by the selected NCAs, and an analysis of the nature, quality and consistency of findings and conclusions reached during their authorisation, supervisory and enforcement activities. The aim of the review is not to 'second-guess' judgements already made, but rather when reviewing those files, to assess the effectiveness of the whole process in which the judgement has been made.
- 12.4 The Assessment Group may also gather other publicly available information.
13. The desk based analysis during on-site visits shall consist of the review of a limited number of files related to the compliance function.
14. The NCAs in question will be requested to provide working documents, which the Assessment Group may request to be translated into English, clarifying any issue arising as part of the peer review process.
15. Criteria for the selection of NCAs for the second stage will be a combination of indicators capturing:
 - a) the size of the market under the responsibility of the NCA in a jurisdiction (measured through the turnover of authorised firms per jurisdiction);
 - b) the breadth of the market under the responsibility of the NCA in a jurisdiction (measured through the number of authorised firms under MiFID and the number of authorised firms passported into other Member States);
 - c) the number of firms the NCA authorised during the peer-review period;

- d) the percentage of authorised firms examined during the period ('examination rate');
- e) of those authorised firms examined, the percentage in respect of which actions were taken ('action rate');

and indicators related to resources (human and financial) involved in the compliance function for the purpose of authorisation, supervision and enforcement:

- f) ratio of the total number of authorised firms in the jurisdiction to the total resources devoted to activities involving a compliance function component in 2015 (man years);
- g) ratio of the total number of authorised firms examined in 2015 to the total resources devoted to activities involving a compliance function component (man years);

and other criteria considered relevant by the Assessment Group, in view of the findings of the questionnaire and in line with the Methodology.

16. Following the initial responses to the questionnaire, the Assessment Group will establish a shortlist of NCAs to be visited. The selection will be informed by the criteria above, and an explanation of the proposed selection will be provided. This proposal will be submitted to the Board for its approval before any visit starts.

Seeking input from stakeholders

17. Depending on the outcome of the responses to the self-assessment questionnaire, the Assessment Group may seek input from stakeholders. At this stage, no proposal to meet with stakeholders is being made to the Board. If after the first stage of the peer review the Assessment Group decides to seek stakeholder input, it will seek approval for such approach from the Board. Any such input will be governed by the recent principles adopted by the Principles – Stakeholder Engagement in Peer Reviews (ESMA/2016/BS/078).

Review approach

18. In accordance with the Peer Review Methodology, the peer review will be carried out by an Assessment Group. The Assessment Group will be composed of the following persons, with extensive knowledge and experience in the authorisation, supervision and enforcement activities related to the compliance function and in the conduct of reviews:
19. The Assessment Group shall be coordinated by Sonia Martinez, CNMV, Spain.
20. The members of the Assessment Group will be:

Nina Sjoman (FIN FSA, FI);
Vassiliki Galanopoulou (HCMC, EL)
Katalin Csilla Szabo (MNB, HU);
Simon Sloan (CBoI, IE);
Simona Serio (Consob, IT);
John Sammut (MFSA, MT);
Magdalena Szumielewicz (KNF, PL);
Adam Nádaský (NBS, SK);
Philip Brennan (ESMA).

21. Nathalie Piscione, from ESMA's Legal, Convergence and Enforcement department, will act as Rapporteur of the Assessment Group.
22. In line with the Methodology, the Assessment Group will report its findings to the Board of Supervisors, for its approval, after having consulted the Supervisory Convergence Standing Committee.

Review Period

23. The period under review covers the compliance function requirements under the Guidelines from 1 July 2014 up to 30 June 2016.

Methodology

24. As well as reviewing existent policies and procedures, such as sampling procedures, some of the tools that can be used include, but are not limited to, interviews with NCAs' staff, access to authorisation, supervisory and enforcement files and demonstration of the work carried out. As far as the access to files is concerned, at least the following documents will be requested: inspection plans and agendas, the file related to the compliance function responsibilities, documentation of the initial analysis of the compliance function responsibilities, all related correspondence with the authorised firm, any documents received from authorised firms related to the compliance function responsibilities, as well as documentation describing results of such analysis, final report of the examination detailing the findings and any action taken (including any communication of the results or recommendations to the authorised firm).
25. The obligations on professional secrecy as stipulated by Article 70 of the ESMA Regulation and subsequently by the ESMA Management Board Decision on Professional Secrecy and Confidentiality (ESMA/2011/MB/4) will apply to all members of the Assessment Group through their explicit consent to comply with those obligations. A confidentiality agreement will be signed by all members of the Assessment Group.
26. As a matter of principle, all Assessment Group members should commit to actively participate to the review, including through the on-site visits. Furthermore, to perform this review within the deadline and deliver the outcome by October 2017, all NCAs must commit to

cooperating with the Assessment Group and facilitating the work of the Assessment Group within the timelines set out.

