En ny lag om värdepappersmarknaden

Supplement

Slutbetänkande
av Värdepappersmarknadsutredningen

Stockholm 2006

STATENS OFFENTLIGA UTREDNINGAR

SOU 2006:74

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Till statsrådet Sven-Erik Österberg

Regeringen beslutade den 23 juni 2004 att tillkalla en särskild utredare med uppdrag att se över frågor som rör lagstiftningen för värdepappersinstitut, börser och auktoriserade marknadsplatser (Dir. 2004:90). Till särskild utredare förordnades f.d. generaldirektören Hans Jacobson.

Sedan Hans Jacobson den 3 oktober 2005 avlidit förordnades justitierådet Johan Munck den 21 oktober 2005 att vara särskild utredare. Dessutom förordnades sakkunniga och experter i utredningen.

Utredningen har antagit namnet Värdepappersmarknadsutredningen. Den 28 april 2006 överlämnade utredningen huvudbetänkandet *En ny lag om värdepappersmarknaden* (SOU 2006:50).

Härmed överlämnas slutbetänkandet *En ny lag om värdepappersmarknaden – supplement* (SOU 2006:74).

Utredningsuppdraget är med detta slutfört.

Stockholm i juli 2006

Johan Munck

/Mattias Steen

Förteckning över vilka som har deltagit i utredningens arbete med slutbetänkandet En ny lag om värdepappersmarknaden – supplement (SOU 2006:74)

Särskild utredare
Justitierådet Johan Munck

Sakkunniga
Chefsjuristen Mats Beckman, Stockholmsbörsen AB
Verkställande direktören Kerstin Hermansson, Svenska Fondhandlareföreningen
Finansinspektör Ülle-Reet Jakobson, Finansinspektionen
Skattejuristen Anna Jansson, Sveriges Aktiesparares Riksförbund
Group Risk Manager Svante Johansson, Carnegie Investment Bank AB
Kanslirådet Henrik Lennefeldt, Finansdepartementet
Kanslirådet Amina Lundqvist, Justitiedepartementet
Ekonomie doktor Jonas Niemeyer, Sveriges riksbank
Departementssekreteraren Catarina Erséus, Jordbruksdepartementet

Experter
Bankjuristen Johan Lycke, Enskilda Securities AB
Ekonomie doktor Johan Molin, Sveriges riksbank

Sekreterare
Kammarrättsassessorn Mattias Steen

Assistenter
Monica Berglund
Lisbeth Kristoffersson

Innehåll

Bilagor

Förkortningar

Dir.	Kommittédirektiv
EES	Europeiska ekonomiska samarbetsområdet
EG	Europeiska gemenskapen
Genomförande-direktiv	Kommissionens förslag till genomförande-direktiv efter omröstningen i europeiska värdepapperskommittén den 26 juni 2006
Genomförande-förordning	Kommissionens förslag till genomförande-förordning efter omröstningen i europeiska värdepapperskommittén den 26 juni 2006
LV	Utredningens förslag till lag om värde-pappersmarknaden
MiFID	Europaparlamentets och rådets direktiv 2004/39/EG av den 21 april 2004 om marknader för finansiella instrument och om ändring av rådets direktiv 85/611/EEG och 93/6/EEG och Europaparlamentets och rådets direktiv 2000/12/EG samt upp-hävande av rådets direktiv 93/22/EEG
NOU	Norges offentlige utredninger
SOU	Statens offentliga utredningar

Författningsförslag

Justering av utredningens tidigare förslag till lag om värdepappersmarknaden

Utredningen justerar sitt förslag enligt huvudbetänkandet SOU 2006:50 på nedan angivet sätt.

Lydelse enligt SOU 2006:50	*Slutligt förslag*
8 kap. 26 §	
Medel som tas emot av ett värdepappersbolag med redovisningsskyldighet enligt 2 kap. 2 § första stycket 2 skall *genast* avskiljas *och sättas in på räkning i kreditinstitut*.	Medel som tas emot av ett värdepappersbolag med redovisningsskyldighet enligt 2 kap. 2 § första stycket 2 skall *utan dröjsmål* avskiljas *från bolagets egna medel*.
13 kap. 6 §	
En börs skall ha ändamålsenliga regler för handeln på en reglerad marknad som drivs av börsen. Av reglerna skall framgå 1. deltagarnas förpliktelser mot börsen, 2. de regler som gäller för transaktioner på marknaden, 3. kompetenskraven för de anställda och uppdragstagare hos deltagarna som deltar i handeln för deltagarnas räkning, och 4. bestämmelser om clearing och avveckling av de transaktioner som genomförts.	
	Reglerna får inte hindra en deltagare att välja ett system för avveckling av de transaktioner som genomförts på den reglerade marknaden under förutsättning att

1. förbindelserna och avtalen mellan det valda avvecklingssystemet och varje annat system säkerställer en effektiv och ekonomisk avveckling av transaktionen, och

2. Finansinspektionen har godtagit att det valda avvecklingssystemet används för avveckling av transaktioner på den reglerade marknaden.

14 kap.

2 §

En börs får som deltagare i handeln på en reglerad marknad ha *Riksbanken* och Riksgäldskontoret samt juridiska personer som har en betryggande kapitalstyrka, ändamålsenlig organisation av verksamheten, nödvändiga riskhanteringsrutiner, säkra tekniska system och i övrigt är lämpliga att delta i handeln vid den reglerade marknaden.	En börs får som deltagare i handeln på en reglerad marknad ha *Sveriges riksbank* och Riksgäldskontoret samt *fysiska eller* juridiska personer som har en betryggande kapitalstyrka, ändamålsenlig organisation av verksamheten, nödvändiga riskhanteringsrutiner, säkra tekniska system och i övrigt är lämpliga att delta i handeln vid den reglerade marknaden.

1 Inledning

1.1 Utredningsuppdraget

Utredningen lämnade i april i år sitt huvudbetänkande *En ny lag om värdepappersmarknaden* (SOU 2006:50). I betänkandet lämnade utredningen bl.a. förslag på hur Europaparlamentets och rådets direktiv 2004/39/EG om marknader för finansiella instrument (MiFID) ska genomföras i svensk rätt. Enligt MiFID skulle medlemsstaterna senast den 30 april 2006 ha antagit de lagar och andra författningar som är nödvändiga för att följa direktivet. Den 5 april 2006 antogs emellertid ett ändringsdirektiv till MiFID som innebär att tidsfristen för antagandet av nationella regler förlängs till den 31 januari 2007.[1] Samtidigt infördes en bestämmelse om att de nationella reglerna ska börja tillämpas först från och med den 1 november 2007.

Anledningen till den förlängda tiden för genomförandet av MiFID är en förskjutning av tidsplanen för de genomförandebestämmelser som ska beslutas i enlighet med den lagstiftningsprocess som gäller på värdepappersområdet (den s.k. Lamfalussyprocessen).[2] Som framgår av huvudbetänkandet innehåller MiFID ett stort antal mandat för kommissionen att, efter diskussion och omröstning i europeiska värdepapperskommittén, anta genomförandebestämmelser i syfte att förtydliga MiFID:s bestämmelser. Enligt kommissionens tidsplan skulle de formella förslagen till genomförandebestämmelser ha presenterats i september 2005 och europeiska värdepapperskommittén ha röstat om förslagen i december samma år. Kommissionen presenterade emellertid sina formella förslag till genomförandebestämmelser först i februari i år och omröstningen om dem skedde först i slutet av juni i år. Kommissionen beräknas formellt anta genomförandebestämmelserna under hösten 2006.

[1] Europaparlamentets och rådets direktiv 2006/31/EG av den 5 april 2006 om ändring av direktiv 2004/39/EG om marknader för finansiella instrument i fråga om vissa tidsfrister.
[2] Se om genomförandebestämmelserna och Lamfalussyprocessen i kapitel 6 i utredningens huvudbetänkande.

För att detta ska kunna ske krävs att Europaparlamentet under sommaren inte motsätter sig kommissionens förslag.[3]

Med anledning av denna förskjutning av omröstningen i europeiska värdepapperskommittén sköts tidpunkten för utredningens slutredovisning av uppdraget fram till den 14 juli 2006. Tanken var därvid att utredningen skulle ha möjlighet att ta del av de förslag till genomförandebestämmelser som europeiska värdepapperskommittén numera har röstat om.[4]

1.2 Kommissionens genomförandebestämmelser

Utredningen utgick i sitt arbete med huvudbetänkandet från kommissionens förslag till genomförandedirektiv och genomförandeförordning från den 21 mars 2006. De genomförandebestämmelser som europeiska värdepapperskommittén numera har röstat om skiljer sig emellertid på flera punkter från de förslag som fanns tillgängliga i mars. Vidare har ett antal artiklar tagits bort och ett antal artiklar tillkommit, vilket har fått till följd att artiklarnas numrering inte överensstämmer med artiklarna i förslagen till genomförandebestämmelser. Detsamma gäller även ett flertal skäl i ingressen till såväl genomförandedirektivet som genomförandeförordningen.

För att underlätta det vidare arbetet och läsningen av huvudbetänkandet har utredningen gjort register från förslagen till genomförandebestämmelserna i dess lydelse från den 21 mars 2006 till lydelsen efter omröstningen i europeiska värdepapperskommittén. Dessa register finns intagna som bilagor 3 och 4 till detta betänkande. Dessutom framgår av bilaga 5 de bestämmelser genom vilka MiFID genomförs i svensk rätt. Genomförandedirektivet och genomförandeförordningen i deras lydelser efter omröstningen i europeiska värdepapperskommittén finns intagna som bilagor 1 och 2.

Utredningen har i huvudbetänkandet endast i ett mindre antal fall gett en detaljerad beskrivning av innehållet i artiklarna i förslagen till genomförandebestämmelser. I flertalet fall har utredningen enbart hänvisat till vilka artiklar i genomförandebestämmelserna som grundar sig på en viss artikel i MiFID. I vissa fall har

[3] Det är inte sannolikt att Europaparlamentet skulle motsätta sig förslagen till genomförandebestämmelser då kommissionen och parlamentet inför omröstningen i europeiska värdepapperskommittén har fört diskussioner om innehållet i förslagen.
[4] Se dir 2006:45. Direktivet finns intaget som bilaga till huvudbetänkandet.

emellertid utredningen mer detaljerat återgett innehållet i artiklarna. De hänseenden i vilka dessa artiklars innehåll ändrats sakligt kommenteras i kapitel 2.

1.3 Övriga frågor

Representanter från utredningen har under våren deltagit i tre möten i Bryssel med representanter från kommissionen och de övriga medlemsstaterna angående genomförandet av MiFID. Under mötena har medlemsstaterna fått tillfälle att diskutera frågor rörande tolkningen av direktivet. Utredningen kan konstatera att de antaganden om reglernas innebörd som gjorts i huvudbetänkandet väl överensstämmer med de diskussioner som har förts på mötena. Diskussionerna har dock föranlett utredningen att överväga om även fysiska personer ska få delta i handeln vid en reglerad marknad. Utredningens överväganden i denna del finns i kapitel 3.

Utredningen har under sitt arbete med slutbetänkandet uppmärksammat att ett par sakliga justeringar bör göras av lagförslagen i huvudbetänkandet liksom några rättelser av rena felskrivningar. Dessa frågor behandlas i kapitel 3.

2 Kommissionens genomförandebestämmelser

2.1 Inledning

Ett stort antal artiklar i genomförandedirektivet och genomförandeförordningen har ändrats i förhållande till kommissionens förslag till genomförandebestämmelser från mars 2006. I bilagorna 3 och 4 till betänkandet finns artikelregister som i vänsterspalten utgår från kommissionens förslag till genomförandebestämmelser från mars i år. Det är dessa förslag till genomförandebestämmelser som utredningen i huvudbetänkandet genomgående har hänvisat till och som finns intagna som bilagor till det betänkandet. I högerspalten i registren anges vilka artiklar i de genomförandebestämmelser som europeiska värdepapperskommittén röstat om som motsvarar de tidigare förslagen.

Utredningen har i huvudbetänkandet endast i ett mindre antal fall detaljerat återgett innehållet i artiklarna i förslagen till genomförandedirektiv och genomförandeförordning. Nedan kommer i avsnitten 2.2 och 2.3 i huvudsak endast att kommenteras de artiklar i genomförandebestämmelserna som har ändrats i sak och som mer detaljerat berörts i huvudbetänkandet. Det kan redan nu noteras att de ändringar som har skett av genomförandebestämmelserna inte medför några nya författningsförslag från utredningens sida. Detta sammanhänger framför allt med utredningens förslag att genomförandedirektivet och de delar av genomförandeförordningen som medlemsstaterna har getts möjlighet att nationellt reglera i huvudsak bör genomföras i form av föreskrifter från Finansinspektionen.[1]

[1] Se s. 180 f i huvudbetänkandet.

2.2 Kommissionens genomförandedirektiv

Artikel 4

I artikel 4 i genomförandedirektivet finns ett principiellt förbud för medlemsstaterna att nationellt införa strängare krav än vad som följer av genomförandedirektivet. Sådana krav får införas endast om vissa förutsättningar är uppfyllda. Enligt artikeln i dess lydelse enligt förslaget från mars får medlemsstaterna endast i undantagsfall behålla eller ålägga strängare krav än vad som följer av genomförandedirektivet och endast om dessa strängare krav är objektivt motiverade och står i proportion till särskilda risker som inte beaktas *fullt ut* i direktivet avseende investerarskydd eller marknadsintegriteten. I den slutliga versionen har orden ”fullt ut” byts ut mot ”tillfredsställande”. Vidare har ett nytt skäl tillkommit i ingressen till direktivet (skäl 10).

Utredningen har i huvudbetänkandet bedömt att genomförandedirektivets mycket snäva förutsättningar för en avvikande nationell reglering för närvarande inte är uppfyllda.[2] Den slutliga versionen av artikel 4 i genomförandedirektivet verkar lätta upp möjligheterna något för en avvikande reglering. Utredningen anser dock att det även med den nya lydelsen saknas skäl att för närvarande utnyttja möjligheten att införa strängare krav än dem som följer av genomförandedirektivet.

Artikel 44

Artikel 44 i genomförandedirektivet behandlar kriterier för bästa orderutförande och har behandlats på s. 378 f i huvudbetänkandet. I artikel 44.3 har dock ett nytt andra stycke tillkommit jämfört med kommissionens förslag till genomförandedirektiv från mars. I den nya bestämmelsen anges att när det vid genomförandet av en order finns mer än en handelsplats där ordern kan utföras så ska värdepappersföretaget på var och en av de handelsplatser för utförandet som finns upptagna i företagets riktlinjer för utförande av order och som har möjlighet att utföra den aktuella ordern även beakta sina egna kommissioner och kostnader för utförandet av ordern på var och en av de handelsplatser som kan komma i fråga

[2] Se s. 181 i huvudbetänkandet.

för utförandet.[3] Den nya bestämmelsen får närmast ses som ett förtydligande av artikel 21 i MiFID och innebär enligt utredningens mening inte någon saklig förändring.

Artikel 45

I artikeln finns bestämmelser om hur värdepappersföretag ska handla i kunders bästa intresse när de tillhandahåller investeringstjänsterna portföljförvaltning och vidarebefordran av order.[4] I artikeln i dess lydelse enligt kommissionens förslag från mars föreskrevs endast att värdepappersföretagen vid tillhandahållande av dessa tjänster skulle uppfylla skyldigheter motsvarande dem som anges i artiklarna 21 (bästa orderutförande) och 22.1 (hantering av kundorder) i MiFID. Artikel 45 i dess lydelse efter omröstningen i europeiska värdepapperskommittén har blivit betydligt mer omfattande. Enligt artikel 45.1 och 45.2 ska ett värdepappersföretag uppfylla skyldigheterna att enligt artikel 19.1 i MiFID handla i sina kunders bästa intresse även när de placerar order hos andra enheter. Av artikel 45.4 första stycket framgår därutöver att värdepappersföretaget ska vidta alla rimliga åtgärder för att uppnå bästa möjliga resultat för sina kunder med beaktande av de faktorer som anges i artikel 21.1 i MiFID. På samma sätt som gäller enligt artikel 44.1 och 44.3 i genomförandedirektivet ska dessa kriterier rangordnas. Enligt andra stycket ska ett värdepappersföretag anses ha uppfyllt kraven om företaget följt en specifik instruktion från kunden. I artikel 45.5 och 45.6 finns bestämmelser om att värdepappersföretaget ska upprätta riktlinjer och övervaka att dessa följs. Bestämmelserna motsvarar i stora delar dem som finns i artikel 21 i MiFID. Hänvisningen till artikel 22.1 i MiFID har tagits bort men i stället har det införts en skyldighet för värdepappersföretagen att i likhet med artikel 22.1 första stycket tillämpa förfaranden och använda system som gör det möjligt att snabbt och rättvist utföra en kunds order.

Sammanfattningsvis kan konstateras att kommissionen med utgångspunkt i artikel 19.1 i MiFID infört regler om bästa order-

[3] Se även skäl 71 i ingressen till genomförandedirektivet som bl.a. stadgar att företagets egna interna kommission och avgifter inte bör tas med i beräkningen av kostnaderna för utförande av order för att undvika att blanda ihop investeringstjänster i samband med utförande av order och det faktiska pris som ett värdepappersföretag tillämpar för denna tjänst.
[4] Se s. 378 i huvudbetänkandet.

utförande vid tillhandahållande av portföljförvaltning och vidarebefordran av order liknande dem som gäller vid utförande av order enligt artiklarna 21 och 22.1 i MiFID. Några ändringar i utredningens författningsförslag föranleder inte den nya lydelsen.

2.3 Kommissionens genomförandeförordning

De ändringar som har gjorts i genomförandeförordningen är till största del av teknisk karaktär. Att notera är dock att tabell 4 i bilaga 2 till genomförandeförordningen har ändrats i sak.[5] I tabellen konkretiseras när och hur länge ett offentliggörande kan skjutas upp. Hur länge ett offentliggörande kan skjutas upp beror såväl på aktiens omsättning som på transaktionens storlek. Till skillnad från vad som föreskrevs i kommissionens förslag från mars kan ett offentliggörande i vissa fall skjutas upp till slutet av handelsdagen tre dagar efter transaktionen (två dagar enligt det tidigare förslaget). Tabellen har även justerats på så sätt att möjligheterna att skjuta upp större transaktioner har utökats. Enligt artikel 40.3 i förordningen, som är ny, ska kommissionen senast två år efter det att förordningen trätt i kraft se över möjligheterna till uppskjutande av offentliggörande av information enligt tabell 4.

Kravet för systematiska internhandlare att offentliggöra fasta bud gäller endast för s.k. likvida aktier (artikel 27.1 i MiFID). Kommissionen har i artikel 22 i genomförandeförordningen preciserat vad som menas med detta begrepp.[6] Ett av kraven för att en aktie ska anses vara likvid är att den handlas dagligen. Något undantag från denna regel angavs inte i kommissionens förslag från mars. I genomförandeförordningen i dess lydelse efter omröstningen i europeiska värdepapperskommittén har emellertid lagts till ett nytt skäl i ingressen som anger att en aktie, trots att den inte handlas dagligen, undantagsvis kan anses som likvid, om anledningen till att den inte har handlats sammanhänger med bevarandet av en ordnad marknad, force majeure eller liknande förhållanden (skäl 16). Det är således fråga om speciella förhållanden som inte direkt hänför sig till aktiens normala omsättning.

Slutligen kan noteras att skäl 15 i ingressen har tagits bort. Detta har gjorts för att tydliggöra att artikel 18.2 i genomförande-

[5] Se s. 304 ff i huvudbetänkandet.
[6] Se s. 298 i huvudbetänkandet.

förordningen inte endast är tillämplig på s.k. isbergsorder utan även på t.ex. s.k. stop loss order.[7]

[7] Se s. 293 f i huvudbetänkandet.

3 Övriga frågor

3.1 Deltagare vid en reglerad marknad

Förslag: En börs får som deltagare i handeln på en reglerad marknad ha Sveriges riksbank och Riksgäldskontoret samt fysiska eller juridiska personer som har en betryggande kapitalstyrka, ändamålsenlig organisation av verksamheten, nödvändiga riskhanteringsrutiner, säkra tekniska system och i övrigt är lämpliga att delta i handeln vid den reglerade marknaden.

Av artikel 42.3 i MiFID framgår att reglerade marknader som medlemmar eller aktörer får uppta värdepappersföretag och kreditinstitut samt andra personer som

a) är lämpliga,
b) besitter tillräcklig handelsförmåga och handelskompetens,
c) i tillämpliga fall har lämplig organisation, och
d) har tillräckliga resurser för sin uppgift med beaktande av de olika finansiella arrangemang som den reglerade marknaden har upprättat för att garantera korrekt avvecklig av transaktioner.

Utredningen har i huvudbetänkandet bedömt att kraven på börsmedlemmar i lagen (1992:543) om börs- och clearingverksamhet (börs- och clearinglagen) motsvarar vad som krävs enligt artikel 42.3.[1] I utredningens förslag till en ny lag om värdepappersmarknaden har därför bestämmelsen i 14 kap. 2 § om deltagare på en reglerad marknad utformats med motsvarande bestämmelse i börs- och clearinglagen som förebild. Enligt bestämmelsen får en börs som deltagare i handeln på en reglerad marknad ha Riksbanken och Riksgäldskontoret samt juridiska personer som har en betryggande kapitalstyrka, ändamålsenlig organisation av verksamheten, nödvändiga

[1] Se s. 403 i huvudbetänkandet och s. 294 i författningsbilagan.

riskhanteringssystem, säkra tekniska system och i övrigt är lämpliga att delta i handeln vid den reglerade marknaden.

Vid ett s.k. genomförandemöte med representanter från kommissionen och de övriga medlemsstaterna diskuterades frågan om medlemsstaterna har rätt att ställa upp hinder för reglerade marknader att som deltagare tillåta även fysiska personer. Stor oenighet rådde i frågan. Kommissionens representant vid mötet tolkade dock bestämmelsen så att medlemsstaterna inte har rätt att hindra börser att tillåta fysiska personer att delta i handeln vid en reglerad marknad. Det finns därmed anledning att återigen behandla frågan.

När det gäller MiFID råder en viss osäkerhet om i vilka hänseenden som medlemsstaterna har rätt att anta en strängare reglering (minimiharmonisering) och i vilka detta inte är tillåtet (fullharmonisering).[2] Utredningen har i huvudbetänkandet tolkat direktivet så att medlemsstaterna har rätt att införa kompletterande och strängare bestämmelser när det gäller t.ex. krav på börser och reglerade marknader.

En norsk utredning lämnade i februari i år ett betänkande angående hur MiFID bör genomföras i norsk rätt.[3] I betänkandet föreslås att såväl juridiska som fysiska personer ska ha möjlighet att delta i handeln vid en reglerad marknad. Utredningen har varit i kontakt med företrädare för motsvarande utredningar i Danmark och Finland. Dessa har uppgett att de överväger att ändra sin nuvarande lagstiftning och likt Norge föreslå att även fysiska personer ska kunna delta i handeln.

Oavsett hur MiFID ska tolkas i denna del kan det konstateras att möjligheten för fysiska personer att delta i handeln vid en reglerad marknad troligtvis kommer att finnas i Norge, Danmark och Finland. Som angetts redan i huvudbetänkandet är det särskilt angeläget att det nationella genomförandet av MiFID blir så enhetligt som möjligt inom Norden bl.a. på grund av att aktiemarknaden går mot en alltmer nordisk eller nordisk-baltisk integration (s. 183). Detta gäller även frågan om vilka personer som ska ha möjlighet att kunna delta i handeln vid en reglerad marknad. En fysisk person som kan delta i handeln vid en reglerad marknad i t.ex. Norge, Danmark och Finland bör därför inte med automatik förbjudas att handla vid en reglerad marknad i Sverige. Utredningen föreslår således att även fysiska personer ska kunna delta i handeln vid en reglerad marknad i Sverige. Förslaget har inte någon

[2] Jfr s. 85 i huvudbetänkandet.
[3] Om marknader for finansielle instrumenter (NOU 2006:3).

större praktisk betydelse, och utredningen kan inte se att det skulle innebära några risker eller få några andra negativa konsekvenser för värdepappersmarknaden i Sverige. Fortfarande kommer kraven på en deltagare om betryggande kapitalstyrka, ändamålsenlig organisation etc. att gälla. Avslutningsvis kan nämnas att en börs naturligtvis själv kan ha regler som innebär att endast juridiska personer kan delta i handeln.

3.2 Mottagande av medel med redovisningsskyldighet

Förslag: Medel som tas emot av ett värdepappersbolag med redovisningsskyldighet ska utan dröjsmål avskiljas från bolagets egna medel.