27. In respect of a number of jurisdictions, the work of this peer review may mean that the Assessment Group may need to get information from competent authorities who are not normally represented at ESMA Board meetings. ESMA members are reminded of their obligation to encourage and facilitate cooperation and to act as a channel of communication between ESMA and these specific competent authorities.
28. The Coordinator, with the assistance of the Rapporteur, will work to prevent conflict of interest arising in the Assessment Group. This will include the rule that no on-site team can include a representative of the NCA being visited, nor can an NCA representative work on the assessment of that NCA.

Evidence

29. Competent Authorities will be asked to support their replies to the questions (written or oral) with examples from their actions, practices and procedures, in the form of supervisory files, and samples, and their supervisory handbooks, instruction manuals and similar material. The evidence shall demonstrate their supervisory actions in relation to the application of the Guidelines. The evidence will have to be provided in English if available. When an English version of the evidence is not available, the answer has - to the extent practicable - to describe the relevant evidence in English as stated by the Methodology in paragraph 28.

Publication

30. The report resulting from the work shall be made public, unless the Board of Supervisors decides otherwise at the time of approving the report. The findings of the Assessment Group shall in any case be reported for the approval of the Board of Supervisors, after consultation of the Supervisory Convergence Standing Committee.

Time-line expected for the work

Task/Event

Approval of the mandate by the Board of Supervisors
Launch of the questionnaire (to be completed within approximately 4 weeks)
Analysis of replies, begin drafting of report, accuracy checks and preparation of visits, selection of the relevant files; selection, approval, and organisation of onsite visits
On-site visits and analysis of files

Accuracy checks with NCAs bilaterally

Dates (tentative)

September 2016
November 2016

*December 2016-
 January 2017*

*February – May
 2017*
June - July 2017



Finalisation of report following and consultation of the Report with the Supervisory Convergence Standing Committee
Submission of Report to the Board of Supervisors

August - September 2017

September - October 2017

4.2 Annexe 2 – The Questionnaire

Questionnaire - Peer Review on certain aspects of the MiFID Compliance Function - Guidelines 1 to 4

Fields marked with * are mandatory

1 Introduction

The ESMA Supervisory Convergence Work Programme 2016 provides that a peer review on the compliance function guidelines²⁴ (Guidelines) may be initiated in 2016 in order to assess compliance by NCAs with the Guidelines, identify good practices and potential areas for improvement.

This peer review will be conducted in accordance with Article 30 Regulation (EU) No. 1095 /2010 of the European Parliament and of the Council of 24 November 2010 (ESMA Regulation) and the revised [Review Panel] Methodology (ESMA/2013/1709) (Methodology).

In line with the ESMA Regulation and the Methodology, the peer review must also include a review of the independence of the NCAs and capacity to achieve high quality supervisory outcomes, including the adequacy of resources and governance and the effective application of the Guidelines, the capacity of the NCA to respond to market developments, the degree of convergence in the application of law and supervisory practices, and the extent to which the practices achieve the objectives. The mandate was approved by the Board of Supervisors in September 2016.

In accordance with the Methodology, the peer review will be carried out by the assessment group identified in the mandate.

In line with the Methodology the assessment group will report its findings to the Board of Supervisors, for its approval, after having consulted the Supervisory Convergence Standing Committee.

The peer review shall focus on guidelines 1, 2, 3 and 4 of the Guidelines that apply to investment firms (as defined in Article 4(1)(1) of MiFID), including credit institutions that provide investment services, UCITS management companies (when they are providing the investment services of individual portfolio management or of investment advice (within the meaning of Article 6(3)(a) and (b) of the UCITS Directive). For the purpose of this questionnaire, any reference to investment firm will therefore also cover those UCITS management companies.

Depending on the outcome of the responses to the self-assessment questionnaire the assessment group may seek input from stakeholders and in accordance with the Stakeholder Engagement in Peer Reviews (ESMA/2016/632).

²⁴ ESMA/2012/388



This questionnaire will be followed by on-sites visits to a number of NCAs selected by the Board of Supervisors in accordance with the mandate.

The period under review spans from 1 July 2014 to 30 June 2016. All questions relate to that period and answers should cover that period unless otherwise specified in the questionnaire.

The Report resulting from the work shall be made public in line with the Methodology.

2 Instructions to fill in the questionnaire

Where there is more than one body in a Member State responsible for completing the questionnaire (whether as competent authority or as delegate, or as other), it is the responsibility of the ESMA member to ensure that both bodies answer to this questionnaire and represent the state of affairs in that Member State (and not just in one body), and that the answers describe the aggregate of answers from both bodies in a timely manner.

In some questions, you are requested to provide an explanation or a description. Please provide a clear and concise answer and do not copy extract of your legislation or regulation as the reader may not have the local background allowing full understanding. Members of the assessment group may contact you in case of question.