Av artikel 13.8 i MiFID framgår bl.a. att varje värdepappersföretag som innehar penningmedel som tillhör dess kunder ska vidta lämpliga åtgärder för att sörja för kundernas rättigheter och förhindra att kundmedel används för företagets egen räkning. Utredningen har i huvudbetänkandet föreslagit att bestämmelsen genomförs i svensk rätt genom 8 kap. 26 § lagen om värdepappersmarknaden. Denna paragraf motsvarar nu gällande 3 kap. 5 § första stycket lagen (1991:981) om värdepappersrörelse och stadgar att medel som tas emot av ett värdepappersbolag med redovisningsskyldighet genast ska avskiljas och *sättas in på räkning i kreditinstitut*.

Enligt artikel 18.1 i genomförandedirektivet, som är en genomförandebestämmelse till artikel 13.8 i MiFID, ska ett värdepappersföretag som tar emot kundmedel omgående placera dessa medel på ett konto som öppnats i en centralbank, kreditinstitut eller en godkänd penningmarknadsfond. Med nuvarande skrivning i förslaget till 8 kap. 26 § lagen om värdepappersmarknaden skulle det inte vara möjligt för ett värdepappersbolag att placera medel som mottagits med redovisningsskyldighet i en penningmarknadsfond.

Bestämmelsen i utredningens förslag bör därför justeras så att kravet på att medel som mottagits med redovisningsskyldighet ska sättas in på räkning i kreditinstitut tas bort. För att bättre överensstämma med MiFID bör bestämmelsen endast ställa krav på att medlen utan dröjsmål ska avskiljas från bolagets egna medel (jfr lagen (1944:181) om redovisningsmedel).

3.3 Ett värdepappersinstituts rätt att välja avvecklingssystem

Förslag: Börsens regler får inte hindra en deltagare att välja ett system för avveckling av de transaktioner som genomförts på den reglerade marknaden under förutsättning att förbindelserna och avtalen mellan det valda avvecklingssystemet och varje annat system säkerställer en effektiv och ekonomisk avveckling av transaktionen samt att Finansinspektionen har godtagit att det valda systemet används för avveckling av transaktioner på den reglerade marknaden.

Enligt artikel 34.2 i MiFID ska medlemsstaterna kräva att de reglerade marknaderna ger alla sina medlemmar eller aktörer rätt att välja avvecklingssystem av de transaktioner som genomförts på den reglerade marknaden förutsatt att

1. förbindelserna och avtalen mellan det valda avvecklingssystemet och varje annat system säkerställer en effektiv och ekonomisk avveckling av transaktionen, och
2. den behöriga myndigheten som ansvarar för tillsynen över den reglerade marknaden har tillstyrkt att utnyttjande av ett annat avvecklingssystem av transaktioner som genomförts på den reglerade marknaden än det som valts av marknaden i fråga ger tekniska förutsättningar för att finansmarknaden ska kunna fungera friktionsfritt och korrekt.

I 13 kap. 6 § i utredningens förslag till ny lag om värdepappersmarknaden finns bestämmelser om att en börs ska ha ändamålsenliga regler för handeln på en reglerad marknad. Av reglerna ska bl.a. framgå bestämmelser om clearing och avveckling av de transaktioner som genomförts.

Utredningen har uppmärksammats på att det i dess huvudbetänkande saknas förslag som genomför artikel 34.2 i MiFID. Denna fråga är emellertid mycket komplicerad. Det finns i dag inte förutsättningar för aktörerna på en börs att välja avvecklingssystem, eftersom en börs måste arbeta med standardiserade villkor när det gäller tid och plats för leverans och det saknas sådan förbindelse mellan avvecklingssystemen i olika länder som gör det möjligt att fritt välja avvecklingssystem. Det pågår visserligen ett intensivt arbete inom EU på dessa frågor, men detta arbete har inte

avancerat så långt att det för närvarande går att överblicka om det inom överskådlig tid kommer att finnas förutsättningar för aktörerna att välja avvecklingssystem utan att detta drar med sig skilda börslistor för olika system, något som inte kan vara tanken med artikeln. Detta skulle nämligen omöjliggöra eller i varje fall kraftigt försvåra en effektiv börshandel.

Inom utredningen har ifrågasatts om det är meningsfullt att genomföra den aktuella artikeln, innan man vet om den kommer att svara mot en realitet, eftersom det kan hävdas att bestämmelser i ämnet i dagsläget snarast blir missvisande. Att underlåta detta skulle emellertid innebära ett åsidosättande av den genomförandeplikt som gäller för medlemsstaterna. Utredningen har därför stannat för att komplettera sitt förslag med en bestämmelse motsvarande artikel 34.2 i MiFID. Det är dock knappast tänkbart att det redan när de nya reglerna träder i kraft skulle kunna finnas förutsättningar för val mellan andra avvecklingssystem än sådana där de aktuella marknadsplatserna, clearingorganisationerna eller centrala värdepappersförvararna genom avtal eller andra arrangemang har skapat länkar i syfte att möjliggöra gränsöverskridande clearing och avveckling (jfr kommissionens arbetsdokument om hantering av värdepappersaffärer efter handel, publicerat den 23 maj 2006 på kommissionens hemsida). Utredningen vågar inte ha någon uppfattning i frågan om eller när det över huvud taget är eller kommer att vara tekniskt och praktiskt möjligt att skapa sådana förutsättningar.

Utredningen föreslår att kompletteringen sker genom att ett nytt stycke införs i 13 kap. 6 § lagen om värdepappersmarknaden. Detta bör innehålla att börsens regler inte får hindra en deltagare att välja ett system för avveckling av de transaktioner som genomförts på den reglerade marknaden under förutsättning att 1) förbindelserna och avtalen mellan det valda avvecklingssystemet och varje annat system säkerställer en effektiv och ekonomisk avveckling av transaktionen, och 2) Finansinspektionen har godtagit att det aktuella avvecklingssystemet används för avveckling av sådana transaktioner. Det bör därvid inte krävas att inspektionen har meddelat ett formligt beslut om godkännande utan endast att den inte gjort någon erinran med anledning av underrättelse om att exempelvis en viss länk för avveckling avses bli tillämpad. Inspektionen har därvid givetvis anledning att främst beakta intresset av att marknaden kan fungera effektivt och korrekt.

3.4 Några rättelser i huvudbetänkandet

Utredningen vill utnyttja tillfället att göra några rättelser av felskrivningar i författningsförslaget i huvudbetänkandet som numera upptäckts. Dessa felskrivningar är följande.

- I 2 kap. 4 § 6 står ”stöd sitt”. Det ska i stället stå ”stöd av sitt”.
- I 8 kap. 2 § görs en hänvisning till 4 kap. 1 § första stycket 2. Hänvisningen ska i stället göras till punkt 1 i samma stycke.
- I 8 kap. 33 § 10 bör ordet lämplighetsprövning ersättas med ordet prövning.
- I 11 kap. 3 § bör Riksbanken ersättas med Sveriges riksbank.
- Punkt 3 i övergångsbestämmelserna har fallit bort. Någon text saknas dock inte utan punkt 4 ska rätteligen benämnas punkt 3 osv.

KOMMISSIONENS FÖRSLAG TILL GENOMFÖRANDEDIREKTIV

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, DRAFT 30.06.06
[Institutional Reference]

Draft

COMMISSION DIRECTIVE

implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms, and defined terms for the purposes of that Directive

Note: this draft text is based on the text approved by the European Securities Committee on 26 June 2006 (with typographical corrections). It remains subject to Parliamentary oversight.

The final text will be that adopted by the Commission (probably in September 2006) and subsequently published in the Official Journal.

Draft

COMMISSION DIRECTIVE

implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

(Text with EEA Relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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[1], and in particular Article 4(2), Article 13(10), Article 18(3), Article 19(10), Article 21(6), Article 22(3) and Article 24(5) thereof,

Whereas:

(1) Directive 2004/39/EC establishes the framework for a regulatory regime for financial markets in the Community, governing, among other matters, operating conditions relating to the performance by investment firms of investment services and, where appropriate, ancillary services and investment activities; organisational requirements for investment firms performing such services and activities, and for regulated markets; reporting requirements in respect of transactions in financial instruments; and transparency requirements in respect of transactions in shares admitted to trading on a regulated market.

(2) The rules for the implementation of the regime governing organisational requirements for investment firms performing investment services and, where appropriate, ancillary services and investment activities on a professional basis, and for regulated markets, should be consistent with the aim of Directive 2004/39/EC. They should be designed to ensure a high level of integrity, competence and soundness among investment firms and entities that operate regulated markets or MTFs, and to be applied in a uniform manner.

(3) It is necessary to specify concrete organisational requirements and procedures for investment firms performing such services or activities. In particular, rigorous procedures should be provided for with regard to matters such as compliance, risk management, complaints handling, personal transactions, outsourcing and the identification, management and disclosure of conflicts of interest.

[1] OJ L 145, 30.4.2004, p. 1.

(4) The organisational requirements and conditions for authorisation for investment firms should be set out in the form of a set of rules that ensures the uniform application of the relevant provisions of Directive 2004/39/EC. This is necessary in order to ensure that investment firms have equal access on equivalent terms to all markets in the Community and to eliminate obstacles, linked to authorisation procedures, to cross-border activities in the field of investment services.

(5) The rules for the implementation of the regime governing operating conditions for the performance of investment and ancillary services and investment activities should reflect the aim underlying that regime. That is to say, they should be designed to ensure a high level of investor protection to be applied in a uniform manner through the introduction of clear standards and requirements governing the relationship between an investment firm and its client. On the other hand, as regards investor protection, and in particular the provision of investors with information or the seeking of information from investors, the retail or professional nature of the client or potential client concerned should be taken into account.

(6) The form of a Directive is necessary in order to enable the implementing provisions to be adjusted to the specificities of the particular market and legal system in each Member State.

(7) In order to ensure the uniform application of the various provisions of Directive 2004/39/EC, it is necessary to establish a harmonised set of organisational requirements and operating conditions for investment firms. Consequently, Member States and competent authorities should not add supplementary binding rules when transposing and applying the rules specified in this Directive, save where this Directive makes express provision to this effect.

(8) However, in exceptional circumstances, it should be possible for Member States to impose requirements on investment firms additional to those laid down in the implementing rules. However, such intervention should be restricted to those cases where specific risks to investor protection or to market integrity including those related to the stability of the financial system have not been adequately addressed by the Community legislation, and it should be strictly proportionate.

(9) Any additional requirements retained or imposed by Member States in conformity with this Directive must not restrict or otherwise affect the rights of investment firms under Articles 31 and 32 of Directive 2004/39/EC.

(10) The specific risks addressed by any additional requirements retained by Member States at the date of application of this Directive should be of particular importance to the market structure of the State in question, including the behaviour of firms and consumers in that market. The assessment of those specific risks should be made in the context of the regulatory regime put in place by Directive 2004/39/EC and its detailed implementing rules. Any decision to retain additional requirements should be made with proper regard to the objectives of that Directive to remove barriers to the cross-border provision of investment service by harmonising the initial authorisation and operating requirements for investment firms.

(11) Investment firms vary widely in their size, their structure and the nature of their business. A regulatory regime should be adapted to that diversity while imposing

certain fundamental regulatory requirements which are appropriate for all firms. Regulated entities should comply with their high level obligations and design and adopt measures that are best suited to their particular nature and circumstances.

(12) However, a regulatory regime which entails too much uncertainty for investment firms may reduce efficiency. Competent authorities are expected to issue interpretative guidance on provisions on this Directive, with a view in particular to clarifying the practical application of the requirements of this Directive to particular kinds of firms and circumstances. Non-binding guidance of this kind might, among other things, clarify how the provisions of this Directive and Directive 2004/39/EC apply in the light of market developments. To ensure a uniform application of this Directive and Directive 2004/39/EC, the Commission may issue guidance by way of interpretative communications or other means. Furthermore, the Committee of European Securities Regulators may issue guidance in order to secure convergent application of this Directive and Directive 2004/39/EC by competent authorities.

(13) The organisational requirements established under Directive 2004/39/EC are without prejudice to systems established by national law for the registration of individuals working within investment firms.

(14) For the purposes of the provisions of this Directive requiring an investment firm to establish, implement and maintain an adequate risk management policy, the risks relating to the firm's activities, processes and systems should include the risks associated with the outsourcing of critical or important functions or of investment services or activities. Such risks should include those associated with the firm's relationship with the service provider, and the potential risks posed where the outsourced activities of multiple investment firms or other regulated entities are concentrated within a limited number of service providers.

(15) The fact that risk management and compliance functions are performed by the same person does not necessarily jeopardise the independent functioning of each function. The conditions that persons involved in the compliance function should not also be involved in the performance of the functions that they monitor, and that the method of determining the remuneration of such persons should not be likely to compromise their objectivity, may not be proportionate in the case of small investment firms. However, they would only be disproportionate for larger firms in exceptional circumstances.

(16) A number of the provisions of Directive 2004/39/EC require investment firms to collect and maintain information relating to clients and services provided to clients. Where those requirements involve the collection and processing of personal data, firms should ensure that they comply with national measures implementing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

(17) Where successive personal transactions are carried out on behalf of a person in accordance with prior instructions given by that person, the obligations under the provisions of this Directive relating to personal transactions should not apply separately to each such successive transaction if those instructions remain in force and unchanged. Similarly, those obligations should not apply to the termination or withdrawal of such instructions, provided that any financial instruments which had

previously been acquired pursuant to the instructions are not disposed of at the same time as the instructions terminate or are withdrawn. However, those obligations should apply in relation to a personal transaction, or the commencement of successive personal transactions, carried out on behalf of the same person if those instructions are changed or if new instructions are issued.

(18) Competent authorities should not make the authorisation to provide investment services or activities subject to a general prohibition on the outsourcing of one or more critical or important functions or investment services or activities. Investment firms should be allowed to outsource such activities if the outsourcing arrangements established by the firm comply with certain conditions.

(19) For the purposes of the provisions of this Directive setting out conditions for outsourcing critical or important operational functions or investment services or activities, an outsourcing that would involve the delegation of functions to the extent that the firm becomes a letter box entity should be considered to undermine the conditions with which the investment firm must comply in order to be and remain authorised in accordance with Article 5 of Directive 2004/39/EC.

(20) The outsourcing of investment services or activities or critical and important functions is capable of constituting a material change of the conditions for the authorisation of the investment firm, as referred to in Article 16(2) of Directive 2004/39/EC. If such outsourcing arrangements are to be put in place after the investment firm has obtained an authorisation according to the provisions included in Chapter I of Title II of Directive 2004/39/EC, those arrangements should be notified to the competent authority where required by Article 16(2) of Directive 2004/39/EC.

(21) Investment firms are required by this Directive to give the responsible competent authority prior notification of any arrangement for the outsourcing of the management of retail client portfolios that it proposes to enter into with a service provider located in a third country, where certain specified conditions are not met. However, competent authorities are not expected to authorise or otherwise approve any such arrangement or its terms. The purpose of the notification, rather, is to ensure that the competent authority has the opportunity to intervene in appropriate cases. It is the responsibility of the investment firm to negotiate the terms of any outsourcing arrangement, and to ensure that those terms are consistent with the obligations of the firm under this Directive and Directive 2004/39/EC, without the formal intervention of the competent authority.

(22) For the purposes of regulatory transparency, and in order to ensure an appropriate level of certainty for investment firms, this Directive requires each competent authority to publish a statement of its policy in relation to the outsourcing of retail portfolio management to service providers located in third countries. That statement must set out examples of cases where the competent authority is unlikely to object to such outsourcing, and must include an explanation of why outsourcing in such cases is unlikely to impair the ability of the firm to comply with the general conditions for outsourcing under this Directive. In providing that explanation, a competent authority should always indicate the reasons why outsourcing in the cases in question would not impede the effectiveness of its access to all the

information relating to the outsourced service that is necessary for the authority to carry out its regulatory functions in respect of the investment firm.

(23) Where an investment firm deposits funds it holds on behalf of a client with a qualifying money market fund, the units in that money market fund should be held in accordance with the requirements for holding financial instruments belonging to clients.

(24) The circumstances which should be treated as giving rise to a conflict of interest should cover cases where there is a conflict between the interests of the firm or certain persons connected to the firm or the firm's group and the duty the firm owes to a client; or between the differing interests of two or more of its clients, to whom the firm owes in each case a duty. It is not enough that the firm may gain a benefit if there is not also a possible disadvantage to a client, or that one client to whom the firm owes a duty may make a gain or avoid a loss without there being a concomitant possible loss to another such client.

(25) Conflicts of interest should be regulated only where an investment service or ancillary service is provided by an investment firm. The status of the client to whom the service is provided – as either retail, professional or eligible counterparty – is irrelevant for this purpose.

(26) In complying with its obligation to draw up a conflict of interest policy under Directive 2004/39/EC which identifies circumstances which constitute or may give rise to a conflict of interest, the investment firm should pay special attention to the activities of investment research and advice, proprietary trading, portfolio management and corporate finance business, including underwriting or selling in an offering of securities and advising on mergers and acquisitions. In particular, such special attention is appropriate where the firm or a person directly or indirectly linked by control to the firm performs a combination of two or more of those activities.

(27) Investment firms should aim to identify and manage the conflicts of interest arising in relation to their various business lines and their group's activities under a comprehensive conflicts of interest policy. In particular, the disclosure of conflicts of interest by an investment firm should not exempt it from the obligation to maintain and operate the effective organisational and administrative arrangements required under Article 13(3) of Directive 2004/39/EC. While disclosure of specific conflicts of interest is required by Article 18(2) of Directive 2004/39/EC, an over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be managed is not permitted.

(28) Investment research should be a sub-category of the type of information defined as a recommendation in Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest[2], but it applies to financial instruments as defined in Directive

[2] OJ L 339, 24.12.2003, p. 73.

2004/39/EC. Recommendations, of the type so defined, which do not constitute investment research as defined in this Directive are nevertheless subject to the provisions of Directive 2003/125/EC as to the fair presentation of investment recommendations and the disclosure of conflicts of interest.

(29) The measures and arrangements adopted by an investment firm to manage the conflicts of interests that might arise from the production and dissemination of material that is presented as investment research should be appropriate to protect the objectivity and independence of financial analysts and of the investment research they produce. Those measures and arrangements should ensure that financial analysts enjoy an adequate degree of independence from the interests of persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom the investment research is disseminated.

(30) Persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom investment research is disseminated should include corporate finance personnel and persons involved in sales and trading on behalf of clients or the firm.

(31) Exceptional circumstances in which financial analysts and other persons connected with the investment firm who are involved in the production of investment research may, with prior written approval, undertake personal transactions in instruments to which the research relates should include those circumstances where, for personal reasons relating to financial hardship, the financial analyst or other person is required to liquidate a position.

(32) Small gifts or minor hospitality below a level specified in the firm's conflicts of interest policy and mentioned in the summary description of that policy that is made available to clients should not be considered as inducements for the purposes of the provisions relating to investment research.

(33) The concept of dissemination of investment research to clients or the public should not include dissemination exclusively to persons within the group of the investment firm.

(34) Current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed.

(35) The same requirements should apply to the substantial alteration of investment research produced by a third party as apply to the production of research.

(36) Financial analysts should not become involved in activities other than the preparation of investment research where such involvement is inconsistent with the maintenance of that person's objectivity. The following involvements should ordinarily be considered as inconsistent with the maintenance of that person's objectivity: participating in investment banking activities such as corporate finance business and underwriting, participating in 'pitches' for new business or 'road

shows' for new issues of financial instruments; or being otherwise involved in the preparation of issuer marketing.

(37) Without prejudice to the provisions of this Directive relating to the production or dissemination of investment research, it is recommended that producers of investment research that are not investment firms should consider adopting internal policies and procedures designed to ensure that they also comply with the principles set out in this Directive as to the protection of the independence and objectivity of that research.

(38) Requirements imposed by this Directive, including those relating to personal transactions, to dealing with knowledge of investment research and to the production or dissemination of investment research, apply without prejudice to other requirements of Directive 2004/39/EC and Directive 2003/6/EC of the European parliament and of the Council of 28 january 2003 on insider dealing and market manipulation (market abuse)[4] and their respective implementing measures.

(39) For the purposes of the provisions of this Directive concerning inducements, the receipt by an investment firm of a commission in connection with investment advice or general recommendations, in circumstances where the advice or recommendations are not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the investment advice to the client.

(40) This Directive permits investment firms to give or receive certain inducements only subject to specific conditions, and provided they are disclosed to the client, or are given to or by the client or a person on behalf of the client.

(41) This Directive requires investment firms that provide investment services other than investment advice to new retail clients to enter into a written basic agreement with the client, setting out the essential rights and obligations of the firm and the client. However, it imposes no other obligations as to the form, content and performance of contracts for the provisions of investment or ancillary services.

(42) This Directive sets out requirements for marketing communications only with respect to the obligation in Article 19(2) of Directive 2004/39/EC that information addressed to clients, including marketing communications, should be fair, clear and not misleading.

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

(44) Appropriate and proportionate information requirements should be established which take account of the status of a client as either retail or professional. An objective of Directive 2004/39/EC is to ensure a proportionate balance between investor protection and the disclosure obligations which apply to investment firms. To this end, it is appropriate that less stringent specific information requirements be

[4] OJ L 96, 14.4.2003, p. 16

included in this Directive with respect to professional clients than apply to retail clients. Professional clients should, subject to limited exceptions, be able to identify for themselves the information that is necessary for them to make an informed decision, and to ask the investment firm to provide that information. Where such information requests are reasonable and proportionate investment firms should provide additional information.

(45) Investment firms should provide clients or potential clients with adequate information on the nature of financial instruments and the risks associated with investing in them so that their clients can take each investment decision on a properly informed basis. The level of detail of this information may vary according to the client's categorisation as either a retail client or a professional client and the nature and risk profile of the financial instruments that are being offered, but should never be so general as to omit any essential elements. It is possible that for some financial instruments only the information referring to the type of an instrument will be sufficient whereas for some others the information will need to be product-specific.

(46) The conditions with which information addressed by investment firms to clients and potential clients must comply in order to be fair, clear and not misleading should apply to communications intended for retail clients in a way that is appropriate and proportionate, taking into account, for example, the means of communication, and the information that the communication is intended to convey to the clients or potential clients. In particular, it would not be appropriate to apply such conditions to marketing communications which consist only of one or more of the following: the name of the firm, a logo or other image associated with the firm, a contact point, a reference to the types of investment services provided by the firm, or to its fees or commissions.

(47) For the purposes of Directive 2004/39/EC and of this Directive, information should be considered to be misleading if it has a tendency to mislead the person or persons to whom it is addressed or by whom it is likely to be received, whether or not the person who provides the information considers or intends it to be misleading.

(48) In determining what constitutes the provision of information in good time before a time specified in this Directive, an investment firm should take into account, having regard to the urgency of the situation and the time necessary for the client to absorb and react to the specific information provided, the client's need for sufficient time to read and understand it before taking an investment decision. A client is likely to require less time to review information about a simple or standardised product or service, or a product or service of a kind he has purchased previously, than he would require for a more complex or unfamiliar product or service.

(49) Nothing in this Directive obliges investment firms to provide all required information about the investment firm, financial instruments, costs and associated charges, or concerning the safeguarding of client financial instruments or client funds immediately and at the same time, provided that they comply with the general obligation to provide the relevant information in good time before the time specified in this Directive. Provided that the information is communicated to the client in good time before the provision of the service, nothing in this Directive obliges firms

to provide it either separately, as part of a marketing communication, or by incorporating the information in a client agreement.

(50) In cases where an investment firm is required to provide information to a client before the provision of a service, each transaction in respect of the same type of financial instrument should not be considered as the provision of a new or different service.

(51) In cases where an investment firm providing portfolio management services is required to provide to retail clients or potential retail clients information on the types of financial instruments that may be included in the client portfolio and the types of transactions that may be carried out in such instruments, such information should state separately whether the investment firm will be mandated to invest in financial instruments not admitted to trading on a regulated market, in derivatives, or in illiquid or highly volatile instruments; or to undertake short sales, purchases with borrowed funds, securities financing transactions, or any transactions involving margin payments, deposit of collateral or foreign exchange risk.

(52) The provision by an investment firm to a client of a copy of a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading[5] should not be treated as the provision by the firm of information to a client for the purposes of the operating conditions under Directive 2004/39/EC which relate to the quality and contents of such information, if the firm is not responsible under that directive for the information given in the prospectus.

(53) The information which an investment firm is required to give to a retail client concerning costs and associated charges includes information about the arrangements for payment or performance of the agreement for the provision of investment services and any other agreement relating to a financial instrument that is being offered. For this purpose, arrangements for payment will generally be relevant where a financial instrument contract is terminated by cash settlement. Arrangements for performance will generally be relevant where, upon termination, a financial instrument requires the delivery of shares, bonds, a warrant, bullion or another instrument or commodity.

(54) As regards collective investment undertakings covered by Directive 85/611/EEC of the Council of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[6], it is not the purpose of this Directive to regulate the content of the simplified prospectus as defined by Article 28 of Directive 85/611/EEC. No information should be added to the simplified prospectus as a result of the implementation of this Directive.

(55) The simplified prospectus provides, notably, sufficient information in relation to the costs and associated charges in respect to the UCITS itself. However, investment firms distributing units in UCITS should additionally inform their clients about all

[5] OJ L 345, 31.12.2003, p. 64.
[6] OJ L 375, 31.12.1985, p. 3

the other costs and associated charges related to their provision of investment services in relation to units in UCITS.

(56) It is necessary to make different provision for the application of the suitability test in Article 19(4) of Directive 2004/39/EC and the appropriateness test in Article 19(5) of that Directive. These tests have different scope with regards to the investment services to which they relate, and have different functions and characteristics.

(57) For the purposes of Article 19(4) of Directive 2004/39/EC, a transaction may be unsuitable for the client or potential client because of the risks of the financial instruments involved, the type of transaction, the characteristics of the order or the frequency of the trading. A series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client. In the case of portfolio management, a transaction might also be unsuitable if it would result in an unsuitable portfolio.

(58) In accordance with Article 19(4) of Directive 2004/39/EC, a firm is required to assess the suitability of investment services and financial instruments to a client only when it is providing investment advice or portfolio management to that client. In the case of other investment services, the firm is required by Article 19(5) of that Directive to assess the appropriateness of an investment service or product for a client, and then only if the product is not offered on an execution-only basis under Article 19(6) of that Directive (which applies to non-complex products).

(59) For the purposes of the provisions of this Directive requiring investment firms to assess the appropriateness of investment services or products offered or demanded, a client who has engaged in a course of dealings involving a specific type of product or service beginning before the date of application of Directive 2004/39/EC should be presumed to have the necessary experience and knowledge in order to understand the risks involved in relation to that product or investment service. Where a client engages in a course of dealings of that kind through the services of an investment firm, beginning after the date of application of that Directive, the firm is not required to make a new assessment on the occasion of each separate transaction. It complies with its duty under Article 19(5) of that Directive provided that it makes the necessary assessment of appropriateness before beginning that service.

(60) A recommendation or request made, or advice given, by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation within the meaning of Article 19(4) of Directive 2004/39/EC.

(61) For the purposes of determining whether a unit in a collective investment undertaking which does not comply with the requirements of Directive 85/611/EC, that has been authorised for marketing to the public, should be considered as non-complex, the circumstances in which valuation systems will be independent of the issuer should include where they are overseen by a depositary that is regulated as a provider of depositary services in a Member State.

(62) Nothing in this Directive requires competent authorities to approve the content of the basic agreement between an investment firm and its retail clients. However, neither does it prevent them from doing so, insofar as any such approval is based only on the firm's compliance with its obligations under Directive 2004/39/EC to act honestly, fairly and professionally in accordance with the best interests of its clients, and to establish a record that sets out the rights and obligations of investment firms and their clients, and the other terms on which firms will provide services to their clients.

(63) The records an investment firm is required to keep should be adapted to the type of business and the range of investment services and activities performed, provided that the record-keeping obligations set out in Directive 2004/39/EC and this Directive are fulfilled. For the purposes of the reporting obligations in respect of portfolio management, a contingent liability transaction is one that involves any actual or potential liability for the client that exceeds the cost of acquiring the instrument.

(64) For the purposes of the provisions on reporting to clients, a reference to the type of the order should be understood as referring to its status as a limit order, market order, or other specific type of order.

(65) For the purposes of the provisions on reporting to clients, a reference to the nature of the order should be understood as referring to orders to subscribe for securities, or to exercise an option, or similar client order.

(66) When establishing its execution policy in accordance with Article 21(2) of Directive 2004/39/EC, an investment firm should determine the relative importance of the factors mentioned in Article 21(1) of that Directive, or at least establish the process by which it determines the relative importance of these factors, so that it can deliver the best possible result to its clients. In order to give effect to that policy, an investment firm should select the execution venues that enable it to obtain on a consistent basis the best possible result for the execution of client orders. An investment firm should apply its execution policy to each client order that it executes with a view to obtaining the best possible result for the client in accordance with that policy. The obligation under Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for the client should not be treated as requiring an investment firm to include in its execution policy all available execution venues.

(67) For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client.

(68) When an investment firm executes an order following specific instructions from the client, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the client instructions relate. The fact that the client has given specific instructions which cover one part or aspect of the order should not be treated as releasing the investment firm from its best execution obligations in respect of any other parts or aspects of the client order that are not covered by such instructions. An investment firm should not induce a client to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the client, when the firm ought reasonably to know that an instruction to that effect is likely to prevent it from obtaining the best possible result for that client. However, this should not prevent a firm inviting a client to choose between two or more specified trading venues, provided that those venues are consistent with the execution policy of the firm.

(69) Dealing on own account with clients by an investment firm should be considered as the execution of client orders, and therefore subject to the requirements under Directive 2004/39/EC and this Directive and, in particular, those obligations in relation to best execution. However, if an investment firm provides a quote to a client and that quote would meet the investment firm's obligations under Article 21(1) of Directive 2004/39/EC if the firm executed that quote at the time the quote was provided, then the firm will meet those same obligations if it executes its quote after the client accepts it, provided that, taking into account the changing market conditions and the time elapsed between the offer and acceptance of the quote, the quote is not manifestly out of date.

(70) The obligation to deliver the best possible result when executing client orders applies in relation to all types of financial instruments. However, given the differences in market structures or the structure of financial instruments, it may be difficult to identify and apply a uniform standard of and procedure for best execution that would be valid and effective for all classes of instrument. Best execution obligations should therefore be applied in a manner that takes into account the different circumstances associated with the execution of orders related to particular types of financial instruments. For example, transactions involving a customised OTC financial instrument that involve a unique contractual relationship tailored to the circumstances of the client and the investment firm may not be comparable for best execution purposes with transactions involving shares traded on centralised execution venues.

(71) For the purposes of determining best execution when executing retail client orders, the costs related to execution should include an investment firm's own commissions or fees charged to the client for limited purposes, in cases where more than one venue listed in the firm's execution policy is capable of executing a particular order. In such cases, the firm's own commissions and costs for executing the order on each of the eligible execution venues should be taken into account in order to assess and compare the results for the client that would be achieved by executing the order on each such venue. However, it is not intended to require a firm to compare the results that would be achieved for its client on the basis of its own execution policy and its own commissions and fees, with results that might be achieved for the same client by any other investment firm on the basis of a different execution policy or a different structure of commissions or fees. Nor is it intended to require a firm to

compare the differences in its own commissions which are attributable to differences in the nature of the services that the firm provides to clients.

(72) The provisions of this Directive that provide that costs of execution should include an investment firm's own commissions or fees charged to the client for the provision of an investment service should not apply for the purpose of determining what execution venues must be included in the firm's execution policy for the purposes of Article 21(3) of Directive 2004/39/EC.

(73) It should be considered that an investment firm structures or charges its commissions in a way which discriminates unfairly between execution venues if it charges a different commission or spread to clients for execution on different execution venues and that difference does not reflect actual differences in the cost to the firm of executing on those venues.

(74) The provisions of this Directive as to execution policy are without prejudice to the general obligation of an investment firm under Article 21(4) of Directive 2004/39/EC to monitor the effectiveness of its order execution arrangements and policy and assess the venues in its execution policy on a regular basis.

(75) This Directive is not intended to require a duplication of effort as to best execution between an investment firm which provides the service of reception and transmission of order or portfolio management and any investment firm to which that investment firm transmits its orders for execution.

(76) The best execution obligation under Directive 2004/39/EC requires investment firms to take all reasonable steps to obtain the best possible result for their clients. The quality of execution, which includes aspects such as the speed and likelihood of execution (fill rate) and the availability and incidence of price improvement, is an important factor in the delivery of best execution. Availability, comparability and consolidation of data related to execution quality provided by the various execution venues is crucial in enabling investment firms and investors to identify those execution venues that deliver the highest quality of execution for their clients. This Directive does not mandate the publication by execution venues of their execution quality data, as execution venues and data providers should be permitted to develop solutions concerning the provision of execution quality data. The Commission should submit a report by 1 November 2008 on the market-led developments in this area with a view to assessing availability, comparability and consolidation at a European level of information concerning execution quality.

(77) For the purposes of the provisions of this Directive concerning client order handling, the reallocation of transactions should be considered as detrimental to a client if, as an effect of that reallocation, unfair precedence is given to the investment firm or to any particular client.

(78) Without prejudice to Directive 2003/6/EC, for the purposes of the provisions of this Directive concerning client order handling, client orders should not be treated as otherwise comparable if they are received by different media and it would not be practicable for them to be treated sequentially. For the further purposes of those provisions, any use by an investment firm of information relating to a pending client order in order to deal on own account in the financial instruments to which the

client order relates, or in related financial instruments, should be considered a misuse of that information. However, the mere fact that market makers or bodies authorised to act as counterparties confine themselves to pursuing their legitimate business of buying and selling financial instruments, or that persons authorised to execute orders on behalf of third parties confine themselves to carrying out an order dutifully, should not in itself be deemed to constitute a misuse of information.

(79) Advice about financial instruments given in a newspaper, journal, magazine or any other publication addressed to the general public (including by means of the internet), or in any television or radio broadcast, should not be considered as a personal recommendation for the purposes of the definition of 'investment advice' in Directive 2004/39/EC.

(80) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.

(81) Generic advice about a type of financial instrument is not investment advice for the purposes of Directive 2004/39/EC, because this Directive specifies that, for the purposes of Directive 2004/39/EC, investment advice is restricted to advice on particular financial instruments. However, if an investment firm provides generic advice to a client about a type of financial instrument which it presents as suitable for, or based on a consideration of the circumstances of, that client, and that advice is not in fact suitable for the client, or is not based on a consideration of his circumstances, depending on the circumstances of the particular case, the firm is likely to be acting in contravention of Article 19(1) or (2) of Directive 2004/39/EC. In particular, a firm which gives a client such advice would be likely to contravene the requirement of Article 19(1) to act honestly, fairly and professionally in accordance with the best interests of its clients. Similarly or alternatively, such advice would be likely to contravene the requirement of Article 19(2) that information addressed by a firm to a client should be fair, clear and not misleading.

(82) Acts carried out by an investment firm that are preparatory to the provision of an investment service or carrying out an investment activity should be considered as an integral part of that service or activity. This would include, for example, the provision of generic advice by an investment firm to clients or potential clients prior to or in the course of the provision of investment advice or any other investment service or activity.

(83) The provision of a general recommendation (that is, one which is intended for distribution channels or the public) about a transaction in a financial instrument or a type of financial instrument constitutes the provision of an ancillary service within Section B(5) of Annex I of Directive 2004/39/EC, and consequently Directive 2004/39/EC and its protections apply to the provision of that recommendation.

(84) The Committee of European Securities Regulators, established by Commission Decision 2001/527/EC[7] has been consulted for technical advice.

(85) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DIRECTIVE:

Chapter I

Scope and definitions

Article 1

Subject-matter and scope

1. This Directive lays down the detailed rules for the implementation of Article 4(1)(4) and 4(2), Article 13(2) to (8), Article 18, Article 19(1) to (6), Article 19(8), and Articles 21, 22 and 24 of Directive 2004/39/EC.

2. Chapter II and Sections 1 to 4, Article 45 and Sections 6 and 8 of Chapter III and, to the extent they relate to those provisions, Chapter I and Section 9 of Chapter III and Chapter IV of this Directive shall apply to management companies in accordance with Article 5(4) of Council Directive 85/611/EEC.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) 'distribution channels' means distribution channels within the meaning of Article 1(7) of Commission Directive 2003/125/EC;[9]

(2) 'durable medium' means any instrument which enables a client to store information addressed personally to that client in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(3) 'relevant person' in relation to an investment firm, means any of the following:

(a) a director, partner or equivalent, manager or tied agent of the firm;

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7 OJ L 191, 13.7.2001, p. 43

9 OJ L 339, 24.12.2003, p. 73.

(b) a director, partner or equivalent, or manager of any tied agent of the firm;

(c) an employee of the firm or of a tied agent of the firm, as well as any other natural person whose services are placed at the disposal and under the control of the firm or a tied agent of the firm and who is involved in the provision by the firm of investment services and activities;

(d) a natural person who is directly involved in the provision of services to the investment firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities;

(4) 'financial analyst' means a relevant person who produces the substance of investment research;

(5) 'group', in relation to an investment firm, means the group of which that firm forms a part, consisting of a parent undertaking, its subsidiaries and the entities in which the parent undertaking or its subsidiaries hold a participation, as well as undertakings linked to each other by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC on consolidated accounts[11];

(6) 'outsourcing' means an arrangement of any form between an investment firm and a service provider by which that service provider performs a process, a service or an activity which would otherwise be undertaken by the investment firm itself;

(7) 'person with whom a relevant person has a family relationship' means any of the following:

(a) the spouse of the relevant person or any partner of that person considered by national law as equivalent to a spouse;

(b) a dependent child or stepchild of the relevant person;

(c) any other relative of the relevant person who has shared the same household as that person for at least one year on the date of the personal transaction concerned;

(8) 'securities financing transaction' has the meaning given in [the Implementing Regulation][12];

(9) 'senior management' means the person or persons who effectively direct the business of the investment firm as referred to in Article 9(1) of Directive 2004/39/EC.

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11 OJ No L 193, 18.7.1983, p.1.
12 [OJ XXX]

Article 3

Conditions applying to the provision of information

1. Where, for the purposes of this Directive, information is required to be provided in a durable medium, Member States shall permit investment firms to provide that information in a durable medium other than on paper only if:

   (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on; and

   (b) the person to whom the information is to be provided, when offered the choice between information on paper or in that other durable medium, specifically chooses the provision of the information in that other medium.

2. Where, pursuant to Article 29, 30, 31, 32, 33 or 46(2) of this Directive, an investment firm provides information to a client by means of a website and that information is not addressed personally to the client, Member States shall ensure that the following conditions are satisified:

   (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on;

   (b) the client must specifically consent to the provision of that information in that form;

   (c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;

   (d) the information must be up to date;

   (e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it.

3. For the purposes of this Article, the provision of information by means of electronic communications shall be treated as appropriate to the context in which the business between the firm and the client is, or is to be, carried on if there is evidence that the client has regular access to the internet. The provision by the client of an email address for the purposes of the carrying on of that business shall be treated as such evidence.

Article 4

Additional requirements on investment firms in certain cases

1. Member States may retain or impose requirements additional to those in this Directive only in those exceptional cases where such requirements are objectively justified and proportionate so as to address specific risks to investor protection or to

market integrity that are not adequately addressed by this Directive, and provided that one of the following conditions is met:

(a) the specific risks addressed by the requirements are of particular importance in the circumstances of the market structure of that Member State;

(b) the requirement addresses risks or issues that emerge or become evident after the date of application of this Directive and that are not otherwise regulated by or under Community measures.

2. Any requirements imposed under paragraph 1 shall not restrict or otherwise affect the rights of investment firms under Articles 31 and 32 of Directive 2004/39/EC.

3. Member States shall notify to the Commission:

(a) any requirement which it intends to retain in accordance with paragraph 1 before the date of transposition of this Directive; and

(b) any requirement which it intends to impose in accordance with paragraph 1 at least one month before the date appointed for that requirement to come into force.

In each case, the notification shall include a justification for that requirement.

The Commission shall communicate to Member States and make public on its website the notifications it receives in accordance with this paragraph.

4. By 31 December 2009 the Commission shall report to the European Parliament and the Council on the application of this Article.

Chapter II

Organisational requirements

SECTION 1

ORGANISATION

Article 5

(Article 13(2) to (8) of Directive 2004/39/EC)

General organisational requirements

1. Member States shall require investment firms to comply with the following requirements:

(a) to establish, implement and maintain decision-making procedures and an organisational structure which clearly and in documented manner specifies reporting lines and allocates functions and responsibilities;

(b) to ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities;

(c) to establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the investment firm;

(d) to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them;

(e) to establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the investment firm;

(f) to maintain adequate and orderly records of their business and internal organisation;

(g) to ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally.

Member States shall ensure that, for those purposes, investment firms take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business.

2. Member States shall require investment firms to establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.

3. Member States shall require investment firms to establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of investment services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their investment services and activities.

4. Member States shall require investment firms to establish, implement and maintain accounting policies and procedures that enable them, at the request of the competent authority, to deliver in a timely manner to the competent authority financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.

5. Member States shall require investment firms to monitor and, on a regular basis, to evaluate the adequacy and effectiveness of their systems, internal control mechanisms and arrangements established in accordance with paragraphs 1 to 4, and to take appropriate measures to address any deficiencies.

Article 6

(Article 13(2) of Directive 2004/39/EC)

Compliance

1. Member States shall ensure that investment firms establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the firm to comply with its obligations under Directive 2004/39/EC, as well as the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the competent authorities to exercise their powers effectively under that Directive.

   Member States shall ensure that, for those purposes, investment firms take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business.

2. Member States shall require investment firms to establish and maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:

   (a) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with the first subparagraph of paragraph 1, and the actions taken to address any deficiencies in the firm's compliance with its obligations;

(b) to advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligations under Directive 2004/39/EC.

3. In order to enable the compliance function to discharge its responsibilities properly and independently, Member States shall require investment firms to ensure that the following conditions are satisfied:

(a) the compliance function must have the necessary authority, resources, expertise and access to all relevant information;

(b) a compliance officer must be appointed and must be responsible for the compliance function and for any reporting as to compliance required by Article 9(2);

(c) the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor;

(d) the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so.

However, an investment firm shall not be required to comply with point (c) or point (d) if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of investment services and activities, the requirement under that point is not proportionate and that its compliance function continues to be effective.

Article 7

(second subparagraph of Article 13(5) of Directive 2004/39/EC)

Risk management

1. Member States shall require investment firms to take the following actions:

(a) to establish, implement and maintain adequate risk management policies and procedures which identify the risks relating to the firm's activities, processes and systems, and where appropriate, set the level of risk tolerated by the firm;

(b) to adopt effective arrangements, processes and mechanisms to manage the risks relating to the firm's activities, processes and systems, in light of that level of risk tolerance;

(c) to monitor the following:

(i) the adequacy and effectiveness of the investment firm's risk management policies and procedures;

(ii) the level of compliance by the investment firm and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with point (b);

(iii) the adequacy and effectiveness of measures taken to address any deficiencies in those policies, procedures, arrangements, processes and mechanisms, including failures by the relevant persons to comply with such arrangements, processes and mechanisms or follow such policies and procedures.

2. Member States shall require investment firms, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of the investment services and activities undertaken in the course of that business, to establish and maintain a risk management function that operates independently and carries out the following tasks:

(a) implementation of the policy and procedures referred to in paragraph 1;

(b) provision of reports and advice to senior management in accordance with Article 9(2).

Where an investment firm is not required under the first sub-paragraph to establish and maintain a risk management function that functions independently, it must nevertheless be able to demonstrate that the policies and procedures which it is has adopted in accordance with paragraph 1 satisfy the requirements of that paragraph and are consistently effective.

Article 8

(second subparagraph of Article 13(5) of Directive 2004/39/EC)

Internal audit

Member States shall require investment firms, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business, to establish and maintain an internal audit function which is separate and independent from the other functions and activities of the investment firm and which has the following responsibilities:

(a) to establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the investment firm's systems, internal control mechanisms and arrangements;

(b) to issue recommendations based on the result of work carried out in accordance with point (a);

(c) to verify compliance with those recommendations;

(d) to report in relation to internal audit matters in accordance with Article 9(2).

Article 9

(Article 13(2) of Directive 2004/39/EC)

Responsibility of senior management

1. Member States shall require investment firms, when allocating functions internally, to ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the firm complies with its obligations under Directive 2004/39/EC.

   In particular, senior management and, where appropriate, the supervisory function shall be required to assess and periodically to review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under Directive 2004/39/EC and to take appropriate measures to address any deficiencies.

2. Member States shall require investment firms to ensure that their senior management receive on a frequent basis, and at least annually, written reports on the matters covered by Articles 6, 7 and 8 indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies.

3. Member States shall require investment firms to ensure that the supervisory function, if any, receives on a regular basis written reports on the same matters.

4. For the purposes of this Article, 'supervisory function' means the function within an investment firm responsible for the supervision of its senior management.

Article 10

(Article 13(2) of Directive 2004/39/EC)

Complaints handling

Member States shall require investment firms to establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from retail clients or potential retail clients, and to keep a record of each complaint and the measures taken for its resolution.

Article 11

(Article 13(2) of Directive 2004/39/EC)

Meaning of personal transaction

For the purposes of Article 12 and Article 25, personal transaction means a trade in a financial instrument effected by or on behalf of a relevant person, where at least one of the following criteria are met:

(a) that relevant person is acting outside the scope of the activities he carries out in that capacity;

(b) the trade is carried out for the account of any of the following persons:

(i) the relevant person;

(ii) any person with whom he has a family relationship, or with whom he has close links;

(iii) a person whose relationship with the relevant person is such that the relevant person has a direct or indirect material interest in the outcome of the trade, other than a fee or commission for the execution of the trade.

Article 12

(Article 13(2) of Directive 2004/39/EC)

Personal transactions

1. Member States shall require investment firms to establish, implement and maintain adequate arrangements aimed at preventing the following activities in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 1(1) of Directive 2003/6/EC or to other confidential information relating to clients or transactions with or for clients by virtue of an activity carried out by him on behalf of the firm:

(a) entering into a personal transaction which meets at least one of the following criteria:

(i) that person is prohibited from entering into it under Directive 2003/6/EC;

(ii) it involves the misuse or improper disclosure of that confidential information;

(iii) it conflicts or is likely to conflict with an obligation of the investment firm under Directive 2004/39/EC;

(b) advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);

(c) without prejudice to Article 3(a) of Directive 2003/6/EC, disclosing, other than in the normal course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:

(i) to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);

(ii) to advise or procure another person to enter into such a transaction.

2. The arrangements required under paragraph 1 must in particular be designed to ensure that:

(a) each relevant person covered by paragraph 1 is aware of the restrictions on personal transactions, and of the measures established by the investment firm in connection with personal transactions and disclosure, in accordance with paragraph 1;

(b) the firm is informed promptly of any personal transaction entered into by a relevant person, either by notification of that transaction or by other procedures enabling the firm to identify such transactions;

In the case of outsourcing arrangements the investment firm must ensure that the firm to which the activity is outsourced maintains a record of personal transactions entered into by any relevant person and provides that information to the investment firm promptly on request.

(c) a record is kept of the personal transaction notified to the firm or identified by it, including any authorisation or prohibition in connection with such a transaction.

3. Paragraphs 1 and 2 shall not apply to the following kinds of personal transaction:

(a) personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;

(b) personal transactions in units in collective undertakings that comply with the conditions necessary to enjoy the rights conferred by Directive 85/611/EEC or are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.

SECTION 2

OUTSOURCING

Article 13

(Article 13(2) and first subparagraph of Article 13(5) of Directive 2004/39/EC)

Meaning of critical and important operational functions

1. For the purposes of the first subparagraph of Article 13(5) of Directive 2004/39/EC, an operational function shall be regarded as critical or important if a defect or failure in its performance would materially impair the continuing compliance of an investment firm with the conditions and obligations of its authorisation or its other obligations under Directive 2004/39/EC, or its financial performance, or the soundness or the continuity of its investment services and activities.

2. Without prejudice to the status of any other function, the following functions shall not be considered as critical or important for the purposes of paragraph 1:

   (a) the provision to the firm of advisory services, and other services which do not form part of the investment business of the firm, including the provision of legal advice to the firm, the training of personnel of the firm, billing services and the security of the firm's premises and personnel;

   (b) the purchase of standardised services, including market information services and the provision of price feeds.

Article 14

(Article 13(2) and first subparagraph of Article 13(5) of Directive 2004/39/EC)

Conditions for outsourcing critical or important operational functions or investment services or activities

1. Member States shall ensure that, when investment firms outsource critical or important operational functions or any investment services or activities, the firms remain fully responsible for discharging all of their obligations under Directive 2004/39/EC and comply, in particular, with the following conditions:

   (a) the outsourcing must not result in the delegation by senior management of its responsibility;

   (b) the relationship and obligations of the investment firm towards its clients under the terms of Directive 2004/39/EC must not be altered;

(c) the conditions with which the investment firm must comply in order to be authorised in accordance with Article 5 of Directive 2004/39/EC, and to remain so, must not be undermined;

(d) none of the other conditions subject to which the firm's authorisation was granted must be removed or modified.

2. Member States shall require investment firms to exercise due skill, care and diligence when entering into, managing or terminating any arrangement for the outsourcing to a service provider of critical or important operational functions or of any investment services or activities.