3 Market structure in the Member State

In order to have an understanding of the market and to apply criteria for the selection of NCAs for the second stage of the peer review i.e. on-site visits, the assessment group needs to get information on the market under the responsibility of the NCA²⁵

Please provide the following information for investment firms and make the distinction for credit institutions authorised to provide investment service:

*1 The number of investment firms authorised under MiFID under the responsibility of the NCA as of the 30 June 2016

*2 The number of investment firms authorised under MiFID passported into other Member States as of the 30 June 2016

*3 The turnover for 2015 of the investment firms authorised under MiFID under the responsibility of the NCA for their MiFID activities and services.

*4 The number of firms granted authorisation under MiFID by the NCA during the review period i.e. between 1 July 2014 and 30 June 2016

²⁵ See paragraph 15 of the Mandate

*5 The percentage of investment firms authorised under MiFID where the compliance function was examined i.e. subject to on-site inspection or thematic review during the review period i.e. between 1 July 2014 and 30 June 2016. Please provide the scope, average length of time, and number of staff involved.

*6 Of the investment firms authorised referred to above in the previous question, the percentage in respect of which enforcement measures were taken in respect to the compliance function during the review period.

4 Legal and organisational character of the NCA

In line with the Methodology, the peer review will cover the assessment of the independence of the NCAs and capacity to achieve high quality supervisory outcomes, as well as the capacity of the NCA to respond to market developments [1] ²⁶. For that purpose, the assessment group will need to get information related to resources involved in the compliance function activities for the purpose of authorisation, supervision and enforcement, and to governance.

4.1 Identification of NCA(s)

*7 Please identify the competent authority/ies involved in the authorisation, supervision and enforcement of the compliance function requirements applicable to authorised investment firms under MiFID in your jurisdiction.

4.2 Resources

Please provide the following information:

*8 For 2015, the number of staff involved in activities implying a compliance function component under MiFID. We understand that organization of each NCA may differ, so please: - indicate whether the staff is mainly involved in MiFID activities and explain - provide the breakdown of the figure for each of: 1) the authorisation process, 2) the on-going supervision i.e. desk-based review, and examination process i.e. on-site inspections and thematic reviews, 3) the enforcement process.

*9 The ratio of the total number of authorised firms under MiFID under the responsibility of the NCA to the total resources devoted to activities involving a compliance function component in 2015 (man/year) as referred to in question 8 above.

[1] See paragraph 10 of the Mandate

*10 The ratio of the total number of authorised firms under MiFID examined (i.e. subject to on-site inspection or thematic review) in 2015 to the total resources devoted to activities involving a compliance function component as referred to in question 8 above.

*11 Please indicate in average the years of relevant experience (e.g. work within the NCA, work in the private sector in relation to the compliance function, etc...) for those directly involved in (1) the authorisation (2) the examination, i.e. on-site inspections and thematic reviews and (3) the enforcement process of investment firms.

*12 Please indicate the number of hours of training related to the compliance function in 2015, including both internal and external training (hours per staff member), 1) for staff involved in the authorisation of investment firms under MiFID; 2) for staff involved in the examination, i.e. on-site inspections and thematic reviews, of investment firms under MiFID; 3) for staff involved in enforcement measures under MiFID.

4.3 Financial resources

*13 Please indicate the percentage of your NCA annual budget allocated to the authorisation, supervision and enforcement activities related to the compliance function under MiFID in 2015.

4.4 Governance

Please provide the following information:

*14 Explain the organisation of the NCA with regard to the authorisation, supervision and enforcement related to the compliance function under MiFID. Please provide an organisation chart and highlight departments/Unit dealing with the compliance function under MiFID with regard to authorisation, supervision and enforcement.

*15 Explain the decision making process including criteria used in your NCA regarding the authorisation of investment firms under MiFID, regarding the selection of authorised investment firms for on-site inspection, for deciding on actions i.e. supervisory measures such as CEO letter, supervisory advice, and enforcement measures such as fine, suspension or withdrawal of authorisation.

5 General Framework regarding the compliance function under MiFID

*16 How has your NCA incorporated the Guidelines in its regulatory framework? Does your NCA have tools in order to ensure compliance with the Guidelines?

*17 Does your NCA publish any guidance in relation to the compliance function?

18 If you answered "no" or "other" to the previous question, please explain.

*19 Please list the source of information you use to perform your supervisory activities and the document(s) you specifically require from investment firms.

*20 Does your NCA supervise authorised investment firms that have outsourced their compliance function?

No

Yes, but there are no difference in our approach compared to a non-outsourcing situation

Yes, and there are differences in our approach compared to a non-outsourcing situation.

21 If you answered, "Yes, and there are differences in our approach compared to a non-outsourcing situation" to the previous question, please explain the difference(s) in your approach and in particular indicate whether you have a different approach depending on whether the outsourcing is made to a group-entity or a third party.

*22 Does your NCA adopt a different approach in relation to the compliance function under MiFID with regard to UCITS management companies providing investment services of individual portfolio management or of investment advice?

23 Please explain

*24 When weaknesses are identified in relation to the compliance function, how does your NCA address such weaknesses? Please list the 3 most frequently observed weaknesses that have been identified and the 3 main actions to address them.