Investment firms shall in particular take the necessary steps to ensure that the following conditions are satisfied:

(a) the service provider must have the ability, capacity, and any authorisation required by law to perform the outsourced functions, services or activities reliably and professionally;

(b) the service provider must carry out the outsourced services effectively, and to this end the firm must establish methods for assessing the standard of performance of the service provider;

(c) the service provider must properly supervise the carrying out of the outsourced functions, and adequately manage the risks associated with the outsourcing;

(d) appropriate action must be taken if it appears that the service provider may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;

(e) the investment firm must retain the necessary expertise to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and must supervise those functions and manage those risks;

(f) the service provider must disclose to the investment firm any development that may have a material impact on its ability to carry out the outsourced functions effectively and in compliance with applicable laws and regulatory requirements;

(g) the investment firm must be able to terminate the arrangement for outsourcing where necessary without detriment to the continuity and quality of its provision of services to clients;

(h) the service provider must cooperate with the competent authorities of the investment firm in connection with the outsourced activities;

(i) the investment firm, its auditors and the relevant competent authorities must have effective access to data related to the outsourced activities, as well as to the business premises of the service provider; and the competent authorities must be able to exercise those rights of access;

(j) the service provider must protect any confidential information relating to the investment firm and its clients;

(k) the investment firm and the service provider must establish, implement and maintain a contingency plan for disaster recovery and periodic testing of backup facilities, where that is necessary having regard to the function, service or activity that has been outsourced.

3. Member States shall require the respective rights and obligations of the investment firms and of the service provider to be clearly allocated and set out in a written agreement.

4. Member States shall provide that, where the investment firm and the service provider are members of the same group, the investment firm may, for the purposes of complying with this Article and Article 15, take into account the extent to which the firm controls the service provider or has the ability to influence its actions.

5. Member States shall require investment firms to make available on request to the competent authority all information necessary to enable the authority to supervise the compliance of the performance of the outsourced activities with the requirements of this Directive.

Article 15

(Article 13(2) and first subparagraph of Article 13(5) of Directive 2004/39/EC)

Service providers located in third countries

1. In addition to the requirements set out in Article 14, Member States shall require that, where an investment firm outsources the investment service of portfolio management provided to retail clients to a service provider located in a third country, that investment firm ensures that the following conditions are satisfied:

(a) the service provider must be authorised or registered in its home country to provide that service and must be subject to prudential supervision;

(b) there must be an appropriate cooperation agreement between the competent authority of the investment firm and the supervisory authority of the service provider.

2. Where one or both of those conditions mentioned in paragraph 1 are not satisfied, an investment firm may outsource investment services to a service provider located in a third country only if the firm gives prior notification to its competent authority about the outsourcing arrangement and the competent authority does not object to that arrangement within a reasonable time following receipt of that notification.

3. Without prejudice to paragraph 2, Member States shall publish or require competent authorities to publish a statement of policy in relation to outsourcing covered by paragraph 2. That statement shall set out examples of cases where the competent

authority would not, or would be likely not to, object to an outsourcing under paragraph 2 where one or both of the conditions in points (a) and (b) of paragraph 1 are not met. It shall include a clear explanation as to why the competent authority considers that in such cases outsourcing would not impair the ability of investment firms to fulfil their obligations under Article 14.

4. Nothing in this article limits the obligations on investment firms to comply with the requirements in Article 14.

5. Competent authorities shall publish a list of the supervisory authorities in third countries with which they have cooperation agreements that are appropriate for the purposes of point (b) of paragraph 1.

SECTION 3

SAFEGUARDING OF CLIENT ASSETS

Article 16

(Article 13(7) and (8) of Directive 2004/39/EC)

Safeguarding of client financial instruments and funds

1. Member States shall require that, for the purposes of safeguarding clients' rights in relation to financial instruments and funds belonging to them, investment firms comply with the following requirements:

(a) they must keep such records and accounts as are necessary to enable them at any time and without delay to distinguish assets held for one client from assets held for any other client, and from their own assets;

(b) they must maintain their records and accounts in a way that ensures their accuracy, and in particular their correspondence to the financial instruments and funds held for clients;

(c) they must conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties by whom those assets are held;

(d) they must take the necessary steps to ensure that any client financial instruments deposited with a third party, in accordance with Article 17, are identifiable separately from the financial instruments belonging to the investment firm and from financial instruments belonging to that third party, by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection;

(e) they must take the necessary steps to ensure that client funds deposited, in accordance with Article 18, in a central bank, a credit institution or a bank

authorised in a third country or a qualifying money market fund are held in an account or accounts identified separately from any accounts used to hold funds belonging to the investment firm;

(f) they must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.

2. If, for reasons of the applicable law, including in particular the law relating to property or insolvency, the arrangements made by investment firms in compliance with paragraph 1 to safeguard clients' rights are not sufficient to satisfy the requirements of Article 13(7) and (8) of Directive 2004/39/EC, Member States shall prescribe the measures that investment firms must take in order to comply with those obligations.

3. If the applicable law of the jurisdiction in which the client funds or financial instruments are held prevents investment firms from complying with points (d) or (e) of paragraph 1, Member States shall prescribe requirements which have an equivalent effect in terms of safeguarding clients' rights.

Article 17

(Article 13(7) of Directive 2004/39/EC)

Depositing client financial instruments

1. Member States shall permit investment firms to deposit financial instruments held by them on behalf of their clients into an account or accounts opened with a third party provided that the firms exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for the holding and safekeeping of those financial instruments.

In particular, Member States shall require investment firms to take into account the expertise and market reputation of the third party as well as any legal requirements or market practices related to the holding of those financial instruments that could adversely affect clients' rights.

2. Member States shall ensure that, if the safekeeping of financial instruments for the account of another person is subject to specific regulation and supervision in a jurisdiction where an investment firm proposes to deposit client financial instruments with a third party, the investment firm does not deposit those financial instruments in that jurisdiction with a third party which is not subject to such regulation and supervision.

3. Member States shall ensure that investment firms do not deposit financial instruments held on behalf of clients with a third party in a third country that does not regulate the holding and safekeeping of financial instruments for the account of another person unless one of the following conditions is met:

(a) the nature of the financial instruments or of the investment services connected with those instruments requires them to be deposited with a third party in that third country;

(b) where the financial instruments are held on behalf of a professional client, that client requests the firm in writing to deposit them with a third party in that third country.

Article 18

(Article 13(8) of Directive 2004/39/EC)

Depositing client funds

1. Member States shall require investment firms, on receiving any client funds, promptly to place those funds into one or more accounts opened with any of the following:

(a) a central bank;

(b) a credit institution authorised in accordance with Directive 2000/12/EC;

(c) a bank authorised in a third country;

(d) a qualifying money market fund.

The first subparagraph shall not apply to a credit institution authorised under Directive [2006/48/EC] of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (recast)[13] in relation to deposits within the meaning of that Directive held by that institution.

2. For the purposes of point (d) of paragraph 1, and of Article 16(1)(e), a 'qualifying money market fund' means a collective investment undertaking authorised under Directive 85/611/EEC, or which is subject to supervision and, if applicable, authorised by an authority under the national law of a Member State, and which satisfies the following conditions:

(a) its primary investment objective must be to maintain the net asset value of the undertaking either constant at par (net of earnings), or at the value of the investors' initial capital plus earnings;

(b) it must, with a view to achieving that primary investment objective, invest exclusively in high quality money market instruments with a maturity or residual maturity of no more than 397 days, or regular yield adjustments consistent with such a maturity, and with a weighted average maturity of 60

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days. It may also achieve this objective by investing on an ancillary basis in deposits with credit institutions;

(c) it must provide liquidity through same day or next day settlement.

For the purposes of point (b), a money market instrument shall be considered to be of high quality if it has been awarded the highest available credit rating by each competent rating agency which has rated that instrument. An instrument that is not rated by any competent rating agency shall not be considered to be of high quality.

For the purposes of the second subparagraph, a rating agency shall be considered to be competent if it issues credit ratings in respect of money market funds regularly and on a professional basis and is an eligible ECAI within the meaning of Article 81(1) of Directive [2006/48/EEC].

3. Member States shall require that, where investment firms do not deposit client funds with a central bank, they exercise all due skill, care and diligence in the selection, appointment and periodic review of the credit institution, bank or money market fund where the funds are placed and the arrangements for the holding of those funds.

Member States shall ensure, in particular, that investment firms take into account the expertise and market reputation of such institutions or money market funds with a view to ensuring the protection of clients' rights, as well as any legal or regulatory requirements or market practices related to the holding of client funds that could adversely affect clients' rights.

Member States shall ensure that clients have the right to oppose the placement of their funds in a qualifying money market fund.

Article 19

(Article 13(7) of Directive 2004/39/EC)

Use of client financial instruments

1. Member States shall not allow investment firms to enter into arrangements for securities financing transactions in respect of financial instruments held by them on behalf of a client, or otherwise use such financial instruments for their own account or the account of another client of the firm, unless the following conditions are met:

(a) the client must have given his prior express consent to the use of the instruments on specified terms, as evidenced, in the case of a retail client, by his signature or equivalent alternative mechanism;

(b) the use of that client's financial instruments must be restricted to the specified terms to which the client consents.

2. Member States may not allow investment firms to enter into arrangements for securities financing transactions in respect of financial instruments which are held on behalf of a client in an omnibus account maintained by a third party, or otherwise use financial instruments held in such an account for their own account or for the account of another client unless, in addition to the conditions set out in paragraph 1, at least one of the following conditions is met:

(a) each client whose financial instruments are held together in an omnibus account must have given prior express consent in accordance with point (a) of paragraph 1;

(b) the investment firm must have in place systems and controls which ensure that only financial instruments belonging to clients who have given prior express consent in accordance with point (a) of paragraph 1 are so used.

The records of the investment firm shall include details of the client on whose instructions the use of the financial instruments has been effected, as well as the number of financial instruments used belonging to each client who has given his consent, so as to enable the correct allocation of any loss.

Article 20

(Article 13(7) and (8) of Directive 2004/39/EC)

Reports by external auditors

Member States shall require investment firms to ensure that their external auditors report at least annually to the competent authority of the home Member State of the firm on the adequacy of the firm's arrangements under Articles 13(7) and (8) of Directive 2004/39/EC and this Section.

SECTION 4

CONFLICTS OF INTEREST

Article 21

(Articles 13(3) and 18 of Directive 2004/39/EC)

Conflicts of interest potentially detrimental to a client

Member States shall ensure that, for the purposes of identifying the types of conflict of interest that arise in the course of providing investment and ancillary services or a combination thereof and whose existence may damage the interests of a client, investment firms take into account, by way of minimum criteria, the question of whether the investment

firm or a relevant person, or a person directly or indirectly linked by control to the firm, is in any of the following situations, whether as a result of providing investment or ancillary services or investment activities or otherwise:

(a) the firm or that person is likely to make a financial gain, or avoid a financial loss, at the expense of the client;

(b) the firm or that person has an interest in the outcome of a service provided to the client or of a transaction carried out on behalf of the client, which is distinct from the client's interest in that outcome;

(c) the firm or that person has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client;

(d) the firm or that person carries on the same business as the client;

(e) the firm or that person receives or will receive from a person other than the client an inducement in relation to a service provided to the client, in the form of monies, goods or services, other than the standard commission or fee for that service.

Article 22

(Articles 13(3) and 18(1) of Directive 2004/39/EC)

Conflicts of interest policy

1. Member States shall require investment firms to establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to the size and organisation of the firm and the nature, scale and complexity of its business.

   Where the firm is a member of a group, the policy must also take into account any circumstances, of which the firm is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other members of the group.

2. The conflicts of interest policy established in accordance with paragraph 1 shall include the following content:

   (a) it must identify, with reference to the specific investment services and activities and ancillary services carried out by or on behalf of the investment firm, the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clients;

   (b) it must specify procedures to be followed and measures to be adopted in order to manage such conflicts.

3. Member States shall ensure that the procedures and measures provided for in paragraph 2(b) are designed to ensure that relevant persons engaged in different business activities involving a conflict of interest of the kind specified in paragraph 2(a) carry on those activities at a level of independence appropriate to the

size and activities of the investment firm and of the group to which it belongs, and to the materiality of the risk of damage to the interests of clients.

For the purposes of paragraph 2(b), the procedures to be followed and measures to be adopted shall include such of the following as are necessary and appropriate for the firm to ensure the requisite degree of independence:

(a) effective procedures to prevent or control the exchange of information between relevant persons engaged in activities involving a risk of a conflict of interest where the exchange of that information may harm the interests of one or more clients;

(b) the separate supervision of relevant persons whose principal functions involve carrying out activities on behalf of, or providing services to, clients whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the firm;

(c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;

(d) measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out investment or ancillary services or activities;

(e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate investment or ancillary services or activities where such involvement may impair the proper management of conflicts of interest.

If the adoption or the practice of one or more of those measures and procedures does not ensure the requisite degree of independence, Member States shall require investment firms to adopt such alternative or additional measures and procedures as are necessary and appropriate for those purposes.

4. Member States shall ensure that disclosure to clients, pursuant to Article 18(2) of Directive 2004/39/EC, is made in a durable medium and includes sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the investment or ancillary service in the context of which the conflict of interest arises.

Article 23

(Article 13(6) of Directive 2004/39/EC)

Record of services or activities giving rise to detrimental conflict of interest

Member States shall require investment firms to keep and regularly to update a record of the kinds of investment or ancillary service or investment activity carried out by or on behalf of

the firm in which a conflict of interest entailing a material risk of damage to the interests of one or more clients has arisen or, in the case of an ongoing service or activity, may arise.

Article 24

(Article 19(2) of Directive 2004/39/EC)

Investment research

1. For the purposes of Article 25, 'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:

   (a) it is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;

   (b) if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2004/39/EC.

2. A recommendation of the type covered by Article 1(3) of Directive 2003/125/EC but relating to financial instruments as defined in Directive 2004/39/EC that does not meet the conditions set out in paragraph 1 shall be treated as a marketing communication for the purposes of Directive 2004/39/EC and Member States shall require any investment firm that produces or disseminates the recommendation to ensure that it is clearly identified as such.

   Additionally, Member States shall require those firms to ensure that any such recommendation contains a clear and prominent statement that (or, in the case of an oral recommendation, to the effect that) it has not been prepared in accordance with legal requirements designed to promote the independence of investment research, and that it is not subject to any prohibition on dealing ahead of the dissemination of investment research.

Article 25

(Article 13(3) of Directive 2004/39/EC)

Additional organisational requirements where a firm produces and disseminates investment research

1. Member States shall require investment firms which produce, or arrange for the production of, investment research that is intended or likely to be subsequently

disseminated to clients of the firm or to the public, under their own responsibility or that of a member of their group, to ensure the implementation of all the measures set out in Article 22(3) in relation to the financial analysts involved in the production of the investment research and other relevant persons whose responsibilities or business interests may conflict with the interests of the persons to whom the investment research is disseminated.

2. Member States shall require investment firms covered by paragraph 1 to have in place arrangements designed to ensure that the following conditions are satisfied:

(a) financial analysts and other relevant persons must not undertake personal transactions or trade, other than as market makers acting in good faith and in the ordinary course of market making or in the execution of an unsolicited client order, on behalf of any other person, including the investment firm, in financial instruments to which investment research relates, or in any related financial instruments, with knowledge of the likely timing or content of that investment research which is not publicly available or available to clients and cannot readily be inferred from information that is so available, until the recipients of the investment research have had a reasonable opportunity to act on it;

(b) in circumstances not covered by point (a), financial analysts and any other relevant persons involved in the production of investment research must not undertake personal transactions in financial instruments to which the investment research relates, or in any related financial instruments, contrary to current recommendations, except in exceptional circumstances and with the prior approval of a member of the firm's legal or compliance function;

(c) the investment firms themselves, financial analysts, and other relevant persons involved in the production of the investment research must not accept inducements from those with a material interest in the subject-matter of the investment research;

(d) the investment firms themselves, financial analysts, and other relevant persons involved in the production of the investment research must not promise issuers favourable research coverage;

(e) issuers, relevant persons other than financial analysts, and any other persons must not before the dissemination of investment research be permitted to review a draft of the investment research for the purpose of verifying the accuracy of factual statements made in that research, or for any other purpose other than verifiying compliance with the firm's legal obligations, if the draft includes a recommendation or a target price.

For the purposes of this paragraph, 'related financial instrument' means a financial instrument the price of which is closely affected by price movements in another financial instrument which is the subject of investment research, and includes a derivative on that other financial instrument.

3. Member States shall exempt investment firms which disseminate investment research produced by another person to the public or to clients from complying with paragraph 1 if the following criteria are met:

(a) the person that produces the investment research is not a member of the group to which the investment firm belongs;

(b) the investment firm does not substantially alter the recommendations within the investment research;

(c) the investment firm does not present the investment research as having been produced by it;

(d) the investment firm verifies that the producer of the research is subject to requirements equivalent to the requirements under this Directive in relation to the production of that research, or has established a policy setting such requirements.

Chapter III

Operating conditions for investment firms

SECTION 1

INDUCEMENTS

Article 26

(Article 19(1) of Directive 2004/39/EC)

Inducements

Member States shall ensure that investment firms are not regarded as acting honestly, fairly and professionally in accordance with the best interests of a client if, in relation to the provision of an investment or ancillary service to the client, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:

(a) a fee, commission or non-monetary benefit paid or provided to or by the client or a person on behalf of the client;

(b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied:

(i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate

and understandable, prior to the provision of the relevant investment or ancillary service;

(ii) the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service to the client and not impair compliance with the firm's duty to act in the best interests of the client;

(c) proper fees which enable or are necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients.

Member States shall permit an investment firm, for the purposes of point (b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that it undertakes to disclose further details at the request of the client and provided that it honours that undertaking.

SECTION 2

INFORMATION TO CLIENTS AND POTENTIAL CLIENTS

Article 27

(Article 19(2) of Directive 2004/39/EC)

Conditions with which information must comply in order to be fair, clear and not misleading

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 28

(Article 19(3) of Directive 2004/39/EC)

Information concerning client categorisation

1. Member States shall ensure that investment firms notify new clients, and existing clients that the investment firm has newly categorised as required by Directive 2004/39/EC, of their categorisation as a retail client, a professional client or an eligible counterparty in accordance with that Directive.

2. Member States shall ensure that investment firms inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that it would entail.

3. Member States shall permit investment firms, either on their own initiative or at the request of the client concerned:

   (a) to treat as a professional or retail client a client that might otherwise be classified as an eligible counterparty pursuant to Article 24(2) of Directive 2004/39/EC;

   (b) to treat as a retail client a client that is considered as a professional client pursuant to Section I of Annex II to Directive 2004/39/EC.

Article 29

(Article 19(3) of Directive 2004/39/EC)

General requirements for information to clients

1. Member States shall require investment firms, in good time before a retail client or potential retail client is bound by any agreement for the provision of investment services or ancillary services or before the provision of those services, whichever is the earlier, to provide that client or potential client with the following information:

   (a) the terms of any such agreement;

   (b) the information required by Article 30 relating to that agreement or to those investment or ancillary services.

2. Member States shall require investment firms, in good time before the provision of investment services or ancillary services to retail clients or potential retail clients, to provide the information required under Articles 30 to 33.

3. Member States shall require investment firms to provide professional clients with the information referred to in Article 32(5) and (6) in good time before the provision of the service concerned.

4. The information referred to in paragraphs 1 to 3 shall be provided in a durable medium or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

5. By way of exception to paragraphs 1 and 2, Member States shall permit investment firms, in the following circumstances, to provide the information required under paragraph 1 to a retail client immediately after that client is bound by any agreement for the provision of investment services or ancillary services, and the information required under paragraph 2 immediately after starting to provide the service:

   (a) the firm was unable to comply with the time-limits specified in paragraphs 1 and 2 because, at the request of the client, the agreement was concluded using a means of distance communication which prevents the firm from providing the information in accordance with paragraph 1 or 2;

   (b) in any case where Article 3(3) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC[15] does not otherwise apply, the investment firm complies with the requirements of that Article in relation to the retail client or potential retail client, as if that client or potential client were a 'consumer' and the investment firm were a 'supplier' within the meaning of that Directive.

[15] OJ L 271, 9.10.200, p. 16

6. Member State shall ensure that investment firms notify a client in good time about any material change to the information provided under Articles 30 to 33 which is relevant to a service that the firm is providing to that client. That notification shall be given in a durable medium if the information to which it relates is given in a durable medium.

7. Member States shall require investment firms to ensure that information contained in a marketing communication is consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services.

8. Member States shall ensure that, where a marketing communication contains an offer or invitation of the following nature and specifies the manner of response or includes a form by which any response may be made, it includes such of the information referred to in Articles 30 to 33 as is relevant to that offer or invitation:

(a) an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service with any person who responds to the communication;

(b) an invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service.

However, the first subparagraph shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the potential retail client must refer to another document or documents, which, alone or in combination, contain that information.

Article 30

(first indent of Article 19(3) of Directive 2004/39/EC)

Information about the investment firm and its services for retail clients and potential retail clients

1. Member States shall require investment firms to provide retail clients or potential retail clients with the following general information, where relevant:

(a) the name and address of the investment firm, and the contact details necessary to enable clients to communicate effectively with the firm;

(b) the languages in which the client may communicate with the investment firm, and receive documents and other information from the firm;

(c) the methods of communication to be used between the investment firm and the client including, where relevant, those for the sending and reception of orders;

(d) a statement of the fact that the investment firm is authorised and the name and contact address of the competent authority that has authorised it;

(e) where the investment firm is acting through a tied agent, a statement of this fact specifying the Member State in which that agent is registered;

(f) the nature, frequency and timing of the reports on the performance of the service to be provided by the investment firm to the client in accordance with Article 19(8) of Directive 2004/39/EC;

(g) if the investment firm holds client financial instruments or client funds, a summary description of the steps which it takes to ensure their protection, including summary details of any relevant investor compensation or deposit guarantee scheme which applies to the firm by virtue of its activities in a Member State;

(h) a description, which may be provided in summary form, of the conflicts of interest policy maintained by the firm in accordance with Article 22;

(i) at any time that the client requests it, further details of that conflicts of interest policy in a durable medium or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

2. Member States shall ensure that, when providing the service of portfolio management, investment firms establish an appropriate method of evaluation and comparison such as a meaningful benchmark, based on the investment objectives of the client and the types of financial instruments included in the client portfolio, so as to enable the client for whom the service is provided to assess the firm's performance.

3. Member States shall require that where investment firms propose to provide portfolio management services to a retail client or potential retail client, they provide the client, in addition to the information required under paragraph 1, with such of the following information as is applicable:

(a) information on the method and frequency of valuation of the financial instruments in the client portfolio;

(b) details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio;

(c) a specification of any benchmark against which the performance of the client portfolio will be compared;

(d) the types of financial instrument that may be included in the client portfolio and types of transaction that may be carried out in such instruments, including any limits;

(e) the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion.

Article 31

(second indent of Article 19(3) of Directive 2004/39/EC)

Information about financial instruments

1. Member States shall require investment firms to provide clients or potential clients with a general description of the nature and risks of financial instruments, taking into account, in particular, the client's categorisation as either a retail client or a professional client. That description must explain the nature of the specific type of instrument concerned, as well as the risks particular to that specific type of instrument in sufficient detail to enable the client to take investment decisions on an informed basis.

2. The description of risks shall include, where relevant to the specific type of instrument concerned and the status and level of knowledge of the client, the following elements:

   (a) the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment;

   (b) the volatility of the price of such instruments and any limitations on the available market for such instruments;

   (c) the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments;

   (d) any margin requirements or similar obligations, applicable to instruments of that type.

   Member States may specify the precise terms, or the contents, of the description of risks required under this paragraph.

3. If an investment firm provides a retail client or potential retail client with information about a financial instrument that is the subject of a current offer to the public and a prospectus has been published in connection with that offer in accordance with Directive 2003/71/EC, that firm shall inform the client or potential client where that prospectus is made available to the public.

4. Where the risks associated with a financial instrument composed of two or more different financial instruments or services are likely to be greater than the risks associated with any of the components, the investment firm shall provide an adequate description of the components of that instrument and the way in which its interaction increases the risks.

5. In the case of financial instruments that incorporate a guarantee by a third party, the information about the guarantee shall include sufficient detail about the guarantor

and the guarantee to enable the retail client or potential retail client to make a fair assessment of the guarantee.

Article 32

(first indent of Article 19(3) of Directive 2004/39/EC)

Information requirements concerning safeguarding of client financial instruments or client funds

1. Member States shall ensure that, where investment firms hold financial instruments or funds belonging to retail clients, they provide those retail clients or potential retail clients with such of the information specified in paragraphs 2 to 7 as is relevant.