*25 During the review period, did your NCA use supervisory measures (such as CEO letter, supervisory advice) and/or impose enforcement measures (i.e. fine, suspension or withdrawal of authorisation) on an authorised investment firm because of failure to comply with the compliance function guidelines 1,2,3 or 4?

26 If you answered yes to the previous question, please briefly describe the failure(s) and the related supervisory and/or enforcement measure(s) including how many times these measures were used over the assessment period.

*27 Please list the 3 main challenges you encounter in each of the authorisation, supervision and enforcement phases of the compliance function for the aspects related to the compliance risk assessment, the monitoring, reporting and advisory obligation of the compliance function. Please explain how you address them or intend to address them.

6 Guideline 1 – Compliance risk assessment

Extract of the Guidelines

Relevant legislation: Article 6(1) of the MiFID Implementing Directive.

General guideline 1

14. Investment firms should ensure that the compliance function takes a risk-based approach in order to allocate the function's resources efficiently. A compliance risk assessment should be used to determine the focus of the monitoring and advisory activities of the compliance function. The compliance risk assessment should be performed regularly to ensure that the focus and the scope of compliance monitoring and advisory activities remain valid.

Supporting guidelines

15. MiFID requires investment firms to establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the investment firm to comply with its obligations under MiFID. As part of this, the compliance function should identify the level of compliance risk the investment firm faces, taking into account the investment services, activities and ancillary services provided by the investment firm, as well as the types of financial instruments traded and distributed.

16. The compliance risk assessment should take into account the applicable obligations under MiFID, national implementing regulation and the policies, procedures, systems and controls implemented within the firm in the area of investment services and activities. The assessment should also take into account the results of any monitoring activities and of any relevant internal or external audit findings.

17. The compliance function's objectives and work programme should be developed and set up on the basis of this compliance risk assessment. The identified risks should be reviewed on a regular basis as well as ad-hoc when necessary to ensure that any emerging risks are taken into consideration (for example, resulting from new business fields or other changes in the investment firm's structure)

Background information

The Assessment Group aims at assessing convergence in the outcome of the work of the NCAs in the scope of the authorisation, on-going supervision and enforcement roles of the NCAs and in particular with respect to the frequency and basis or established criteria on which the compliance function undertook a compliance risk assessment[1].

[1] See paragraph 11.1 of the Mandate

The Assessment Group seeks to understand each NCAs supervisory approach to ensuring that the compliance function undertakes a risk based approach to compliance activity. This assessment of the investment firm's compliance risk should form the basis for how the compliance function

prioritises its monitoring and advisory activity. The assessment should take into account not only MiFID obligations, but also other national regulations and upstream regulations. The assessment should further consider the output of previous compliance monitoring and audit findings. The Assessment Group is also interested in understanding whether investment firms have documented and implemented policies and procedures around the compliance risk assessment process and whether compliance risk assessments are completed sufficiently frequently such that the assessment remains fit for purpose.

*28 During the review period, did your NCA use supervisory measures (such as CEO letter, supervisory advice) and/or impose enforcement measures (i.e. fine, suspension or withdrawal of authorisation) on an authorised investment firm because of failure to comply with the compliance function guidelines 1,2, 3 or 4?

*29 Does your NCA require firms applying for an authorisation to have internal policies and procedures to undertake a compliance risk assessment? Yes, we ask whether firms applying for authorisation have internal policies and procedures to undertake a compliance risk assessment. Yes, we expect firms to submit internal policies and procedures and we assess the documents Yes, other. No, we don't ask related information in the authorisation process.

30 If you answer, "Yes, other" or "No" to the previous question, please explain.

*31 How does your NCA determine whether investment firms have adequate policies and procedures in place for performing compliance risk assessment? Choose one or more of the following alternatives:

We verify that investment firms have policies and procedures for compliance risk assessment.

We verify that investment firms regularly review and update their compliance policy and procedures by reviewing investment firms' written reports to senior management/board packs.

We verify compliance risk assessments prepared by investment firms and verify that the investment firms operate in line with their documented policies and procedures.

Other

32 If you answer "other" to the previous question, please explain.

*33 Does your NCA, through the on-going supervision process, seek to establish that investment firms regularly perform a compliance risk assessment?

Not during the review period

Yes, by conducting on-site inspection

yes, by conducting thematic reviews



yes, by conducting desk-based reviews

yes, by conducting interviews

yes, by conducting other queries

34 If you answer yes to the previous question: - how often does your NCA carry out the checks referred to above? - if you answer, "yes, by conducting other queries" to the previous question, please explain.

*35 How does your NCA assess if investment firms have appropriately identified their level of compliance risk? Choose one or more of the following alternatives:

We check whether investment firms have considered investments services provided by the firm in their compliance risk assessment

We check whether investment firms have considered the types of financial instruments manufactured, traded and/or distributed, in their compliance risk assessment

We check whether investment firms have considered MiFID obligations and national regulation in their compliance risk assessment

We check whether investment firms have considered firms own policies, procedures, systems and controls in the area of investment services in their compliance risk assessment

We check whether investment firms have considered results of any monitoring activities and relevant internal or external audit findings in their compliance risk assessment

We check whether investment firms have considered any emerging risks in their compliance risk assessment

We check whether investment firms have considered passported activities in their compliance risk assessment

We check whether investment firms have considered other items in their compliance risk assessment

We assess the basis on which investment firms have assigned risk levels to identified risks.

We ensure that investment firms have reviewed their identified risks regularly and ad-hoc if needed

Other

36 If you answer to the previous question by ticking one or several of the 4 last proposals, please explain each of this (ese) answer(s).

7 Guideline 2 - Monitoring obligations of the compliance function

Extract of the Guidelines

Relevant legislation: Article 6(2)(a) of the MiFID Implementing Directive.

General guideline 2

18. Investment firms should ensure that the compliance function establishes a monitoring programme that takes into consideration all areas of the investment firm's investment services, activities and any relevant ancillary services. The monitoring programme should establish priorities determined by the compliance risk assessment ensuring that compliance risk is comprehensively monitored.

Supporting guidelines

19. The aim of a monitoring programme should be to evaluate whether the investment firm's business is conducted in compliance with its obligations under MiFID and whether its internal guidelines, organisation and control measures remain effective and appropriate.

20. Where an investment firm is part of a group, responsibility for the compliance function rests with each investment firm in that group. An investment firm should therefore ensure that its compliance function remains responsible for monitoring its own compliance risk. This includes where a firm outsources compliance tasks to another firm within the group. The compliance function within each investment firm should, however, take into account the group of which it is a part - for example, by working closely with audit, legal, regulatory and compliance staff in other parts of the group.

21. The risk-based approach to compliance should form the basis for determining the appropriate tools and methodologies used by the compliance function, as well as the extent of the monitoring programme and the frequency of monitoring activities performed by the compliance function (which may be recurring, ad-hoc and/or continuous). The compliance function should also ensure that its monitoring activities are not only desk-based, but that it also verifies how policies and procedures are implemented in practice, for example through on-site inspections at the operative business units. The compliance function should also consider the scope of reviews to be performed.

22. Suitable tools and methodologies for monitoring activities that could be used by the compliance function include (but are not limited to):

(a) the use of aggregated risk measurements (for example, risk indicators);

(b) the use of reports warranting management attention, documenting material deviations between actual occurrences and expectations (an exceptions report) or situations requiring resolution (an issues log);

(c) targeted trade surveillance, observation of procedures, desk reviews and/or interviewing relevant staff.

23. The monitoring programme should reflect changes to the investment firm's risk profile, which may arise, for example, from significant events such as corporate acquisitions, IT system changes, or reorganisation. It should also extend to the implementation and effectiveness of any remedial measures taken by the investment firm in response to breaches of MiFID.

24. Monitoring activities performed by the compliance function should also take into account:

(a) the business area's obligation to comply with regulatory requirements;

(b) the first level controls in the investment firm's business areas (i.e. controls by the operative units, as opposed to second level controls performed by compliance); and

(c) reviews by the risk management, internal control function, internal audit function or other control functions in the area of investment services and activities.

25. Reviews by other control functions should be coordinated with the monitoring activities performed by the compliance function while respecting the different functions' independence and mandate.

26. The compliance function should have a role in overseeing the operation of the complaints process and it should consider complaints as a source of relevant information in the context of its general monitoring responsibilities. This does not require compliance functions to have a role in determining the outcome of complaints. In this regard, investment firms should grant the compliance function access to all customer complaints received by the firm.

Background information

The Assessment Group aims at assessing convergence in the outcome of the work of the NCAs in the scope of the authorisation, on-going supervision and enforcement roles of the NCAs and in particular with respect to (1) the way the findings of the compliance risk assessment were used to determine a monitoring programme and (2) the content of the monitoring programme established by the compliance function and the priorities it established. The Assessment Group is interested in the NCA supervisory approach to supervising that the compliance function establishes a monitoring programme. The monitoring programme should be based on a thorough risk assessment taking into consideration all areas of the investment firm's investment services, activities and any relevant ancillary services. The content of the monitoring programme should reflect the outcome of the compliance risk assessment and establish its priorities. The Assessment Group also seeks to

understand how the NCA supervises that adequate policies and procedures derived from the monitoring programme are verified by the authorised firm in practice.

*37 Does your NCA ensure that the compliance risk assessment is used by investment firms in order to determine their monitoring programme?

Yes, we check that the compliance risk assessment was considered for the purpose of preparing the monitoring programme

Yes, we check that the monitoring programme is aligned with the outcome of the compliance risk assessment

Yes, other

No

38 If you answer "Yes, other" or "No" to the previous question, please explain.

*39 Does your NCA evaluate the content of the monitoring programme and priorities it established?