2. The investment firm shall inform the retail client or potential retail client where the financial instruments or funds of that client may be held by a third party on behalf of the investment firm and of the responsibility of the investment firm under the applicable national law for any acts or omissions of the third party and the consequences for the client of the insolvency of the third party.

3. Where financial instruments of the retail client or potential retail client may, if permitted by national law, be held in an omnibus account by a third party, the investment firm shall inform the client of this fact and shall provide a prominent warning of the resulting risks.

4. The investment firm shall inform the retail client or potential retail client where it is not possible under national law for client financial instruments held with a third party to be separately identifiable from the proprietary financial instruments of that third party or of the investment firm and shall provide a prominent warning of the resulting risks.

5. The investment firm shall inform the client or potential client where accounts that contain financial instruments or funds belonging to that client or potential client are or will be subject to the law of a jurisdiction other than that of a Member State and shall indicate that the rights of the client or potential client relating to those financial instruments or funds may differ accordingly.

6. An investment firm shall inform the client about the existence and the terms of any security interest or lien which the firm has or may have over the client's financial instruments or funds, or any right of set-off it holds in relation to those instruments or funds. Where applicable, it shall also inform the client of the fact that a depository may have a security interest or lien over, or right of set-off in relation to those instruments or funds.

7. An investment firm, before entering into securities financing transactions in relation to financial instruments held by it on behalf of a retail client, or before otherwise using such financial instruments for its own account or the account of another client, shall in good time before the use of those instruments provide the retail client, in a durable medium, with clear, full and accurate information on the obligations and

responsibilities of the investment firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved.

Article 33

(fourth indent of Article 19(3) of Directive 2004/39/EC)

Information about costs and associated charges

Member States shall require investment firms to provide their retail clients and potential retail clients with information on costs and associated charges that includes such of the following elements as are relevant:

(a) the total price to be paid by the client in connection with the financial instrument or the investment service or ancillary service, including all related fees, commissions, charges and expenses, and all taxes payable via the investment firm or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it;

(b) where any part of the total price referred to in point (a) is to be paid in or represents an amount of foreign currency, an indication of the currency involved and the applicable currency conversion rates and costs;

(c) notice of the possibility that other costs, including taxes, related to transactions in connection with the financial instrument or the investment service may arise for the client that are not paid via the investment firm or imposed by it;

(d) the arrangements for payment or other performance.

For the purposes of point (a), the commissions charged by the firm shall be itemised separately in every case.

Article 34

(second and fourth indent of Article 19(3) of Directive 2004/39/EC)

Information drawn up in accordance with Directive 85/611/EEC

1. Member States shall ensure that in respect of units in a collective investment undertaking covered by Directive 85/611/EEC, a simplified prospectus complying with Article 28 of that Directive is regarded as appropriate information for the purposes of the second indent of Article 19(3) of Directive 2004/39/EC.

2. Member States shall ensure that in respect of units in a collective investment undertaking covered by Directive 85/611/EEC, a simplified prospectus complying with Article 28 of that Directive is regarded as appropriate information for the purposes of the fourth indent of Article 19(3) of Directive 2004/39/EC with respect

to the costs and associated charges related to the UCITS itself, including the exit and entry commissions.

SECTION 3

ASSESSMENT OF SUITABILITY AND APPROPRIATENESS

Article 35

(Article 19(4) of Directive 2004/39/EC)

Assessment of suitability

1. Member States shall ensure that investment firms obtain from clients or potential clients such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:

   (a) it meets the investment objectives of the client in question;

   (b) it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;

   (c) it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

2. Where an investment firm provides an investment service to a professional client it shall be entitled to assume that, in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of paragraph 1(c).

   Where that investment service consists in the provision of investment advice to a professional client covered by Section 1 of Annex II to Directive 2004/39/EC, the investment firm shall be entitled to assume for the purposes of paragraph 1(b) that the client is able financially to bear any related investment risks consistent with the investment objectives of that client.

3. The information regarding the financial situation of the client or potential client shall include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

4. The information regarding the investment objectives of the client or potential client shall include, where relevant, information on the length of time for which the client

wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

5. Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 19(4) of Directive 2004/39/EC, the firm shall not recommend investment services or financial instruments to the client or potential client.

Article 36

(Article 19(5) of Directive 2004/39/EC)

Assessment of appropriateness

Member States shall require investment firms, when assessing whether an investment service as referred to in Article 19(5) of Directive 2004/39/EC is appropriate for a client, to determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded.

For those purposes, an investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

Article 37

(Article 19(4) and (5) of Directive 2004/39/EC)

Provisions common to the assessment of suitability or appropriateness

1. Member States shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

   (a) the types of service, transaction and financial instrument with which the client is familiar;

   (b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;

   (c) the level of education, and profession or relevant former profession of the client or potential client.

2. An investment firm shall not encourage a client or potential client not to provide information required for the purposes of Article 19(4) and (5) of Directive 2004/39/EC.

3. An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

Article 38

(first indent of Article 19(6) of Directive 2004/39/EC)

Provision of services in non-complex instruments

A financial instrument which is not specified in the first indent of Article 19(6) of Directive 2004/39/EC shall be considered as non-complex if it satisfies the following criteria:

(a) it does not fall within Article 4(1)(18)(c) of, or points (4) to (10) of Section C of Annex I to, Directive 2004/39/EC;

(b) there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;

(c) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;

(d) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

Article 39

(Article 19(1) and 19(7) of Directive 2004/39/EC)

Retail client agreement

Member States shall require an investment firm that provides an investment service other than investment advice to a new retail client for the first time after the date of application of this Directive to enter into a written basic agreement, in paper or another durable medium, with the client setting out the essential rights and obligations of the firm and the client.

The rights and duties of the parties to the agreement may be incorporated by reference to other documents or legal texts.

SECTION 4

REPORTING TO CLIENTS

Article 40

(Article 19(8) of Directive 2004/39/EC)

Reporting obligations in respect of execution of orders other than for portfolio management

1. Member States shall ensure that where investment firms have carried out an order, other than for portfolio management, on behalf of a client, they take the following action in respect of that order:

   (a) the investment firm must promptly provide the client, in a durable medium, with the essential information concerning the execution of that order;

   (b) in the case of a retail client, the investment firm must send the client a notice in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, if the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

   Point (b) shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the retail client by another person.

   Points (a) and (b) shall not apply where orders executed on behalf of clients relate to bonds funding mortgage loan agreements with the said clients, in which case the report on the transaction shall be made at the same time as the terms of the mortgage loan are comminicated, but no later than one month after the execution of the order.

2. In addition to the requirements under paragraph 1, Member States shall require investment firms to supply the client, on request, with information about the status of his order.

3. Member States shall ensure that, in the case of orders for a retail clients relating to units or shares in a collective investment undertaking which are executed periodically, investment firms either take the action specified in point (b) of paragraph 1 or provide the retail client, at least once every six months, with the information listed in paragraph 4 in respect of those transactions.

4. The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with Table 1 of Annex I to [the Implementing Regulation]:

   (a) the reporting firm identification;

(b) the name or other designation of the client;

(c) the trading day;

(d) the trading time;

(e) the type of the order;

(f) the venue identification;

(g) the instrument identification;

(h) the buy/sell indicator;

(i) the nature of the order if other than buy/sell;

(j) the quantity;

(k) the unit price;

(l) the total consideration;

(m) a total sum of the commissions and expenses charged and, where the retail client so requests, an itemised breakdown;

(n) the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client;

(o) if the client's counterparty was the investment firm itself or any person in the investment firm's group or another client of the investment firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.

For the purposes of point (k), where the order is executed in tranches, the investment firm may supply the client with information about the price of each tranche or the average price. Where the average price is provided, the investment firm shall supply the retail client with information about the price of each tranche upon request.

5. The investment firm may provide the client with the information referred to in paragraph 4 using standard codes if it also provides an explanation of the codes used.

Article 41

(Article 19(8) of Directive 2004/39/EC)

Reporting obligations in respect of portfolio management

1. Member States shall require investments firms which provide the service of portfolio management to clients to provide each such client with a periodic statement in a durable medium of the portfolio management activities carried out on behalf of that client unless such a statement is provided by another person.

2. In the case of retail clients, the periodic statement required under paragraph 1 shall include, where relevant, the following information:

   (a) the name of the investment firm;

   (b) the name or other designation of the retail client's account;

   (c) a statement of the contents and the valuation of the portfolio, including details of each financial instrument held, its market value, or fair value if market value is unavailable and the cash balance at the beginning and at the end of the reporting period, and the performance of the portfolio during the reporting period;

   (d) the total amount of fees and charges incurred during the reporting period, itemising at least total management fees and total costs associated with execution, and including, where relevant, a statement that a more detailed breakdown will be provided on request;

   (e) a comparison of performance during the period covered by the statement with the investment performance benchmark (if any) agreed between the investment firm and the client;

   (f) the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio;

   (g) information about other corporate actions giving rights in relation to financial instruments held in the portfolio;

   (h) for each transaction executed during the period, the information referred to in Article 40(4)(c) to (l) where relevant, unless the client elects to receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

3. In the case of retail clients, the periodic statement referred to in paragraph 1 shall be provided once every 6 months, except in the following cases:

   (a) where the client so requests, the periodic statement must be provided every 3 months;

(b) in cases where paragraph 4 applies, the periodic statement must be provided at least once every 12 months;

(c) where the agreement between an investment firm and a retail client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.

Investment firms shall inform retail clients that they have the right to make requests for the purposes of point (a).

However, the exception provided for in point (b) shall not apply in the case of transactions in financial instruments covered by Article 4(1)(18)(c) of, or any of points 4 to 10 of Section C in Annex I to, Directive 2004/39/EC.

4. Member States shall require investment firms, in cases where the client elects to receive information about executed transactions on a transaction-by-transaction basis, to provide promptly to the client, on the execution of a transaction by the portfolio manager, the essential information concerning that transaction in a durable medium.

Where the client concerned is a retail client, the investment firm must send him a notice confirming the transaction and containing the information referred to in Article 40(4) no later than the first business day following that execution or, if the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

The second subparagraph shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the retail client by another person.

Article 42

(Article 19(8) of Directive 2004/39/EC)

Additional reporting obligations for portfolio management or contingent liability transactions

Member States shall ensure that where investment firms provide portfolio management transactions for retail clients or operate retail client accounts that include an uncovered open position in a contingent liability transaction, they also report to the retail client any losses exceeding any predetermined threshold, agreed between the firm and the client, no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

Article 43

(Article 19(8) of Directive 2004/39/EC)

Statements of client financial instruments or client funds

1. Member States shall require investment firms that hold client financial instruments or client funds to send at least once a year, to each client for whom they hold financial instruments or funds, a statement in a durable medium of those financial instruments or funds unless such a statement has been provided in any other periodic statement.

   The first subparagraph shall not apply to a credit institution authorised under Directive 2000/12/EC in respect of deposits within the meaning of that Directive held by that institution.

2. The statement of client assets referred to in paragraph 1 shall include the following information:

   (a) details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;

   (b) the extent to which any client financial instruments or client funds have been the subject of securities financing transactions;

   (c) the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued.

   In cases where the portfolio of a client includes the proceeds of one or more unsettled transactions, the information referred to in point (a) may be based either on the trade date or the settlement date, provided that the same basis is applied consistently to all such information in the statement.

3. Member States shall permit investment firms which hold financial instruments or funds and which carry out the service of portfolio management for a client to include the statement of client assets referred to in paragraph 1 in the periodic statement it provides to that client pursuant to Article 41(1).

SECTION 5

BEST EXECUTION

Article 44

(Articles 21(1) and 19(1) of Directive 2004/39/EC)

Best execution criteria

1. Member States shall ensure that, when executing client orders, investment firms take into account the following criteria for determining the relative importance of the factors referred to in Article 21(1) of Directive 2004/39/EC:

   (a) the characteristics of the client including the categorisation of the client as retail or professional;

   (b) the characteristics of the client order;

   (c) the characteristics of financial instruments that are the subject of that order;

   (d) the characteristics of the execution venues to which that order can be directed.

   For the purposes of this Article and Article 46, 'execution venue' means a regulated market, an MTF, a systematic internaliser, or a market maker or other liquidity provider or an entity that performs a similar function in a third country to the functions performed by any of the foregoing.

2. An investment firm satisfies its obligation under Article 21(1) of Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order or a specific aspect of an order following specific instructions from the client relating to the order or the specific aspect of the order.

3. Where an investment firm executes an order on behalf of a retail client, the best possible result shall be determined in terms of the total consideration, representing the price of the financial instrument and the costs related to execution, which shall include all expenses incurred by the client which are directly related to the execution of the order, including execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order.

   For the purposes of delivering best execution where there is more than one competing venue to execute an order for a financial instrument, in order to assess and compare the results for the client that would be achieved by executing the order on each of the execution venues listed in the firm's order execution policy that is capable of executing that order, the firm's own commissions and costs for executing the order on each of the eligible execution venues shall be taken into account in that assessment.

4. Member States shall require that investment firms do not structure or charge their commissions in such a way as to discriminate unfairly between execution venues.

5. Before 1 November 2008 the Commission shall present a report to the European Parliament and to the Council on the availability, comparability and consolidation of information concerning the quality of execution of various execution venues.

Article 45

(Article 19(1) of Directive 2004/39/EC)

Duty of investment firms carrying out portfolio management and reception and transmission of orders to act in the best interests of the client

1. Member States shall require investment firms, when providing the service of portfolio management, to comply with the obligation under Article 19(1) of Directive 2004/39/EC to act in accordance with the best interests of their clients when placing orders with other entities for execution that result from decisions by the investment firm to deal in financial instruments on behalf of its client.

2. Member States shall require investment firms, when providing the service of reception and transmission of orders, to comply with the obligation under Article 19(1) of Directive 2004/39/EC to act in accordance with the best interests of their clients when transmitting client orders to other entities for execution.

3. Member States shall ensure that, in order to comply with paragraphs 1 or 2, investment firms take the actions mentioned in paragraphs 4 to 6.

4. Investment firms shall take all reasonable steps to obtain the best possible result for their clients taking into account the factors referred to in Article 21(1) of Directive 2004/39/EC. The relative importance of these factors shall be determined by reference to the criteria set out in Article 44(1) and, for retail clients, to the requirement under Article 44(3).

   An investment firm satisfies its obligations under paragraph 1 or 2, and is not required to take the steps mentioned in this paragraph, to the extent that it follows specific instructions from its client when placing an order with, or transmitting an order to, another entity for execution.

5. Investment firms shall establish and implement a policy to enable them to comply with the obligation in paragraph 4. The policy shall identify, in respect of each class of instruments, the entities with which the orders are placed or to which the investment firm transmits orders for execution. The entities identified must have execution arrangements that enable the investment firm to comply with its obligations under this Article when it places or transmits orders to that entity for execution.

   Investment firms shall provide appropriate information to their clients on the policy established in accordance with this paragraph.

6. Investment firms shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 5 and, in particular, the execution quality of the entities identified in that policy and, where appropriate, correct any deficiencies.

In addition, investment firms shall review the policy annually. Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain the best possible result for their clients.

7. This Article shall not apply when the investment firm that provides the service of portfolio management and/or reception and transmission of orders also executes the orders received or the decisions to deal on behalf of its client's portfolio. In those cases Article 21 of Directive 2004/39/EC applies.

Article 46

(Article 21(3) and (4) of Directive 2004/39/EC)

Execution policy

1. Member States shall ensure that investment firms review annually the execution policy established pursuant to Article 21(2) of Directive 2004/39/EC, as well as their order execution arrangements.

Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain the best possible result for the execution of its client orders on a consistent basis using the venues included in its execution policy.

2. Investment firms shall provide retail clients with the following details on their execution policy in good time prior to the provision of the service:

(a) an account of the relative importance the investment firm assigns, in accordance with the criteria specified in Article 44(1), to the factors referred to in Article 21(1) of Directive 2004/39/EC, or the process by which the firm determines the relative importance of those factors;

(b) a list of the execution venues on which the firm places significant reliance in meeting its obligation to take all reasonable steps to obtain on a consistent basis the best possible result for the execution of client orders;

(c) a clear and prominent warning that any specific instructions from a client may prevent the firm from taking the steps that it has designed and implemented in its execution policy to obtain the best possible result for the execution of those orders in respect of the elements covered by those instructions.

That information shall be provided in a durable medium, or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

SECTION 6

CLIENT ORDER HANDLING

Article 47

(Articles 22(1) and 19(1) of Directive 2004/39/EC)

General principles

1. Member States shall require investment firms to satisfy the following conditions when carrying out client orders:

   (a) they must ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;

   (b) they must carry out otherwise comparable client orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise;

   (c) they must inform a retail client about any material difficulty relevant to the proper carrying out of orders promptly upon becoming aware of the difficulty.

2. Where an investment firm is responsible for overseeing or arranging the settlement of an executed order, it shall take all reasonable steps to ensure that any client financial instruments or client funds received in settlement of that executed order are promptly and correctly delivered to the account of the appropriate client.

3. An investment firm shall not misuse information relating to pending client orders, and shall take all reasonable steps to prevent the misuse of such information by any of its relevant persons.

Article 48

(Articles 22(1) and 19(1) of Directive 2004/39/EC)

Aggregation and allocation of orders

1. Member States shall not permit investment firms to carry out a client order or a transaction for own account in aggregation with another client order unless the following conditions are met:

   (a) it must be unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any client whose order is to be aggregated;

(b) it must be disclosed to each client whose order is to be aggregated that the effect of aggregation may work to its disadvantage in relation to a particular order;

(c) an order allocation policy must be established and effectively implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders and transactions, including how the volume and price of orders determines allocations and the treatment of partial executions.

2. Member States shall ensure that where an investment firm aggregates an order with one or more other client orders and the aggregated order is partially executed, it allocates the related trades in accordance with its order allocation policy.

Article 49

(Articles 22(1) and 19(1) of Directive 2004/39/EC)

Aggregation and allocation of transactions for own account

1. Member States shall ensure that investment firms which have aggregated transactions for own account with one or more client orders do not allocate the related trades in a way that is detrimental to a client.

2. Member States shall require that, where an investment firm aggregates a client order with a transaction for own account and the aggregated order is partially executed, it allocates the related trades to the client in priority to the firm.

However, if the firm is able to demonstrate on reasonable grounds that without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the transaction for own account proportionally, in accordance with its order allocation policy referred to in Article 48(1)(c).

3. Member States shall require investment firms, as part of the order allocation policy referred to in Article 48(1)(c), to put in place procedures designed to prevent the reallocation, in a way that is detrimental to the client, of transactions for own account which are executed in combination with client orders.

SECTION 7

ELIGIBLE COUNTERPARTIES

Article 50

(Article 24(3) of Directive 2004/39/EC)

Eligible counterparties

1. Member States may recognise an undertaking as an eligible counterparty if that undertaking falls within a category of clients who are to be considered professional clients in accordance with paragraphs 1, 2 and 3 of Section I of Annex II to Directive 2004/39/EC**,** excluding any category which is explicitly mentioned in Article 24(2) of that Directive.

   On request, Member States may also recognise as eligible counterparties undertakings which fall within a category of clients who are to be considered professional clients in accordance with Section II of Annex II to Directive 2004/39/EC. In such cases, however, the undertaking concerned shall be recognised as an eligible counterparty only in respect of the services or transactions for which it could be treated as a professional client.

2. Where, pursuant to the second subparagraph of Article 24(2) of Directive 2004/39/EC, an eligible counterparty requests treatment as a client whose business with an investment firm is subject to Articles 19, 21 and 22 of that Directive, but does not expressly request treatment as a retail client, and the investment firm agrees to that request, the firm shall treat that eligible counterparty as a professional client.

   However, where that eligible counterparty expressly requests treatment as a retail client, the provisions in respect of requests of non-professional treatment specified in the second, third and fourth sub-paragraphs of Section I of Annex II to Directive 2004/39/EC shall apply.

SECTION 8

RECORD-KEEPING

Article 51

(Article 13(6) of Directive 2004/39(EC)

Retention of records

1. Member States shall require investment firms to retain all the records required under Directive 2004/39/EC and its implementing measures for a period of at least five years.

   Additionally, records which set out the respective rights and obligations of the investment firm and the client under an agreement to provide services, or the terms on which the firm provides services to the client, shall be retained for at least the duration of the relationship with the client.

   However, competent authorities may, in exceptional circumstances, require investment firms to retain any or all of those records for such longer period as is justified by the nature of the instrument or transaction, if that is necessary to enable the authority to exercise its supervisory functions under Directive 2004/39/EC.

   Following the termination of the authorisation of an investment firm, Member States or competent authorities may require the firm to retain records for the outstanding term of the five year period required under the first subparagraph.

2. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

   (a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;

   (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;

   (c) it must not be possible for the records otherwise to be manipulated or altered.

3. The competent authority of each Member State shall draw up and maintain a list of the minimum records investment firms are required to keep under Directive 2004/39/EC and its implementing measures.

4. Record-keeping obligations under Directive 2004/39/EC and in this Directive are without prejudice to the right of Member States to impose obligations on investment

firms relating to the recording of telephone conversations or electronic communications involving client orders.

5. Before the 31st December 2009 the Commission shall, in the light of discussions with the Committee of European Securities Regulators, report to the European Parliament and the Council on the continued appropriateness of the provisions of paragraph 4.

SECTION 9

DEFINED TERMS FOR THE PURPOSES OF DIRECTIVE 2004/39/EC

Article 52

(Article 4(1)(4) of Directive 2004/39/EC)

Investment advice

For the purposes of the definition of 'investment advice' in Article 4(1)(4) of Directive 2004/39/EC, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

(a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;

(b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.

Chapter IV

Final provisions

Article 53

Transposition

1. Member States shall adopt and publish, by 31 January 2007 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

2. Member States shall apply those provisions from 1 November 2007.

3. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 54

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 55

Addressees

This Directive is addressed to the Member States.

Done at Brussels, […]

For the Commission
[…]
Member of the Commission

KOMMISSIONENS FÖRSLAG TILL GENOMFÖRANDEFÖRORDNING

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, DRAFT 30.06.06
[Institutional Reference]

Draft

COMMISSION REGULATION

implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive

Note: this draft text is based on the text approved by the European Securities Committee on 26 June 2006 (with typographical corrections). It remains subject to Parliamentary oversight.

The final text will be that adopted by the Commission (probably in September 2006) and subsequently published in the Official Journal.

Draft

COMMISSION REGULATION

implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive

(Text with EEA Relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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[1], and in particular Articles 4(1)(2), 4(1)(7) and 4(2), Article 13(10), Article 25(7), Article 27(7), Article 28(3), Article 29(3), Article 30(3), Article 40(6), Article 44(3), Article 45(3), Article 56(5), and Article 58(4) thereof,

Whereas:

(1) Directive 2004/39/EC establishes the general framework for a regulatory regime for financial markets in the Community, setting out, among other matters: operating conditions relating to the performance by investment firms of investment and ancillary services, and investment activities; organisational requirements (including record-keeping obligations) for investment firms performing such services and activities on a professional basis, and for regulated markets; transaction reporting requirements in respect of transactions in financial instruments; transparency requirements in respect of transactions in shares.

(2) It is appropriate that the provisions of this Regulation take that legislative form in order to ensure a harmonised regime in all Member States, to promote market integration and the cross-border provision of investment and ancillary services, and to facilitate the further consolidation of the single market. Provisions relating to certain aspects of record-keeping, and to transaction reporting, transparency and commodity derivatives have few interfaces with national law and with detailed laws governing client relationships.

(3) Detailed and fully harmonised transparency requirements and rules regulating transaction reporting are appropriate so as to ensure equivalent market conditions and the smooth operation of securities markets throughout the Community, and to facilitate the effective integration of those markets. Certain aspects of record-keeping are

[1] OJ L 145, 30.4.2004, p. 1.

closely allied as they make use of the same concepts as are defined for transaction reporting and transparency purposes.

(4) The regime established by Directive 2004/39/EC governing transaction reporting requirements in respect of transactions in financial instruments aims to ensure that relevant competent authorities are properly informed about transactions in which they have a supervisory interest. For those purposes it is necessary to ensure that a single data set is collected from all investment firms with a minimum of variation between Member States, so as to minimise the extent to which businesses operating across borders are subject to different reporting obligations, and so as to maximise the proportion of data held by a competent authority that can be shared with other competent authorities. The measures are also designed to ensure that competent authorities are in a position to carry out their obligations under that Directive as expeditiously and efficiently as possible.