Yes, we check that the priorities set in the monitoring programme and its content relate to the risk areas identified in the compliance risk assessment

Yes, other

No

40 If you answer "Yes, other" or "no" to the previous question, please explain.

*41 Does your NCA review that during the authorisation phase and as part of on-going supervision, the investment firm's internal compliance procedures, organisation and control measures are effective and appropriate from the point of view of that investment firm?

*42 If you answer yes to the previous question, please (1) explain and (2) indicate how frequently your NCA performs the checks during the on-going supervision phase. If you answer "no" to the previous question, please explain.

*43 Does your NCA monitor that the compliance function performs others than desk-based checks?

*44 If you answer "yes" to the previous question: - please explain, and - indicate how frequently your NCA performs that check during the on-going supervision phase. If you answer "no" to the previous question, please explain.

*45 Please identify the tools used by the compliance function for monitoring activities of the investment firm in your jurisdiction?

Use of aggregated risk measurements

Use of reports warranting management attention

Targeted trade surveillance, observation of procedures, desk reviews, staff interviews

Complaints data

Other

46 If you answer "other" to the previous question, please briefly describe the other tool(s) used.

*47 Explain how your NCA assesses that these tools are suitable and list the most useful tools based on your experience.

*48 Does your NCA check that the compliance function has access to all customer complaints received by the firm and use them in their monitoring programme?

Yes, we ask the investment firm to confirm

Yes, we perform sample checks

Yes, other

No

*49 If you answer "yes" to the previous question, please indicate the frequency of the checks. If you answer "yes, other" or "no" to the previous question, please explain.

*50 When your NCA is aware of an event that may influence the investment firm's risk profile, does your NCA check that the compliance monitoring programme is appropriately amended?

Yes, we ask the investment firm confirmation

Yes, we ask for the revised compliance monitoring programme

Yes, other

No

51 Please explain

8 Guideline 3 - Reporting obligations of the compliance function

Extract of the Guidelines

Relevant legislation: Article 6(3)(b) and 9 of the MiFID Implementing Directive.

General guideline 3

27. Investment firms should ensure that the regular written compliance reports are sent to senior management. The reports should contain a description of the implementation and effectiveness of the overall control environment for investment services and activities and a summary of the risks that have been identified as well as remedies undertaken or to be undertaken. Reports must be prepared at appropriate intervals and at least annually. Where the compliance function makes significant findings, the compliance officer should, in addition, report these promptly to senior management. The supervisory function, if any, should also receive the reports.

Supporting guidelines

28. The written compliance report to senior management should cover all business units involved in the provision of investment services, activities and ancillary services. Where the report does not cover all of these activities of the investment firm, it should clearly state the reasons.

29. The following matters should be addressed in these written compliance reports, where relevant:

(a) a description of the implementation and effectiveness of the overall control environment for investment services and activities;

(b) a summary of major findings of the review of the policies and procedures;

(c) a summary of on-site inspections or desk-based reviews performed by the compliance function including breaches and deficiencies in the investment firm's organisation and compliance processes that have been discovered and appropriate measures taken as a result;

(d) risks identified in the scope of the compliance function's monitoring activities;

(e) relevant changes and developments in regulatory requirements over the period covered by the report and the measures taken and to be taken to ensure compliance with the changed requirements (where senior management has not previously been made aware of these through other channels);

(f) other significant compliance issues that have occurred since the last report; and

(g) material correspondence with competent authorities (where senior management has not previously been made aware of these through other channels).

30. The compliance function should report to senior management, in a timely manner, on an ad hoc basis when significant compliance matters have been discovered, such as material breaches of MiFID and the respective national requirements. The report should also contain advice on the necessary remedial steps.

31. The compliance function should consider the need for additional reporting lines to any group compliance function.

32. ESMA notes that some competent authorities require investment firms to provide them with compliance function reports on a regular or ad hoc basis. One competent authority also requires senior management to provide it with an annotated version of the report containing explanations of the compliance function's findings.³ These practices provide competent authorities with first-hand insight into an investment firm's compliance activities, as well as any breaches of regulatory provisions.

Background information

The Assessment Group aims at assessing convergence in the outcome of the work of the NCAs in the scope of the authorisation, on-going supervision and enforcement roles of the NCAs and in particular with respect to (1) the frequency of the compliance report^[1] and (2) the content of the compliance report, including with regard to indications related to the independence of the compliance function^[2]. In order to determine the extent and nature of supervision of the compliance function requirements under Guideline 3 in each NCA, the assessment group is interested in NCAs supervisory approach to monitor how the compliance function adheres to its reporting obligations. In this regard, the assessment group seeks information on how NCAs verify that the compliance function submits to senior management written compliance reports at least on an annual basis, and on an ad hoc basis when required. Furthermore, the assessment group intends to gather information on how NCAs verify the independency of the compliance function with regard to the preparation and circulation of the compliance report, and on whether the report covers the required content.

[1] See paragraph 11.4 of the Mandate

[2] See paragraph 11.5 of the Mandate

*53 Does your NCA check that senior management receives regular and ad hoc reports as required? Yes, we ask the investment firm to confirm Yes, we ask for a copy of the reports Yes, other No

54 Please specify the frequency by which such confirmation is sought

55 Please specify the frequency by which such documentation is required

56 Please explain if you answered Yes other

57 Please explain if you answered No.

58 Did your NCA face a situation where a written compliance report, regular or ad hoc, was not prepared or not sent to senior management or with substantial delay?

59 Please describe how you identified that situation and list the reasons why the report was not prepared or sent to senior management or substantially delayed.

*60 Does your NCA check whether the compliance function reports are reviewed or approved by other function before being sent?

61 Please describe (1) the function(s) involved in the review or approval process, (2) the number of investment firms having this practice and (3) whether the process was provided for in the investment firms rules and procedures.

*62 How does your NCA assess if the compliance function and the compliance officer act independently when reporting to senior management? Choose one or more of the following alternatives

We assess if there is any conflict of interest in the compliance officer's responsibilities.

We check if the compliance officer has access to all relevant information

We check who has the right to appoint or replace the compliance officer

We check if senior managements' deviation from recommendations issued by the compliance function is documented.

Other

We do not assess this

63 Please explain

64 Does your NCA monitor the content of the compliance reports?

65 Please explain

66 At what frequency does your NCA perform that monitoring? Does your NCA require investment firms to submit to the NCA compliance function reports? if yes, is it on a regular basis or on an ad hoc basis? Please list the 3 main missing items and the percentage of investment firms whose reports are not complete



*67 Does your NCA review that investment firms adopt follow up action plan to the compliance function's findings? Yes No

68 Please briefly describe how you carry out this review and how frequently

69 Please explain if you answered No

9 Guideline 4 - Advisory obligations of the compliance function

Extract of the Guidelines

Relevant legislation: Article 6(2) of the MiFID Implementing Directive.

General guideline 4

33. Investment firms should ensure that the compliance function fulfils its advisory responsibilities including: providing support for staff training; providing day-to-day assistance for staff and participating in the establishment of new policies and procedures within the investment firm.

Supporting guidelines

34. Investment firms should promote and enhance a 'compliance culture' throughout the firm. The purpose of the compliance culture is not only to establish the overall environment in which compliance matters are treated, but also to engage staff with the principle of improving investor protection.

35. The investment firm needs to ensure that its staff are adequately trained. The compliance function should support the business units in the area of investment services and activities (i.e. all staff involved directly or indirectly in the provision of investment services and activities) in performing any training. Training and other support should focus particularly, but not exclusively, on:

(a) the internal policies and procedures of the investment firm and its organisational structure in the area of investment services and activities; and

(b) MiFID, the relevant national laws, the applicable standards and guidelines set out by ESMA and competent authorities, and other supervisory and regulatory requirements that may be relevant, as well as any changes to these.

36. Training should be performed on a regular basis, and needs-based training should be performed where necessary. Training should be delivered as appropriate – for example, to the investment firm's entire staff as a whole, to specific business units, or to a particular individual.

37. Training should be developed on an on-going basis so that it takes into account all relevant changes (for example, new legislation, standards or guidelines issued by ESMA and competent authorities, and changes in the investment firm's business model).

38. The compliance function should periodically assess whether staff in the area of investment services and activities hold the necessary level of awareness and correctly apply the investment firm's policies and procedures.

39. Compliance staff should also provide assistance to staff from the operative units in their day-to-day business and be available to answer questions arising out of daily business activity.

40. Investment firms should ensure that the compliance function is involved in the development of the relevant policies and procedures within the investment firm in the area of investment services, activities and ancillary services. In this context, the compliance function should be enabled, for example, to provide compliance expertise and advice to business units about all strategic decisions or new business models, or about the launch of a new advertising strategy in the area of investment services and activities. If the compliance function's advice is not followed, the compliance function should document this accordingly and present it in its compliance reports.

41. Investment firms should ensure that the compliance function is involved in all significant modifications of the organisation of the investment firm in the area of investment services, activities and ancillary services. This includes the decision-making process when new business lines or new financial products are being approved. In this context, the compliance function should be given the right to participate in the approval process for financial instruments to be taken up in the distribution process. Senior management should therefore encourage business units to consult with the compliance function regarding their operations.

42. Investment firms should ensure that the compliance function is involved in all material non-routine correspondence with competent authorities in the area of investment services and activities.