(5) The regime established by Directive 2004/39/EC governing transparency requirements in respect of transactions in shares admitted to trading on a regulated market aims to ensure that investors are adequately informed as to the true level of actual and potential transactions in such shares, whether those transactions take place on regulated markets, multilateral trading facilities, hereinafter 'MTFs', systematic internalisers, or outside those trading venues. Those requirements are part of a broader framework of rules designed to promote competition between trading venues for execution services so as to increase investor choice, encourage innovation, lower transaction costs, and increase the efficiency of the price formation process on a pan-Community basis. A high degree of transparency is an essential part of this framework, so as to ensure a level playing field between trading venues so that the price discovery mechanism in respect of particular shares is not impaired by the fragmentation of liquidity, and investors are not thereby penalised. On the other hand, that Directive recognises that there may be circumstances where exemptions from pre-trade transparency obligations, or deferral of post-trade transparency obligations, may be necessary. This Regulation sets out details of those circumstances, bearing in mind the need both to ensure a high level of transparency, and to ensure that liquidity on trading venues and elsewhere is not impaired as an unintended consequence of obligations to disclose transactions and thereby to make public risk positions.

(6) For the purposes of the provisions on record-keeping, a reference to the type of the order should be understood as referring to its status as a limit order, market order, or other specific type of order. For the purposes of the provisions on record-keeping, a reference to the nature of the order or transaction should be understood as referring to orders to subscribe for securities or the subscription of securities, or to exercise an option or the exercise of an option, or similar client orders or transactions.

(7) It is not necessary at this stage to specify or prescribe in detail the type, nature and sophistication of the arrangements for the exchange of information between competent authorities.

(8) Where a notification made by a competent authority relating to the alternative determination of the most relevant market in terms of liquidity is not acted upon within a reasonable time, or where a competent authority does not agree with the calculation made by the other authority, the competent authorities concerned should

seek to find a solution. It is open to the competent authorities, where appropriate, to discuss the matter in the Committee of European Securities Regulators.

(9) The competent authorities should coordinate the design and establishment of arrangements for the exchange of transaction information between themselves. Again it is open to the competent authorities to discuss those matters in the Committee of European Securities Regulators. Competent authorities should report to the Commission which should inform the European Securities Committee of those arrangements. In carrying out the coordination, competent authorities should consider the need to monitor the activities of investment firms effectively, so as to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market in the Community, the need for decisions to be based on a thorough cost-benefit analysis, the need to ensure that transaction information is used only for the proper discharge of the functions of competent authorities and finally the need to have effective and accountable governance arrangements for any common system that might be considered necessary.

(10) It is appropriate to set the criteria for determining when the operations of a regulated market are of substantial importance in a host Member State, and the consequences of that status in such a way as to avoid creating an obligation on a regulated market to deal with or be made subject to more than one competent authority where otherwise there would be no such obligation.

(11) ISO 10962 (Classification of financial instruments code) is an example of a uniform internationally accepted standard for financial instrument classification.

(12) If granting waivers in relation to pre-trade transparency requirements, or authorising the deferral of post-trade transparency obligations, competent authorities should treat all regulated markets and MTFs equally and in a non-discriminatory manner, so that a waiver or deferral is granted either to all regulated markets and MTFs that they authorise under Directive 2004/39/EC, or to none. Competent authorities which grant the waivers or deferrals should not impose additional requirements.

(13) It is appropriate to consider that a trading algorithm operated by a regulated market or MTF usually should seek to maximise the volume traded, but other trading algorithms should be possible.

(14) A waiver from pre-trade transparency obligations arising under Articles 29 or 44 of Directive 2004/39/EC conferred by a competent authority should not enable investment firms to avoid such obligations in respect of those transactions in liquid shares which they conclude on a bilateral basis under the rules of a regulated market or an MTF where, if carried out outside the rules of the regulated market or MTF, those transactions would be subject to the requirements to publish quotes set out in Article 27 of that Directive.

(15) An activity should be considered as having a material commercial role for an investment firm if the activity is a significant source of revenue, or a significant source of cost. An assessment of significance for these purposes should, in every case, take into account the extent to which the activity is conducted or organised separately, the monetary value of the activity, and its comparative significance by reference both to the overall business of the firm and to its overall activity in the market for the share

concerned in which the firm operates. It should be possible to consider an activity to be a significant source of revenue for a firm even if only one or two of the factors mentioned is relevant in a particular case.

(16) Shares not traded daily should not be considered as having a liquid market for the purposes of Directive 2004/39/EC. However, if, for exceptional reasons, trading in a share is suspended for reasons related to the preservation of an orderly market or force majeure and therefore a share is not traded during some trading days, this should not mean that the share cannot be considered to have a liquid market.

(17) The requirement to make certain quotes, orders or transactions public pursuant to Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC and this Regulation should not prevent regulated markets and MTFs from requiring their members or participants to make public other such information.

(18) Information which is required to be made available as close to real time as possible should be made available as close to instantaneously as technically possible, assuming a reasonable level of efficiency and of expenditure on systems on the part of the person concerned. The information should only be published close to the three minute maximum limit in exceptional cases where the systems available do not allow for a publication in a shorter period of time.

(19) For the purposes of the provisions of this Regulation as to the admission to trading on a regulated market of a transferable security as defined in Article 4(1)(18)(c) of Directive 2004/39/EC, in the case of a security within the meaning of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC[2], there should be considered to be sufficient information publicly available of a kind needed to value that financial instrument.

(20) The admission to trading on a regulated market of units issued by undertakings for collective investment in transferable securities should not allow the avoidance of the relevant provisions of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[3], and in particular Articles 44 to 48 of that Directive.

(21) A derivative contract should only be considered to be a financial instrument under Section C(7) of Annex I to Directive 2004/39/EC if it relates to a commodity and meets the criteria in this Regulation for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and as not being for commercial purposes. A derivative contract should only be considered to be a financial instrument under Section C(10) of that Annex if it relates to an underlying specified in Section C(10) or in this Regulation and meets the criteria in

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2 OJ L 345, 31.12.2003, p. 64.

3 OJ L 375, 31.12.1985, p.3. Directive as last amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).

this Regulation for determining whether it should be considered as having the characteristics of other derivative financial instruments.

(22) The exemptions in Directive 2004/39/EC that relate to dealing on own account or to dealing or providing other investment services in relation to commodity derivatives covered by Sections C(5), C(6) and C(7) of Annex I to that Directive or derivatives covered by Section C(10) of that Annex I could be expected to exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries from the scope of that Directive, and therefore such participants will not be required to apply the tests in this Regulation to determine if the contracts they deal in are financial instruments.

(23) In accordance with Section B(7) of Annex I to Directive 2004/39/EC, investment firms may exercise the freedom to provide ancillary services in a Member State other than their home Member State, by performing investment services and activities and ancillary services of the type included under Section A or B of that Annex related to the underlying of the derivatives included under Sections C(5), (6), (7) and (10) of that Annex, where these are connected to the provision of investment or ancillary services. On this basis, a firm performing investment services or activities, and connected trading in spot contracts, should be capable to take advantage of the freedom to provide ancillary services in respect of that connected trading.

(24) The definition of a commodity should not affect any other definition of that term in national legislation and other community legislation. The tests for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes are only intended to be used for the purposes of determining whether contracts fall within Section C(7) or C(10) of Annex I to Directive 2004/39/EC.

(25) A derivative contract should be understood as relating to a commodity or to another factor where there is a direct link between that contract and the relevant underlying commodity or factor. A derivative contract on the price of a commodity should therefore be regarded as a derivative contract relating to the commodity, while a derivative contract on the transportation costs for the commodity should not be regarded as a derivative contract relating to the commodity. A derivative that relates to a commodity derivative, such as an option on a commodity future (a derivative relating to a derivative) would constitute an indirect investment in commodities and should therefore still be regarded as a commodity derivative for the purposes of Directive 2004/39/EC.

(26) The concept of commodity should not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible.

(27) The Committee of European Securities Regulators, established by Commission Decision 2001/527/EC[4] has been consulted for technical advice.

[4] OJ L 191, 13.7.2001, p. 43

(28) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

Chapter I

General

Article 1

Subject-matter and scope

1. This Regulation lays down the detailed rules for the implementation of Articles 4(1)(2), 4(1)(7), 13(6), 25, 27, 28, 29, 30, 40, 44, 45, 56 and 58 of Directive 2004/39/EC.

2. Articles 7 and 8 shall apply to management companies in accordance with Article 5(4) of Directive 85/611/EEC.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) ‘commodity’ means any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity;

(2) ‘issuer’ means an entity which issues transferable securities and, where appropriate, other financial instruments;

(3) ‘Community issuer’ means an issuer which has its registered office in the Community;

(4) ‘third country issuer’ means an issuer which is not a Community issuer;

(5) ‘normal trading hours’ for a trading venue or an investment firm means those hours which the trading venue or investment firm establishes in advance and makes public as its trading hours;

(6) ‘portfolio trade’ means a transaction in more than one security where those securities are grouped and traded as a single lot against a specific reference price;

(7) ‘relevant competent authority’ for a financial instrument means the competent authority of the most relevant market in terms of liquidity for that financial instrument;

(8) ‘trading venue’ means a regulated market, MTF or systematic internaliser acting in its capacity as such, and, where appropriate, a system outside the Community with similar functions to a regulated market or MTF;

(9) ‘turnover’, in relation to a financial instrument, means the sum of the results of multiplying the number of units of that instrument exchanged between buyers and sellers in a defined period of time, pursuant to transactions taking place on a trading venue or otherwise, by the unit price applicable to each such transaction;

(10) ‘securities financing transaction’ means an instance of stock lending or stock borrowing or the lending or borrowing of other financial instruments, a repurchase or reverse repurchase transaction, or a buy-sell back or sell-buy back transaction.

Article 3

Transactions related to an individual share in a portfolio trade and volume weighted average price transactions

1. A transaction related to an individual share in a portfolio trade shall be considered, for the purposes of Article 18(1)(b)(ii), as a transaction subject to conditions other than the current market price.

It shall also be considered, for the purposes of Article 27(1)(b), as a transaction where the exchange of shares is determined by factors other than the current market valuation of the share.

2. A volume weighted average price transaction shall be considered, for the purposes of Article 18(1)(b)(ii), as a transaction subject to conditions other than the current market price and, for the purposes of Article 25, as an order subject to conditions other than the current market price.

It shall also be considered, for the purposes of Article 27(1)(b), as a transaction where the exchange of shares is determined by factors other than the current market valuation of the share.

Article 4

References to trading day

1. A reference to a trading day in relation to a trading venue, or in relation to post-trade information to be made public under Article 30 or 45 of Directive 2004/39/EC in relation to a share, shall be a reference to any day during which the trading venue concerned is open for trading.

A reference to the opening of the trading day shall be a reference to the commencement of the normal trading hours of the trading venue.

A reference to noon on the trading day shall be a reference to noon in the time zone where the trading venue is established.

A reference to the end of the trading day shall be a reference to the end of its normal trading hours.

2. A reference to a trading day in relation to the most relevant market in terms of liquidity for a share, or in relation to post-trade information to be made public under Article 28 of Directive 2004/39/EC in relation to a share, shall be a reference to any day of normal trading on trading venues in that market.

A reference to the opening of the trading day shall be a reference to the earliest commencement of normal trading in that share on trading venues in that market.

A reference to noon on the trading day shall be a reference to noon in the time zone of that market.

A reference to the end of the trading day shall be a reference to the latest cessation of normal trading in that share on trading venues in that market.

3. A reference to a trading day in relation to a spot contract, within the meaning of Article 38(2), shall be a reference to any day of normal trading of that contract on trading venues.

Article 5

References to transaction

For the purposes of this Regulation, a reference to a transaction is a reference only to the purchase and sale of a financial instrument. For the purposes of this Regulation, other than Chapter II, the purchase and sale of a financial instrument does not include any of the following:

(a) securities financing transactions;

(b) the exercise of options or of covered warrants;

(c) primary market transactions (such as issuance, allotment or subscription) in financial instruments falling within Article 4(1)(18)(a) and (b) of Directive 2004/39/EC

Article 6

First admission to trading of a share on a regulated market

For the purposes of this Regulation, the first admission to trading of a share on a regulated market referred to in Article 40 of Directive 2004/39/EC shall be considered to take place at a time when one of the following conditions applies:

(a) the share has not previously been admitted to trading on a regulated market;

(b) the share has previously been admitted to trading on a regulated market but the share is removed from trading on every regulated market which has so admitted it.

Chapter II

Record-keeping: client orders and transactions

Article 7

(Article 13(6) of Directive 2004/39/EC)

Record-keeping of client orders and decisions to deal

An investment firm shall, in relation to every order received from a client, and in relation to every decision to deal taken in providing the service of portfolio management, immediately make a record of the following details, to the extent they are applicable to the order or decision to deal in question:

(a) the name or other designation of the client;

(b) the name or other designation of any relevant person acting on behalf of the client;

(c) the details specified in point 4, 6, and in points 16 to 19, of Table 1 of Annex I;

(d) the nature of the order if other than buy or sell;

(e) the type of the order;

(f) any other details, conditions and particular instructions from the client that specify how the order must be carried out;

(g) the date and exact time of the receipt of the order, or of the decision to deal, by the investment firm.

Article 8

(Article 13(6) of Directive 2004/39/EC)

Record-keeping of transactions

1. Immediately after executing a client order, or, in the case of investment firms that transmit orders to another person for execution, immediately after receiving confirmation that an order has been executed, investment firms shall record the following details of the transaction in question:

(a) the name or other designation of the client;

(b) the details specified in points 2, 3, 4, 6, and in points 16 to 21, of Table 1 of Annex I;

(c) the total price, being the product of the unit price and the quantity;

(d) the nature of the transaction if other than buy or sell;

(e) the natural person who executed the transaction or who is responsible for the execution.

2. If an investment firm transmits an order to another person for execution, the investment firm shall immediately record the following details after making the transmission:

(a) the name or other designation of the client whose order has been transmitted;

(b) the name or other designation of the person to whom the order was transmitted;

(c) the terms of the order transmitted;

(d) the date and exact time of transmission.

Chapter III

Transaction reporting

Article 9

(Second subparagraph of Article 25(3) of Directive 2004/39/EC)

Determination of the most relevant market in terms of liquidity

1. The most relevant market in terms of liquidity for a financial instrument which is admitted to trading on a regulated market, hereinafter 'the most relevant market', shall be determined in accordance with paragraphs 2 to 8.

2. In the case of a share or other transferable security covered by Article 4(1)(18)(a) of Directive 2004/39/EC or of a unit in a collective investment undertaking, the most relevant market shall be the Member State where the share or the unit was first admitted to trading on a regulated market.

3. In the case of a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or of a money market instrument which, in either case, is

issued by a subsidiary, within the meaning of Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts[5], of an entity which has its registered office in a Member State, the most relevant market shall be the Member State where the registered office of the parent entity is situated.

4. In the case of a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or of a money market instrument which, in either case, is issued by a Community issuer and which is not covered by paragraph 3 of this Article, the most relevant market shall be the Member State where the registered office of the issuer is situated.

5. In the case of a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or a money market instrument which, in either case, is issued by a third country issuer and which is not covered by paragraph 3 of this Article, the most relevant market shall be the Member State where that security was first admitted to trading on a regulated market.

6. In the case of a derivative contract or a financial contract for differences or a transferable security covered by Article 4(1)(18)(c) of Directive 2004/39/EC, the most relevant market shall be:

   (a) where the underlying security is a share or other transferable security covered by Article 4(1)(18)(a) of Directive 2004/39/EC which is admitted to trading on a regulated market, the Member State deemed to be the most relevant market in terms of liquidity for the underlying security, in accordance with paragraph 2;

   (b) where the underlying security is a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or a money market instrument which is admitted to trading on a regulated market, the Member State deemed to be the most relevant market in terms of liquidity for that underlying security, in accordance with paragraphs 3, 4 or 5;

   (c) where the underlying is an index composed of shares all of which are traded on a particular regulated market, the Member State where that regulated market is situated.

7. In any case not covered by paragraphs 2 to 6, the most relevant market shall be the Member State where the regulated market that first admitted the transferable security or derivative contract or financial contract for differences to trading is located.

8. Where a financial instrument covered by paragraphs 2, 5 or 7, or the underlying financial instrument of a financial instrument covered by paragraph 6 to which one of paragraphs 2, 5 or 7 is relevant, was first admitted to trading on more than one regulated market simultaneously, and all those regulated markets share the same home Member State, that Member State shall be the most relevant market.

   Where the regulated markets concerned do not share the same home Member State, the most relevant market in terms of liquidity for that instrument shall be the market where the turnover of that instrument is highest.

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[5] OJ L 193 , 18.07.1983, p. 1.

For the purposes of determining the most relevant market where the turnover of the instrument is highest, each competent authority that has authorised one of the regulated markets concerned shall calculate the turnover for that instrument in its respective market for the previous calendar year, provided that the instrument was admitted to trading at the beginning of that year.

Where the turnover for the relevant financial instrument cannot be calculated by reason of insufficient or non-existent data and the issuer has its registered office in a Member State, the most relevant market shall be the market of the Member State where the registered office of the issuer is situated.

However, where issuer does not have its registered office in a Member State, the most relevant market for that instrument shall be the market where the turnover of the relevant instrument class is the highest. For the purposes of determining that market, each competent authority that has authorised one of the regulated markets concerned shall calculate the turnover for the instruments of the same class in its respective market for the preceding calendar year.

The relevant classes of financial instrument are the following:

(a) shares;

(b) bonds or other forms of securitised debt;

(c) any other financial instruments.

Article 10

(second subparagraph of Article 25(3) of Directive 2004/39/EC)

Alternative determination of most relevant market in terms of liquidity

1. A competent authority may, in January every year, notify the relevant competent authority for a particular financial instrument that it intends to contest the determination, made in accordance with Article 9, of the most relevant market for that instrument.

2. Within four weeks of the sending of the notification, both authorities shall calculate the turnover for that financial instrument in their respective markets over the period of the previous calendar year.

If the results of that calculation indicate that the turnover is higher in the market of the contesting competent authority, that market shall be the most relevant market for that financial instrument. Where that financial instrument is of a type specified in Article 9(6)(a) or (b), that market shall also be the most relevant market for any derivative contract or financial contract for differences or transferable security which is covered by Article 4(1)(18)(c) of Directive 2004/39/EC and in respect of which that financial instrument is the underlying.

Article 11

(Article 25(3) of Directive 2004/39/EC)

List of financial instruments

The relevant competent authority for one or more financial instruments shall ensure that there is established and maintained an updated list of those financial instruments. That list shall be made available to the single competent authority designated as a contact point by each Member State in accordance with Article 56 of Directive 2004/39/EC. That list shall be made available for the first time on the first trading day in June 2007.

In order to assist competent authorities to comply with the first sub-paragraph, each regulated market shall submit identifying reference data on each financial instrument admitted to trading in an electronic and standardised format to its home competent authority. This information shall be submitted for each financial instrument before trading commences in that particular instrument. The home competent authority shall ensure the data is transmitted to the relevant competent authority for the financial instrument concerned. The reference data shall be updated whenever there are changes to the data with respect to an instrument. The requirements in this sub-paragraph may be waived if the relevant competent authority for that financial instrument obtains the relevant reference data by other means.

Article 12

(Article 25(5) of Directive 2004/39/EC)

Reporting channels

1. The reports of transactions in financial instruments shall be made in an electronic form except under exceptional circumstances, when they may be made in a medium which allows for the storing of the information in a way accessible for future reference by the competent authorities other than an electronic form, and the methods by which those reports are made shall satisfy the following conditions:

   (a) they ensure the security and confidentiality of the data reported;

   (b) they incorporate mechanisms for identifying and correcting errors in a transaction report;

   (c) they incorporate mechanisms for authenticating the source of the transaction report;

   (d) they include appropriate precautionary measures to enable the timely resumption of reporting in the case of system failure;

   (e) they are capable of reporting the information required under Article 13 in the format required by the competent authority and in accordance with this

paragraph, within the time-limits set out in Article 25(3) of Directive 2004/39/EC.

2. A trade-matching or reporting system shall be approved by the competent authority for the purposes of Article 25(5) of Directive 2004/39/EC if the arrangements for reporting transactions established by that system comply with paragraph 1 of this Article and are subject to monitoring by a competent authority in respect of their continuing compliance.

Article 13

(Article 25(3) and (5) of Directive 2004/39/EC)

Content of the transaction report

1. The reports of transactions referred to in Article 25(3) and (5) of Directive 2004/39/EC shall contain the information specified in Table 1 of Annex I to this Regulation which is relevant to the type of financial instrument in question and which the competent authority declares is not already in its possession or is not available to it by other means.

2. For the purposes of the identification of a counterparty to the transaction which is a regulated market, an MTF or other central counterparty, as specified in Table 1 of Annex I, each competent authority shall make publicly available a list of identification codes of the regulated markets and MTFs for which, in each case, it is the competent authority of the home Member State, and of any entities which act as central counterparties for such regulated markets and MTFs.

3. Member States may require reports made in accordance with Article 25(3) and (5) of Directive 2004/39/EC to contain information related to the transactions in question which is additional to that specified in Table 1 of Annex I where that information is necessary to enable the competent authority to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner that promotes the integrity of the market, and provided that one of the following criteria is met:

   (a) the financial instrument which is the subject of the report has characteristics which are specific to an instrument of that kind and which are not covered by the information items specified in that table;

   (b) trading methods which are specific to the trading venue where the transaction took place involve features which are not covered by the information items specified in that table.

4. Member States may also require a report of a transaction made in accordance with Article 25(3) and (5) of Directive 2004/39/EC to identify the clients on whose behalf the investment firm has executed that transaction.

Article 14

(Article 25(3) and (5) of Directive 2004/39/EC)

Exchange of information on transactions

1. The competent authorities shall establish arrangements designed to ensure that the information received in accordance with Article 25(3) and (5) of Directive 2004/39/EC is made available to the following:

   (a) the relevant competent authority for the financial instrument in question;

   (b) in the case of branches, the competent authority that has authorised the investment firm providing the information, without prejudice to its right not to receive this information in accordance with Article 25(6) of Directive 2004/39/EC;

   (c) any other competent authority that requests the information for the proper discharge of its supervisory duties under Article 25(1) of Directive 2004/39/EC.

2. The information to be made available in accordance with paragraph 1 shall contain the information items described in Tables 1 and 2 of Annex I.

3. The information referred to in paragraph 1 shall be made available as soon as possible.

   With effect from 1 November 2008 that information shall be made available no later than the close of the next working day of the competent authority that received the information or the request following the day on which the competent authority has received the information or the request.

4. The competent authorities shall coordinate the following:

   (a) the design and establishment of arrangements for the exchange of transaction information between the competent authorities as required by Directive 2004/39/EC and this Regulation;

   (b) any future upgrading of the arrangements.

5. Before 1 February 2007, the competent authorities shall report to the Commission, which shall inform the European Securities Committee, on the design of the arrangements to be established in accordance with paragraph 1.

   They shall also report to the Commission, which shall inform the European Securities Committee, whenever significant changes to those arrangements are proposed.

Article 15

(Article 58(1) of Directive 2004/39/EC)

Request for cooperation and exchange of information

1. Where a competent authority wishes another competent authority to supply or exchange information in accordance with Article 58(1) of Directive 2004/39/EC, it shall submit a written request to that competent authority containing sufficient detail to enable it to provide the information requested.

   However, in a case of urgency, the request may be transmitted orally provided that it is confirmed in writing.

   The competent authority which receives a request shall acknowledge receipt as soon as practicable.

2. Where the information requested under paragraph 1 is internally available to the competent authority that receives the request, that authority shall transmit the requested information without delay to the competent authority which made the request.

   However, if the competent authority that receives the request does not possess or control the information requested, it shall immediately take the necessary steps to obtain that information and to comply fully with the request. That competent authority shall also inform the competent authority that made the request of the reasons for not sending immediately the information requested.

Article 16

(Article 56(2) of Directive 2004/39/EC)

Determination of the substantial importance of a regulated market's operations in a host Member State

The operations of a regulated market in a host Member State shall be considered to be of substantial importance for the functioning of the securities markets and the protection of investors in that host State where one of the following criteria is met:

(a) the host Member State has formerly been the home Member State of the regulated market in question;

(b) the regulated market in question has acquired through merger, takeover, or any other form of transfer the business of a regulated market which had its registered office or head office in the host Member State.

Chapter IV

Market transparency

SECTION 1

PRE-TRADE TRANSPARENCY FOR REGULATED MARKETS AND MTFS

Article 17

(Articles 29 and 44 of Directive 2004/39/EC)

Pre-trade transparency obligations

1. An investment firm or market operator operating an MTF or a regulated market shall, in respect of each share admitted to trading on a regulated market that is traded within a system operated by it and specified in Table 1 of Annex II, make public the information set out in paragraphs 2 to 6.

2. Where one of the entities referred to in paragraph 1 operates a continuous auction order book trading system, it shall, for each share as specified in paragraph 1, make public continuously throughout its normal trading hours the aggregate number of orders and of the shares those orders represent at each price level, for the five best bid and offer price levels.