Background information

The Assessment Group aims at assessing convergence in the outcome of the work of the NCAs in the scope of the authorisation, on-going supervision and enforcement roles of the NCAs and in particular with respect to the compliance function's role in the establishment of new policies and procedures and advising the firm in respect of its general business activities including product launches, advertising campaigns^[1]. The Assessment Group seeks to determine the extent and nature of supervision of the compliance function requirements in each NCA. In this respect, the Assessment Group is interested in NCAs' supervisory approach to monitor that compliance function

[1] See paragraph 11.6 of the Mandate

performs its advisory obligations. The Assessment Group would seek information on whether NCAs analyse the provision of support by the compliance function for staff training as well as day-to-day assistance for staff. In particular, the Assessment Group would like to consider how NCAs verify and ensure that compliance function participates in the establishment of new policies and procedures within the investment firm. Furthermore, the Assessment Group seeks to understand how NCAs supervise whether the investment firm ensures that the compliance function is involved in all significant modifications of the organisation of the investment firm in the area of investment services and ancillary services.

70 Does your NCA apply supervisory process to assess that the investment firms' compliance function fulfils its advisory responsibilities as described in Guideline 4? Yes No

71 Please provide a short description of your supervisory approach

72 Please explain

*73 Does your NCA verify if investment firms' compliance function is engaged in training support for investment firm`s staff?

74 Please explain

75 If you answer "yes" to the previous question, please choose one or more of the following statements:

Your NCA checks that training is organized on a regular and/or needs-based basis where necessary

Your NCA checks that training is delivered to staff according to identified training needs i.e. entire staff, depending on specific business units or particular member of staff

Your NCA checks that training is developed on on-going basis and takes into account all relevant changes (for example new legislation, standards or guidelines issued by ESMA and your NCA, changes in the investment firms' business model)

76 Your NCA assess that the investment firms' compliance function in relation to its training and advisory obligations takes into consideration: the internal policies and procedures of the investment firm and its organisational structure MiFID, the relevant national laws, standards and guidelines set out by ESMA and your NCA

77 If you do not tick one or the two answers in the previous question, please provide an explanation for each of the proposal which is not ticked.

*78 Does your NCA check that investment firms' compliance function:



periodically assesses whether staff in the area of investment services and activities hold the necessary level of awareness and correctly apply the investment firms' policies and procedures

provides assistance to staff from operative units in their day-to-day business and is available to answer questions arising out of daily business activity

is involved in the development of the relevant policies and procedures within the investment firm in the area of investment services, activities and ancillary services

is involved in all significant modifications in the organisation and in the decision making process in each of the following areas: new business models and distribution methods, new financial products, advertising strategy

79 For each proposed answer which is not ticked in the previous question, please explain.

80 Does your NCA review the situations when advice of the investment firms' compliance function is not followed?

81 Does your NCA require the investment firm to document the event and to present it in the compliance report? If your answer is no, please explain.

82 Please explain

83 Does your NCA review and ensure the investment firms' senior management encourage business units to consult the compliance function? Yes No

84 Please list actions which are undertaken by your NCA.

85 Please explain

*86 Does your NCA monitor whether investment firms ensure that their compliance function is involved in all material non-routine correspondence with your NCA including in relation with the verification of compliance reports, the analysis of compliance function internal rules, follow-up of on-site interviews with compliance function?

Yes, for all of them

For part of them

No

87 Please list them

88 Please explain

4.3 Annexe 3 – Statements from NCAs

143. NCAs may express their view on the outcome of the peer review report in a statement. The statement expresses the view of the NCA only and does not prejudice the follow-up by ESMA.

144. CySEC has issued a statement which is reproduced below:

“As identified in the Peer Review (the “Review”), CySEC has taken major steps in executing a number of remedial actions to address authorisation, supervision and enforcement deficiencies identified by both its own Board and the Assessment Group (“AG”). This process is ongoing and, like all other NCAs, will continue to evolve in tandem with the complexity of the European securities market. CySEC’s priority is and always has been to ensure full investor protection.

In doing so, CySEC’s permanent employees have doubled since the completion of the period under review and the process is underway to expand the size of CySEC’s original workforce by 2018-2019. Of these additional permanent employees in place since 2016, almost 50% are dedicated to supervision, including investigation. In products which routinely pose high risks to investors, restrictive measures have been introduced. Accordingly, in the last two years, the frequency of remediating malpractice through the use of financial penalties; licenses suspensions and outright withdrawals has substantially increased.

In February 2017, in order to apply a rigorous analysis of applicants’ testimonies and the risks associated with license authorisation, CySEC amended the Application Form requirements and Checklist for Internal Procedures Manual, in order to be fully compliant with ESMA’s new Q&A guidance. In line with the good practices identified by the AG, this has allowed and will facilitate a broader scale of supervision in line with Guidelines 1-4 under CySEC’s Risk Based Supervisory Framework (“RBS-F”).”

145. The Danish FSA has issued a statement which is reproduced below:

“The Danish FSA is committed to ensure that the compliance function reports to the Board of Directors of the firm and makes a supervisory judgement depending on the specific circumstances when reacting to non-compliance. As verbal orders is a supervisory reaction to non-compliance of the same strength as written orders, the Danish FSA finds that it is fully compliant. Verbal orders are documented but as they must be complied with immediately, they are normally not included in the written inspection report.”