3. Where one of the entities referred to in paragraph 1 operates a quote-driven trading system, it shall, for each share as specified in paragraph 1, make public continuously throughout its normal trading hours the best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices.

   The quotes made public shall be those that represent binding commitments to buy and sell the shares and which indicate the price and volume of shares in which the registered market makers are prepared to buy or sell.

   In exceptional market conditions, however, indicative or one-way prices may be allowed for a limited time.

4. Where one of the entities referred to in paragraph 1 operates a periodic auction trading system, it shall, for each share specified in paragraph 1, make public continuously throughout its normal trading hours the price that would best satisfy the system's trading algorithm and the volume that would potentially be executable at that price by participants in that system.

5. Where one of the entities referred to in paragraph 1 operates a trading system which is not wholly covered by paragraph 2 or 3 or 4, either because it is a hybrid system

falling under more than one of those paragraphs or because the price determination process is of a different nature, it shall maintain a standard of pre-trade transparency that ensures that adequate information is made public as to the price level of orders or quotes for each share specified in paragraph 1, as well as the level of trading interest in that share.

In particular, the five best bid and offer price levels and/or two-way quotes of each market maker in that share shall be made public, if the characteristics of the price discovery mechanism permit it.

6. A summary of the information to be made public in accordance with paragraphs 2 to 5 is specified in Table 1 of Annex II.

Article 18

(Articles 29(2) and 44(2) of Directive 2004/39/EC)

Waivers based on market model and type of order or transaction

1. Waivers in accordance with Article 29(2) and 44(2) of Directive 2004/39/EC may be granted by the competent authorities for systems operated by an MTF or a regulated market, if those systems satisfy one of the following criteria:

   (a) they must be based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is regarded generally by market participants as a reliable reference price;

   (b) they formalise negotiated transactions, each of which meets one of the following criteria:

      (i) it is made at or within the current volume weighted spread reflected on the order book or the quotes of the market makers of the regulated market or MTF operating that system or, where the share is not traded continuously, within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator;

      (ii) it is subject to conditions other than the current market price of the share.

   For the purposes of point (b), the other conditions specified in the rules of the regulated market or MTF for a transaction of this kind must also have been fulfilled.

   In the case of systems having functionality other than as described in points (a) or (b), the waiver shall not apply to that other functionality.

2. Waivers in accordance with Articles 29(2) and 44(2) of Directive 2004/39/EC based on the type of orders may be granted only in relation to orders held in an order management facility maintained by the regulated market or the MTF pending their being disclosed to the market.

Article 19

(Articles 29(2) and 44(2) of Directive 2004/39/EC)

References to negotiated transaction

For the purpose of Article 17(1)(b) a negotiated transaction shall mean a transaction involving members or participants of a regulated market or an MTF which is negotiated privately but executed within the regulated market or MTF and where that member or participant in doing so undertakes one of the following tasks:

(a) dealing on own account with another member or participant who acts for the account of a client;

(b) dealing with another member or participant, where both are executing orders on own account;

(c) acting for the account of both the buyer and seller;

(d) acting for the account of the buyer, where another member or participant acts for the account of the seller;

(e) trading for own account against a client order.

Article 20

(Articles 29(2) and 44(2), and fifth subparagraph of Article 27(1) of Directive 2004/39/EC)

Waivers in relation to transactions which are large in scale

An order shall be considered to be large in scale compared with normal market size if it is equal to or larger than the minimum size of order specified in Table 2 in Annex II. For the purposes of determining whether an order is large in scale compared to normal market size, all shares admitted to trading on a regulated market shall be classified in accordance with their average daily turnover, which shall be calculated in accordance with the procedure set out in Article 33.

SECTION 2

PRE-TRADE TRANSPARENCY FOR SYSTEMATIC INTERNALISERS

Article 21

(Article 4(1)(7) of Directive 2004/39/EC)

Criteria for determining whether an investment firm is a systematic internaliser

1. Where an investment firm deals on own account by executing client orders outside a regulated market or an MTF, it shall be treated as a systematic internaliser if it meets the following criteria indicating that it performs that activity on an organised, frequent and systematic basis:

   (a) the activity has a material commercial role for the firm, and is carried on in accordance with non-discretionary rules and procedures;

   (b) the activity is carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose;

   (c) the activity is available to clients on a regular or continuous basis.

2. An investment firm shall cease to be a systematic internaliser in one or more shares if it ceases to carry on the activity specified in paragraph 1 in respect of those shares, provided that it has announced in advance that it intends to cease that activity using the same publication channels for that announcement as it uses to publish its quotes or, where that is not possible, using a channel which is equally accessible to its clients and other market participants.

3. The activity of dealing on own account by executing client orders shall not be treated as performed on an organised, frequent and systematic basis where the following conditions apply:

   (a) the activity is performed on an *ad hoc* and irregular bilateral basis with wholesale counterparties as part of business relationships which are themselves characterised by dealings above standard market size;

   (b) the transactions are carried out outside the systems habitually used by the firm concerned for any business that it carries out in the capacity of a systematic internaliser.

4. Each competent authority shall ensure the maintenance and publication of a list of all systematic internalisers, in respect of shares admitted to trading on a regulated market, which it has authorised as investment firms.

It shall ensure that the list is current by reviewing it at least annually.

The list shall be made available to the Committee of European Securities Regulators. It shall be considered as published when it is published by the Committee of European Securities Regulators in accordance with Article 34(5).

Article 22

(Article 27 of Directive 2004/39/EC)

Determination of liquid shares

1. A share admitted to trading on a regulated market shall be considered to have a liquid market if the share is traded daily, with a free float not less than EUR 500 million, and one of the following conditions is satisfied:

   (a) the average daily number of transactions in the share is not less than 500;

   (b) the average daily turnover for the share is not less than EUR 2 million.

   However, a Member State may, in respect of shares for which it is the most relevant market, specify by notice that both of those conditions are to apply. That notice shall be made public.

2. A Member State may specify the minimum number of liquid shares for that Member State. The minimum number shall be no greater than 5. The specification shall be made public.

3. Where, pursuant to paragraph 1, a Member State would be the most relevant market for fewer liquid shares than the minimum number specified in accordance with paragraph 2, the competent authority for that Member State may designate one or more additional liquid shares, provided that the total number of shares which are considered in consequence to be liquid shares for which that Member State is the most relevant market does not exceed the minimum number specified by that Member State.

   The competent authority shall designate the additional liquid shares successively in decreasing order of average daily turnover from among the shares for which it is the relevant competent authority that are admitted to trading on a regulated market and are traded daily.

4. For the purposes of the first subparagraph of paragraph 1, the calculation of the free float of a share shall exclude holdings exceeding 5% of the total voting rights of the issuer, unless such a holding is held by a collective investment undertaking or a pension fund.

   Voting rights shall be calculated on the basis of all the shares to which voting rights are attached, even if the exercise of such a right is suspended.

5. A share shall not be considered to have a liquid market for the purposes of Article 27 of Directive 2004/39/EC until six weeks after its first admission to trading on a regulated market, if the estimate of the total market capitalisation for that share at the start of the first day's trading after that admission, provided in accordance with Article 33(3), is less than EUR 500 million.

6. Each competent authority shall ensure the maintenance and publication of a list of all liquid shares for which it is the relevant competent authority.

It shall ensure that the list is current by reviewing it at least annually.

The list shall be made available to the Committee of European Securities Regulators. It shall be considered as published when it is published by the Committee of European Securities Regulators in accordance with Article 34(5).

Article 23

(fourth subparagraph of Article 27(1) of Directive 2004/39/EC)

Standard market size

In order to determine the standard market size for liquid shares, those shares shall be grouped into classes in terms of the average value of orders executed in accordance with Table 3 in Annex II.

Article 24

(Article 27(1) of Directive 2004/39/EC)

Quotes reflecting prevailing market conditions

A systematic internaliser shall, for each liquid share for which it is a systematic internaliser, maintain the following:

(a) a quote or quotes which are close in price to comparable quotes for the same share in other trading venues;

(b) a record of its quoted prices, which it shall retain for a period of 12 months or such longer period as it considers appropriate.

The obligation laid down in point (b) is without prejudice to the obligation of the investment firm under Article 25(2) of Directive 2004/39/EC to keep at the disposal of the competent authority for at least 5 years the relevant data relating to all transactions it has carried out.

Article 25

(fifth subparagraph of Article 27(3) and Article 27(6) of Directive 2004/39/EC)

Execution of orders by systematic internalisers

1. For the purposes of the fifth subparagraph of Article 27(3) of Directive 2004/39/EC, execution in several securities shall be regarded as part of one transaction if that one transaction is a portfolio trade that involves 10 or more securities.

   For the same purposes, an order subject to conditions other than the current market price means any order which is neither an order for the execution of a transaction in shares at the prevailing market price, nor a limit order.

2. For the purposes of Article 27(6) of Directive 2004/39/EC, the number or volume of orders shall be regarded as considerably exceeding the norm if a systematic internaliser cannot execute those orders without exposing itself to undue risk.

   In order to identify the number and volume of orders that it can execute without exposing itself to undue risk, a systematic internaliser shall maintain and implement as part of its risk management policy under Article 7 of [the Implementing Directive][6] a non-discriminatory policy which takes into account the volume of the transactions, the capital that the firm has available to cover the risk for that type of trade, and the prevailing conditions in the market in which the firm is operating.

3. Where, in accordance with Article 27(6) of Directive 2004/39/EC, an investment firm limits the number or volume of orders it undertakes to execute, it shall set out in writing, and make available to clients and potential clients, the arrangements designed to ensure that such a limitation does not result in the discriminatory treatment of clients.

Article 26

(fourth subparagraph Article 27(3) of Directive 2004/39/EC)

Retail size

For the purposes of the fourth subparagraph of Article 27(3) of Directive 2004/39/EC, an order shall be regarded as being of a size bigger than the size customarily undertaken by a retail investor if it exceeds EUR 7 500.

[6] [OJ XXX]

SECTION 3

POST-TRADE TRANSPARENCY FOR REGULATED MARKETS, MTFS AND INVESTMENT FIRMS

Article 27

(Articles 28, 30 and 45 of Directive 2004/39/EC)

Post-trade transparency obligation

1. Investment firms, regulated markets, and investment firms and market operators operating an MTF shall, with regard to transactions in respect of shares admitted to trading on regulated markets concluded by them or, in the case of regulated markets or MTFs, within their systems, make public the following details:

   (a) the details specified in points 2, 3, 6, 16, 17, 18, and 21 of Table 1 in Annex I;

   (b) an indication that the exchange of shares is determined by factors other than the current market valuation of the share, where applicable;

   (c) an indication that the trade was a negotiated trade, where applicable;

   (d) any amendments to previously disclosed information, where applicable.

   Those details shall be made public either by reference to each transaction or in a form aggregating the volume and price of all transactions in the same share taking place at the same price at the same time.

2. By way of exception, a systematic internaliser shall be entitled to use the acronym 'SI' instead of the venue identification referred to in paragraph 1(a) in respect of a transaction in a share that is executed in its capacity as a systematic internaliser in respect of that share.

   The systematic internaliser may exercise that right only as long as it makes available to the public aggregate quarterly data as to the transactions executed in its capacity as a systematic internaliser in respect of that share relating to the most recent calendar quarter, or part of a calendar quarter, during which the firm acted as a systematic internaliser in respect of that share. That data shall be made available no later than one month after the end of each calendar quarter.

   It may also exercise that right during the period between the date specified in Article 41(2), or the date on which the firm commences to be a systematic internaliser in relation to a share, whichever is the later, and the date that aggregate quarterly data in relation to a share is first due to be published.

3. The aggregated quarterly data referred to in the second subparagraph of paragraph 2 shall contain the following information for the share in respect of each trading day of the calendar quarter concerned:

(a) the highest price;

(b) the lowest price;

(c) the average price;

(d) the total number of shares traded;

(e) the total number of transactions;

(f) such other information as the systematic internaliser decides to make available.

4. Where the transaction is executed outside the rules of a regulated market or an MTF, one of the following investment firms shall, by agreement between the parties, arrange to make the information public:

(a) the investment firm that sells the share concerned;

(b) the investment firm that acts on behalf of or arranges the transaction for the seller;

(c) the investment firm that acts on behalf of or arranges the transaction for the buyer;

(d) the investment firm that buys the share concerned.

In the absence of such an agreement, the information shall be made public by the investment firm determined by proceeding sequentially from point (a) to point (d) until the first point that applies to the case in question.

The parties shall take all reasonable steps to ensure that the transaction is made public as a single transaction. For those purposes two matching trades entered at the same time and price with a single party interposed shall be considered to be a single transaction.

Article 28

(Articles 28, 30 and 45 of Directive 2004/39/EC)

Deferred publication of large transactions

The deferred publication of information in respect of transactions may be authorised, for a period no longer than the period specified in Table 4 in Annex II for the class of share and transaction concerned, provided that the following criteria are satisfied:

(a) the transaction is between an investment firm dealing on own account and a client of that firm;

(b) the size of the transaction is equal to or exceeds the relevant minimum qualifying size, as specified in Table 4 in Annex II.

In order to determine the relevant minimum qualifying size for the purposes of point (b), all shares admitted to trading on a regulated market shall be classified in accordance with their average daily turnover to be calculated in accordance with Article 33.

SECTION 4

PROVISIONS COMMON TO PRE- AND POST-TRADE TRANSPARENCY

Article 29

(Articles 27(3), 28(1), 29(1), 44(1) and 45(1) of Directive 2004/39/EC)

Publication and availability of pre- and post-trade transparency data

1. A regulated market, MTF or systematic internaliser shall be considered to publish pre-trade information on a continuous basis during normal trading hours if that information is published as soon as it becomes available during the normal trading hours of the regulated market, MTF or systematic internaliser concerned, and remains available until it is updated.

2. Pre-trade information, and post-trade information relating to transactions taking place on trading venues and within normal trading hours, shall be made available as close to real time as possible. Post-trade information relating to such transactions shall be made available in any case within three minutes of the relevant transaction.

3. Information relating to a portfolio trade shall be made available with respect to each constituent transaction as close to real time as possible, having regard to the need to allocate prices to particular shares. Each constituent transaction shall be assessed separately for the purposes of determining whether deferred publication in respect of that transaction is available under Article 28.

4. Post-trade information relating to transactions taking place on a trading venue but outside its normal trading hours shall be made public before the opening of the next trading day of the trading venue on which the transaction took place.

5. For transactions that take place outside a trading venue, post-trade information shall be made public:

   (a) if the transaction takes place during a trading day of the most relevant market for the share concerned, or during the investment firm's normal trading hours, as close to real time as possible. Post-trade information relating to such

transactions shall be made available in any case within three minutes of the relevant transaction;

(b) in a case not covered by point (a), immediately upon the commencement of the investment firm's normal trading hours or at the latest before the opening of the next trading day in the most relevant market for that share.

Article 30

(Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)

Public availability of pre- and post-trade information

For the purposes of Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC and of this Regulation, pre- and post-trade information shall be considered to be made public or available to the public if it is made available generally through one of the following to investors located in the Community:

(a) the facilities of a regulated market or an MTF;

(b) the facilities of a third party;

(c) proprietary arrangements.

Article 31

(Article 22(2) of Directive 2004/39/EC)

Disclosure of client limit orders

An investment firm shall be considered to disclose client limit orders that are not immediately executable if it transmits the order to a regulated market or MTF that operates an order book trading system, or ensures that the order is made public and can be easily executed as soon as market conditions allow.

Article 32

(Article 22(2), 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)

Arrangements for making information public

Any arrangement to make information public, adopted for the purposes of Articles 30 and 31, shall satisfy the following conditions:

(a) it must include all reasonable steps necessary to ensure that the information to be published is reliable, monitored continuously for errors, and corrected as soon as errors are detected;

(b) it must facilitate the consolidation of the data with similar data from other sources;

(c) it must make the information available to the public on a non-discriminatory commercial basis at a reasonable cost.

Article 33

(Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)

Calculations and estimates for shares admitted to trading on a regulated market

1. In respect of each share that is admitted to trading on a regulated market, the relevant competent authority for that share shall ensure that the following calculations are made in respect of that share promptly after the end of each calendar year:

   (a) the average daily turnover;

   (b) the average daily number of transactions;

   (c) for those shares which satisfy the conditions laid down in Article 22(1)(a) or (b) (as applicable), the free float as at 31 December;

   (d) if the share is a liquid share, the average value of the orders executed.

   This paragraph and paragraph 2 shall not apply to a share which is first admitted to trading on a regulated market four weeks or less before the end of the calendar year.

2. The calculation of the average daily turnover, average value of the orders executed and average daily number of transactions shall take into account all the orders executed in the Community in respect of the share in question between 1 January and 31 December of the preceding year, or, where applicable, that part of the year during which the share was admitted to trading on a regulated market and was not suspended from trading on a regulated market.

   In the calculations of the average daily turnover, average value of the orders executed and average daily number of transactions of a share, non-trading days in the Member State of the relevant competent authority for that share shall be excluded.

3. Before the first admission of a share to trading on a regulated market, the relevant competent authority for that share shall ensure that estimates are provided, in respect of that share, of the average daily turnover, the market capitalisation as it will stand at the start of the first day of trading and, where the estimate of the market capitalisation is EUR 500 million or more:

(a) the average daily number of transactions and, for those shares which satisfy the conditions laid down in Article 22(1)(a) or (b) (as applicable), the free float;

(b) in the case of a share that is estimated to be a liquid share, the average value of the orders executed.

The estimates shall relate to the six-week period following admission to trading, or the end of that period, as applicable, and shall take account of any previous trading history of the share, as well as that of shares that are considered to have similar characteristics.

4. After the first admission of a share to trading on a regulated market, the relevant competent authority for that share shall ensure that, in respect of that share, the figures referred to in points (a) to (d) of paragraph 1 are calculated, using data relating to the first four weeks' trading, as if a reference in point (c) of paragraph 1 to 31 December were a reference to the end of the first four weeks' trading, as soon as practicable after those data are available, and in any case before the end of the six-week period referred to in Article 22(5).

5. During the course of a calendar year, the relevant competent authorities shall ensure the review and where necessary the recalculation of the average daily turnover, average value of the orders executed, average daily number of transactions executed and the free float whenever there is a change in relation to the share or the issuer which significantly affects the previous calculations on an ongoing basis.

6. The calculations referred to in paragraphs 1 to 5 which are to be published on or before the first trading day in March 2009 shall be made on the basis of the data relating to the regulated market or markets of the Member State which is the most relevant market in terms of liquidity for the share in question. For those purposes, negotiated transactions within the meaning of Article 19 shall be excluded from the calculations.

Article 34

(Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)

Publication and effect of results of required calculations and estimates

1. On the first trading day of March of each year, each competent authority shall, in relation to each share for which it is the relevant competent authority that was admitted to trading on a regulated market at the end of the preceding calendar year, ensure the publication of the following information:

(a) the average daily turnover and average daily number of transactions, as calculated in accordance with Article 33(1) and (2);

(b) the free float and average value of the orders executed, where calculated in accordance with Article 33(1) and (2).

This paragraph shall not apply to shares to which the second sub-paragraph of Article 33(1) applies.

2. The results of the estimates and calculations required under Article 33(3), (4) or (5) shall be published as soon as practicable after the calculation or estimate is completed.

3. The information referred to in paragraphs 1 or 2 shall be considered as published when it is published by the Committee of European Securities Regulators in accordance with paragraph 5.

4. For the purposes of this Regulation, the following shall apply:

(a) the classification based on the publication referred to in paragraph 1 shall apply for the 12-month period starting on 1 April following publication and ending on the following 31 March;

(b) the classification based on the estimates provided for in Article 33(3) shall apply from the relevant first admission to trading until the end of the six-week period referred to in Article 22(5);

(c) the classification based on the calculations specified in Article 33(4) shall apply from the end of the six-week period referred to in Article 22(5), until:

(i) where the end of that six-week period falls between 15 January and 31 March (both inclusive) in a given year, 31 March of the following year;

(ii) otherwise, the following 31 March after the end of that period.

However, the classification based on the recalculations specified in Article 33(5) shall apply from the date of publication and, unless further recalculated under Article 33(5), until the following 31 March.

5. The Committee of European Securities Regulators shall, on the basis of data supplied to it by or on behalf of competent authorities, publish on its website consolidated and regularly updated lists of:

(a) every systematic internaliser in respect of a share admitted to trading on a regulated market;

(b) every share admitted to trading on a regulated market, specifying:

(i) the average daily turnover, average daily number of transactions and, for those shares which satisfy the conditions laid down in Article 22(1)(a) or (b) (as applicable), the free float;

(ii) in the case of a liquid share, the average value of the orders executed and the standard market size for that share;

(iii) in the case of a liquid share which has been designated as an additional liquid share in accordance with Article 22(3), the name of the competent authority that so designated it; and

(iv) the relevant competent authority.

6. Each competent authority shall ensure the first publication of the details referred to in points (a) and (b) of paragraph 1 on the first trading day in July 2007, based on the reference period 1 April 2006 to 31 March 2007. By way of derogation from paragraph 4, the classification based on that publication shall apply for the 5-month period starting on 1 November 2007 and ending on 31 March 2008.

Chapter V

Admission of financial instruments to trading

Article 35

(Article 40(1) of Directive 2004/39/EC)

Transferable securities

1. Transferable securities shall be considered freely negotiable for the purposes of Article 40(1) of Directive 2004/39/EC if they can be traded between the parties to a transaction, and subsequently transferred without restriction, and if all securities within the same class as the security in question are fungible.

2. Transferable securities which are subject to a restriction on transfer shall not be considered as freely negotiable unless that restriction is not likely to disturb the market.

3. Transferable securities that are not fully paid may be considered as freely negotiable if arrangements have been made to ensure that the negotiability of such securities is not restricted and that adequate information concerning the fact that the securities are not fully paid, and the implications of that fact for shareholders, is publicly available.

4. When exercising its discretion whether to admit a share to trading, a regulated market shall, in assessing whether the share is capable of being traded in a fair, orderly and efficient manner, take into account the following:

(a) the distribution of those shares to the public;

(b) such historical financial information, information about the issuer, and information providing a business overview as is required to be prepared under Directive 2003/71/EC, or is or will be otherwise publicly available.

5. A transferable security that is officially listed in accordance with Directive 2001/34/EC, and the listing of which is not suspended, shall be deemed to be freely negotiable and capable of being traded in a fair, orderly and efficient manner.

6. For the purposes of Article 40(1) of Directive 2004/39/EC, when assessing whether a transferable security referred to in Article 4(1)(18)(c) of that Directive is capable of being traded in a fair, orderly and efficient manner, the regulated market shall take into account, depending on the nature of the security being admitted, whether the following criteria are satisfied:

(a) the terms of the security are clear and unambiguous and allow for a correlation between the price of the security and the price or other value measure of the underlying;

(b) the price or other value measure of the underlying is reliable and publicly available;

(c) there is sufficient information publicly available of a kind needed to value the security;

(d) the arrangements for determining the settlement price of the security ensure that this price properly reflects the price or other value measure of the underlying;

(e) where the settlement of the security requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there are adequate settlement and delivery procedures for that underlying as well as adequate arrangements to obtain relevant information about that underlying.

Article 36

(Article 40(1) of Directive 2004/39/EC)

Units in collective investment undertakings

1. A regulated market shall, when admitting to trading units in a collective investment undertaking, whether or not that undertaking is constituted in accordance with Directive 85/611/EEC, satisfy itself that the collective investment undertaking complies or has complied with the registration, notification or other procedures which are a necessary precondition for the marketing of the collective investment undertaking in the jurisdiction of the regulated market.

2. Without prejudice to Directive 85/611/EEC or any other Community legislation or national law relating to collective investment undertakings, Member States may provide that compliance with the requirements referred to in paragraph 1 is not a necessary precondition for the admission of units in a collective investment undertaking to trading on a regulated market.

3. When assessing whether units in an open-ended collective investment undertaking are capable of being traded in a fair, orderly and efficient manner in accordance with Article 40(1) of Directive 2004/39/EC, the regulated market shall take the following aspects into account:

(a) the distribution of those units to the public;

(b) whether there are appropriate market-making arrangements, or whether the management company of the scheme provides appropriate alternative arrangements for investors to redeem the units;

(c) whether the value of the units is made sufficiently transparent to investors by means of the periodic publication of the net asset value.

4. When assessing whether units in a closed-end collective investment undertaking are capable of being traded in a fair, orderly and efficient manner in accordance with Article 40(1) of Directive 2004/39/EC, the regulated market shall take the following aspects into account:

(a) the distribution of those units to the public;

(b) whether the value of the units is made sufficiently transparent to investors, either by publication of information on the fund's investment strategy or by the periodic publication of net asset value.

Article 37

(Article 40(1) and (2) of Directive 2004/39/EC)

Derivatives

1. When admitting to trading a financial instrument of a kind listed in points of Sections C(4) to (10) of Annex I to Directive 2004/39/EC, regulated markets shall verify that the following conditions are satisfied:

(a) the terms of the contract establishing the financial instrument must be clear and unambiguous, and enable a correlation between the price of the financial instrument and the price or other value measure of the underlying;

(b) the price or other value measure of the underlying must be reliable and publicly available;

(c) sufficient information of a kind needed to value the derivative must be publicly available;

(d) the arrangements for determining the settlement price of the contract must be such that the price properly reflects the price or other value measure of the underlying;

(e) where the settlement of the derivative requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there must be adequate arrangements to enable market participants to obtain relevant information about that underlying as well as adequate settlement and delivery procedures for the underlying.

2. Where the financial instruments concerned are of a kind listed in Sections C (5), (6), (7) or (10) of Annex I to Directive 2004/39/EC, point (b) of paragraph 1 shall not apply if the following conditions are satisfied:

(a) the contract establishing that instrument must be likely to provide a means of disclosing to the market, or enabling the market to assess, the price or other value measure of the underlying, where the price or value measure is not otherwise publicly available;

(b) the regulated market must ensure that appropriate supervisory arrangements are in place to monitor trading and settlement in such financial instruments;

(c) the regulated market must ensure that settlement and delivery, whether physical delivery or by cash settlement, can be effected in accordance with the contract terms and conditions of those financial instruments.

Chapter VI

Derivative financial instruments

Article 38

(Article 4(1)(2) of Directive 2004/39/EC)

Characteristics of other derivative financial instruments

1. For the purposes of Section C(7) of Annex I to Directive 2004/39/EC, a contract which is not a spot contract within the meaning of paragraph 2 of this Article and which is not covered by paragraph 4 shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if it satisfies the following conditions:

(a) it meets one of the following sets of criteria:

(i) it is traded on a third country trading facility that performs a similar function to a regulated market or an MTF;

(ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF or such a third country trading facility;

(iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or such a third country trading facility;

(b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;

(c) it is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

2. A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

(a) two trading days;

(b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph.

3. For the purposes of Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to an underlying referred to in that Section or in Article 39 shall be considered to have the characteristics of other derivative financial instruments if one of the following conditions is satisfied:

(a) that contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;

(b) that contract is traded on a regulated market or an MTF;

(c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2004/39/EC, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.

Article 39

(Article 4(1)(2) of Directive 2004/39/EC)

Derivatives within Section C(10) of Annex I to Directive 2004/39/EC

In addition to derivative contracts of a kind referred to in Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to any of the following shall fall within that Section if it meets the criteria set out in that Section and in Article 38(3):

(a) telecommunications bandwidth;

(b) commodity storage capacity;

(c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;

(d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources;

(e) a geological, environmental or other physical variable;

(f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;

(g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation.

Chapter VII

Final provisions

Article 40

Re-examinations

1. At least once every two years, and after consulting the Committee of European Securities Regulators, the Commission shall re-examine the definition of 'transaction' for the purposes of this Regulation, the Tables included in Annex II, as well as the criteria for determination of liquid shares contained in Article 22.

2. The Commission shall, after consulting the Committee of European Securities Regulators, re-examine the provisions of Articles 38 and 39 relating to criteria for determining which instruments are to be treated as having the characteristics of other derivative financial instruments, or as being for commercial purposes, or which fall within Section C(10) of Annex I to Directive 2004/39/EC if the other criteria set out in that Section are satisfied in relation to them.

   The Commission shall report to the European Parliament and to the Council at the same time that it makes its reports under Article 65(3)(a) and (d) of Directive 2004/39/EC.

3. The Commission shall, no later than two years after the date of application of this Regulation, after consulting the Committee of European Securities Regulators, re-examine Table 4 of Annex II and report on the results of this re-examination to the European Parliament and the Council.

Article 41

Entry into force

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union.*

2. This Regulation shall apply from 1 November 2007, except Article 11 and Article 34(5) and (6), which shall apply from 1 June 2007.

3. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, […]

For the Commission
[…]
Member of the Commission

ANNEX I

Table 1: List of fields for reporting purposes

Field Identifier	Description
1. Reporting Firm Identification	A unique code to identify the firm which executed the transaction.
2. Trading Day	The trading day on which the transaction was executed.
3. Trading Time	The time at which the transaction was executed, reported in the local time of the competent authority to which the transaction will be reported, and the basis in which the transaction is reported expressed as Coordinated Universal Time (UTC) +/- hours.
4. Buy/Sell Indicator	Identifies whether the transaction was a buy or sell from the perspective of the reporting investment firm or, in the case of a report to a client, of the client.
5. Trading Capacity	Identifies whether the firm executed the transaction: – on its own account (either on its own behalf or on behalf of a client); – for the account, and on behalf, of a client.
6. Instrument Identification	This shall consist in: – a unique code, to be decided by the competent authority (if any) to which the report is made identifying the financial instrument which is the subject of the transaction; – if the financial instrument in question does not have a unique identification code, the report must include the name of the instrument or, in the case of a derivative contract, the characteristics of the contract.
7. Instrument Code Type	The code type used to report the instrument
8. Underlying Instrument Identification	The instrument identification applicable to the security that is the underlying asset in a derivative contract as well as the transferable security falling within Article 4(1)(18)(c) of Directive 2004/39/EC.
9. Underlying Instrument Identification Code type	The code type used to report the underlying instrument.
10. Instrument Type	The harmonised classification of the financial instrument that is the

	subject of the transaction. The description must at least indicate whether the instrument belongs to one of the top level categories as provided by a uniform internationally accepted standard for financial instrument classification.
11. Maturity Date	The maturity date of a bond or other form of securitised debt, or the exercise date / maturity date of a derivative contract.
12. Derivative Type	The harmonised description of the derivative type should be done according to one of the top level categories as provided by a uniform internationally accepted standard for financial instrument classification.
13. Put/Call	Specification whether an option or any other financial instrument is a put or a call.
14. Strike Price	The strike price of an option or other financial instrument.
15. Price Multiplier	The number of units of the financial instrument in question which are contained in a trading lot; for example, the number of derivatives or securities represented by one contract.
16. Unit Price	The price per security or derivative contract excluding commission and (where relevant) accrued interest. In the case of a debt instrument, the price may be expressed either in terms of currency or as a percentage.
17. Price Notation	The currency in which the price is expressed. If, in the case of a bond or other form of securitised debt, the price is expressed as a percentage, that percentage shall be included.
18. Quantity	The number of units of the financial instruments, the nominal value of bonds, or the number of derivative contracts included in the transaction.
19. Quantity Notation	An indication as to whether the quantity is the number of units of financial instruments, the nominal value of bonds or the number of derivative contracts.
20. Counterparty	Identification of the counterparty to the transaction. That identification shall consist in: – where the counterparty is an investment firm, a unique code for that firm, to be determined by the competent authority (if any) to which the report is made; – where the counterparty is a regulated market or MTF or an entity acting as its central counterparty, the unique harmonised identification code for that market, MTF or entity acting as central counterparty, as specified in the list published by the competent authority of the home Member State of that entity in accordance

	with Article 13(2); – where the counterparty is not an investment firm, a regulated market, an MTF or an entity acting as central counterparty, it should be identified as 'customer/client' of the investment firm which executed the transaction.
21. Venue Identification	Identification of the venue where the transaction was executed. That identification shall consist in: – where the venue is a trading venue: its unique harmonised identification code; – otherwise: the code 'OTC'.
22. Transaction Reference Number	A unique identification number for the transaction provided by the investment firm or a third party reporting on its behalf.
23. Cancellation Flag	An indication as to whether the transaction was cancelled.

Table 2: Further details for use of competent authorities

Field Identifier	**Description**
1. Reporting Firm Identification	If a unique code as referred to in Table 1 of Annex 1 is not sufficient to identify the counterparty, competent authorities should develop adequate measures that ensure the identification of the counterparty.
6. Instrument Identification	The unique code, agreed between all the competent authorities, applicable to the financial instrument in question shall be used.
20. Counterparty	If a unique code, or unique harmonised identification code as referred to in Table 1 of Annex 1 is not sufficient to identify the counterparty, competent authorities should develop adequate measures that ensure the identification of the counterparty.

ANNEX II

Table 1: Information to be made public in accordance with Article 17

Type of system	**Description of system**	**Summary of information to be made public, in accordance with Article 17**
continuous auction order book trading system	a system that by means of an order book and a trading algorithm operated without human intervention matches sell orders with matching buy orders on the basis of the best available price on a continuous basis	the aggregate number of orders and the shares they represent at each price level, for at least the five best bid and offer price levels
quote-driven trading system	a system where transactions are concluded on the basis of firm quotes that are continuously made available to participants, which requires the market makers to maintain quotes in a size that balances the needs of members and participants to deal in a commercial size and the risk to which the market maker exposes itself	the best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices
periodic auction trading system	a system that matches orders on the basis of a periodic auction and a trading algorithm operated without human intervention	the price at which the auction trading system would best satisfy its trading algorithm and the volume that would potentially be executable at that price
trading system not covered by first three rows	a hybrid system falling into two or more of the first three rows or a system where the price determination process is of a different nature than that applicable to the types of system covered by first three rows	adequate information as to the level of orders or quotes and of trading interest; in particular, the five best bid and offer price levels and/or two-way quotes of each market maker in the share, if the characteristics of the price discovery mechanism so permit

Table 2: Orders large in scale compared with normal market size

Class in terms of average daily turnover (ADT)	**ADT< €500 000**	**€500 000 ≤ ADT < €1 000 000**	**€1 000 000 ≤ ADT < €25 000 000**	**€25 000 000 ≤ ADT < €50 000 000**	**ADT ≥ €50 000 000**
Minimum size of order qualifying as large in scale compared with normal market size	€50 000	€100 000	€250 000	€400 000	€500 000

Table 3: Standard market sizes

Class in terms of average value of transact-ions (AVT)	**AVT < €10 000**	**€10 000 ≤AVT< €20 000**	**€20 000 ≤AVT< €30 000**	**€30 000 ≤AVT< €40 000**	**€40 000 ≤AVT< €50 000**	**€50 000 ≤AVT< €70 000**	**€70 000 ≤AVT< €90 000**	**Etc.**
Standard market size	€7 500	€15 000	€25 000	€35 000	€45 000	€60 000	€80 000	Etc.

Table 4: Deferred publication thresholds and delays

The table below shows, for each permitted delay for publication and each class of shares in terms of average daily turnover (ADT), the minimum qualifying size of transaction that will qualify for that delay in respect of a share of that type.

		Class of shares in terms of average daily turnover (ADT)			
		ADT < €100 000	**€100 000 ≤ ADT < €1 000 000**	**€1 000 000 ≤ ADT < €50 000 000**	**ADT ≥ €50 000 000**
		Minimum qualifying size of transaction for permitted delay			
Permitted delay for publication	**60 minutes**	€10 000	Greater of 5% of ADT and €25 000	Lower of 10% of ADT and €3 500 000	Lower of 10% of ADT and €7 500 000
	180 minutes	€25 000	Greater of 15% of ADT and €75 000	Lower of 15% of ADT and €5 000 000	Lower of 20% of ADT and €15 000 000
	Until end of trading day (or roll-over to noon of next trading day if trade undertaken in final 2 hours of trading day)	€45 000	Greater of 25% of ADT and €100 000	Lower of 25% of ADT and €10 000 000	Lower of 30% of ADT and €30 000 000
	Until end of trading day next after trade	€60 000	Greater of 50% of ADT and €100 000	Greater of 50% of ADT and €1 000 000	100% of ADT
	Until end of second trading day next after trade	€80 000	100% of ADT	100% of ADT	250% of ADT
	Until end of third trading day next after trade		250% of ADT	250% of ADT	

Kommissionens förslag till genomförandedirektiv från den 21 mars 2006	Kommissionens förslag till genomförandedirektiv efter omröstningen i europeiska värdepapperskommittén den 26 juni 2006
Skäl 1	Skäl 1
Skäl 2	Skäl 2
Skäl 3	Skäl 3
Skäl 4	Skäl 4
Skäl 5	Skäl 5
Skäl 6	Skäl 6
Skäl 7	Skäl 7
Skäl 8	Skäl 8
	Skäl 9
	Skäl 10
Skäl 9	Skäl 11
Skäl 10	Skäl 12
Skäl 11	---
Skäl 12	---
Skäl 13	---
Skäl 14	Skäl 13
Skäl 15	Skäl 14
Skäl 16	Skäl 15
Skäl 17	Skäl 16
Skäl 18	Skäl 17
Skäl 19	Skäl 18
Skäl 20	Skäl 19
Skäl 21	Skäl 20
Skäl 22	Skäl 21
	Skäl 22
	Skäl 23
Skäl 23	Skäl 24
Skäl 24	Skäl 25
Skäl 25	Skäl 26
Skäl 26	Skäl 27
Skäl 27	Skäl 28
Skäl 28	---
Skäl 29	Skäl 29
Skäl 30	Skäl 30

Skäl 31	Skäl 31
Skäl 32	Skäl 32
Skäl 33	Skäl 33
Skäl 34	Skäl 34
Skäl 35	Skäl 35
Skäl 36	Skäl 36
Skäl 37	Skäl 37
Skäl 38	Skäl 38
Skäl 39	Skäl 39
	Skäl 40
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Skäl 42	Skäl 43
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Skäl 48	Skäl 50
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Skäl 50	Skäl 52
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Skäl 52	Skäl 56
Skäl 53	Skäl 57
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Skäl 58	Skäl 63
Skäl 59	Skäl 64
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Skäl 60	Skäl 66
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Skäl 69	Skäl 77
Skäl 70	Skäl 78
Skäl 71	Skäl 79
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Skäl 72	Skäl 81
Skäl 73	Skäl 82
Skäl 74	Skäl 83
Skäl 75	Skäl 84
Skäl 76	Skäl 85
Artikel 1	Artikel 1
Artikel 2	Artikel 2
Artikel 3	Artikel 3
Artikel 4	Artikel 4
Artikel 5	Artikel 5
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Artikel 7	Artikel 7
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Artikel 10	Artikel 10
Artikel 11	Artikel 11
Artikel 12	Artikel 12
Artikel 13	Artikel 13
Artikel 14	Artikel 14
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Artikel 20	Artikel 20
Artikel 21	Artikel 21
Artikel 22	Artikel 22

Artikel 23	Artikel 23
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Artikel 25	Artikel 25
Artikel 26	Artikel 26
Artikel 27	Artikel 27
Artikel 28	Artikel 28
Artikel 29	Artikel 29
Artikel 30	Artikel 30
Artikel 31	Artikel 31
Artikel 32	Artikel 32
Artikel 33	Artikel 33
Artikel 34	Artikel 34
Artikel 35	---
Artikel 36	Artikel 35
Artikel 37	Artikel 36
Artikel 38	Artikel 37
Artikel 39	Artikel 38
Artikel 39 A	Artikel 39
Artikel 40	Artikel 40
Artikel 41	Artikel 41
Artikel 42	Artikel 42
Artikel 43	Artikel 43
Artikel 44	Artikel 44
Artikel 45	Artikel 45
Artikel 46	Artikel 46
Artikel 47	Artikel 47
Artikel 48	Artikel 48
Artikel 49	Artikel 49
Artikel 50	Artikel 50
Artikel 51	Artikel 51
Artikel 52	Artikel 52
Artikel 53	Artikel 53
Artikel 54	Artikel 54
Artikel 55	Artikel 55

Kommissionens förslag till genomförandeförordning från den 21 mars 2006	Kommissionens förslag till genomförandeförordning efter omröstningen i europeiska värdepapperskommittén den 26 juni 2006
Skäl 1	Skäl 1
Skäl 2	Skäl 2
Skäl 3	Skäl 3
Skäl 4	Skäl 4
Skäl 5	Skäl 5
Skäl 6	---
Skäl 7	Skäl 6
Skäl 8	Skäl 7
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Skäl 10	Skäl 9
Skäl 11	Skäl 10
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Skäl 12	Skäl 12
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Skäl 14	Skäl 14
Skäl 15	---
Skäl 16	Skäl 15
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Skäl 20	Skäl 20
Skäl 21	Skäl 21
Skäl 22	Skäl 22
Skäl 23	Skäl 23
Skäl 24	Skäl 24
Skäl 25	Skäl 25
Skäl 26	Skäl 26
Skäl 27	Skäl 27
Artikel 1	Artikel 1
Artikel 2	Artikel 2
Artikel 3	Artikel 3
Artikel 4	Artikel 4

Artikel 5	Artikel 5
Artikel 5 A	Artikel 6
Artikel 6	Artikel 7
Artikel 7	Artikel 8
Artikel 8	Artikel 9
Artikel 9	Artikel 10
Artikel 10	Artikel 11
Artikel 11	Artikel 12
Artikel 12	Artikel 13
Artikel 13	Artikel 14
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Artikel 26	Artikel 27
Artikel 27	Artikel 28
Artikel 28	Artikel 29
Artikel 29	Artikel 30
Artikel 30	Artikel 31
Artikel 31	Artikel 32
Artikel 32	Artikel 33
Artikel 33	Artikel 34
Artikel 34	---
Artikel 35	Artikel 35
Artikel 36	Artikel 36
Artikel 37	Artikel 37
Artikel 38	Artikel 38
Artikel 39	Artikel 39
Artikel 40	Artikel 40
Artikel 41	Artikel 41

Parallelluppställning över genomförandet av direktiv 2004/39/EG (MiFID)

Artikel i direktivet	Svenska bestämmelser
AVDELNING I Definitioner och räckvidd	
1 Räckvidd	1 kap. 1 § och 5 § 21 lagen om värdepappersmarknaden (LV)
2 Undantag	
2.1	2 kap. 4 § LV När det gäller artiklarna 2.1 c, d och k, jfr definitionen av värdepappersrörelse i 1 kap. 5 § LV som anger att verksamheten ska vara yrkesmässig. Artiklarna 2.1 m och n är inte relevanta för Sverige.
2.2	2 kap. 4 § 1 LV
2.3	---
3 Frivilliga undantag	
3.1	2 kap. 4 § 12 LV
3.2	Jfr 4 kap. 1 och 3 §§
4 Definitioner	
4.1.1	1 kap. 5 § 19 och 20 LV
4.1.2	2 kap. 1 § LV
4.1.3	2 kap. 2 § första stycket LV
4.1.4	Definition har inte tagits in
4.1.5	Definition har inte tagits in
4.1.6	Definition har inte tagits in
4.1.7	1 kap. 5 § 18 LV

4.1.8	Definition har inte tagits in
4.1.9	Definition har inte tagits in
4.1.10	Definition har inte tagits in
4.1.11	1 kap. 5 § 15 LV
4.1.12	Definition har inte tagits in
4.1.13	1 kap. 5 § 3 LV
4.1.14	1 kap. 5 § 16 LV
4.1.15	1 kap. 5 § 14 LV
4.1.16	9 kap. 1 § LV
4.1.17	1 kap. 4 § 1 LV
4.1.18	1 kap. 4 § 2 LV
4.1.19	1 kap. 4 § 4 LV
4.1.20	1 kap. 5 § 10 LV
4.1.21	Definition har inte tagits in
4.1.22	1 kap. 5 § 2 LV (definitionen i utredningens förslag inbegriper även myndigheter utanför EES)
4.1.23	1 kap. 5 § 12 LV och lagen (2004:297) om bank- och finansieringsrörelse
4.1.24	Definition i lagen (2004:46) om investeringsfonder
4.1.25	1 kap. 5 § 1 LV
4.1.26	1 kap. 5 § 8 LV
4.1.27	1 kap. 5 § 13 LV
4.1.28	Definition har inte tagits in
4.1.29	Definition har inte tagits in
4.1.30	Definition har inte tagits in
4.1.31	1 kap. 6 § LV
4.2	---

AVDELNING II Villkor för auktorisation och för verksamheten för värdepappersföretag	
KAPITEL 1 Villkor och förfaranden för auktorisation	
5 Auktorisationskrav	
5.1	2 kap. 1 § första meningen LV
5.2	13 kap. 12 § andra stycket LV

5.3	Förordning (1996:596) med instruktion för Finansinspektionen (se s. 251 f i huvudbetänkandet)
5.4	3 kap. 1 § 1 LV
5.5	Frivilligt, möjligheten att delegera har inte utnyttjats
6 Auktorisationens räckvidd	
6.1 Fösta meningen	Ingen direkt motsvarighet, jfr dock 2 kap. 1 § LV
6.1 Andra meningen	2 kap. 2 § LV
6.1 Tredje meningen	2 kap. 2 § LV
6.2	Jfr 2 kap. 1–2 §§ LV
6.3	4 kap. 1–3 §§ LV
7 Förfaranden för att bevilja och avslå ansökningar om auktorisation	
7.1	3 kap. LV
7.2	3 kap. 14 § samt 15 § 1 och 4 LV
7.3	26 kap. 2 § första stycket LV
8 Återkallelse av auktorisation	
8. a	25 kap. 5 § första stycket 3 och 5 LV
8. b	25 kap. 5 § första stycket 1 LV
8. c	25 kap. 5 § första stycket 2 LV
8. d	25 kap. 1 § LV
8. e	25 kap. 1 § LV
9 Personer som leder verksamheten	
9.1 första stycket	3 kap. 1 § 5 LV
9.1 andra stycket	Jfr 12 kap. och 3 kap. LV
9.2	3 kap. 3 § LV
9.3	Framgår indirekt av 3 kap. 1 § LV
9.4	3 kap. 6 § första stycket LV
10 Aktieägare och andra delägare med kvalificerade innehav	

10.1 första och andra styckena	3 kap. 1 § 4 LV
10.1 tredje stycket	3 kap. 2 § andra stycket LV
10.2	3 kap. 2 § andra stycket LV
10.3	24 kap. 1 och 3 §§ LV
10.4	24 kap. 2 § LV
10.5	24 kap. 5 och 6 §§ LV
10.6	24 kap. 7–11 §§ LV
11 Anslutning till ett auktoriserat system för ersättning till investerare	
11	Lagen (1999:158) om investerarskydd
12 Startkapital	
12	3 kap. 8 § LV
13 Krav på organisation av verksamheten	
13.1	---
13.2	8 kap. 7 § LV
13.3	8 kap. 12 § första stycket LV
13.4	8 kap. 8 § LV
13.5 första stycket	8 kap. 11 § LV
13.5 andra stycket	8 kap. 9 § LV
13.6	10 kap. 2 § och 6 § 1 LV
13.7	8 kap. 25 § LV
13. 8	8 kap. 26 § LV
13.9	23 kap. 1 § och 10 kap. 1 § LV
13.10	---
14 Handel och avslut på MTF-plattformar	
14.1	11 kap. 4 § LV
14.2 första stycket	11 kap. 4 § LV
14.2 andra stycket	11 kap. 5 § LV
14.3	11 kap. 2 § LV
14.4	11 kap. 1 andra stycket och 3 § LV
14.5	11 kap. 4 § 4 LV
14.6	Indirekt av 11 kap. 6 § LV
14.7	22 kap. 6 § LV

15 Förbindelser med tredje land	
15.1–5	Ingen motsvarighet
KAPITEL II Villkor för verksamheten i värdepappersföretag	
16 Regelbunden granskning av villkoren för ursprunglig auktorisation	
16.1	25 kap. 1 § LV
16.2	23 och 25 kap. LV
16.3	Frivilligt, möjligheten att delegera har inte utnyttjats
17 Allmänna krav i fråga om fortlöpande tillsyn	
17.1	23 kap. LV
17.2	Frivilligt, möjligheten att delegera har inte utnyttjats
18 Intressekonflikter	
18.1	8 kap. 12 § första stycket LV
18.2	8 kap. 12 § andra stycket LV
18.3	---
19 Uppföranderegler vid tillhandahållande av investeringstjänster till kunder	
19.1	8 kap. 1 § LV
19.2–3	8 kap. 13 § LV
19.4	8 kap. 14 § LV
19.5	8 kap. 15 § LV
19.6	8 kap. 16 § LV
19.7	8 kap. 17 § LV
19.8	8 kap. 18 § LV
19.9	8 kap. 32 § LV
19.10	---
20 Tillhandahållande av tjänster via ett annat värdepappersföretag	
	En uttrycklig bestämmelse med detta innehåll är inte nödvändig (se s. 376 f i huvudbetänkandet)

21 Skyldighet att utföra order på de villkor som är mest lämpliga för kunden	
21.1	8 kap. 19 § LV
21.2	8 kap. 20 § första stycket LV
21.3 första stycket	8 kap. 20 § andra stycket LV
21.3 andra stycket	8 kap. 13 § första stycket 5 och 21 § LV
21.3 tredje stycket	8 kap. 21 och 22 §§ LV
21.4	8 kap. 20 § tredje stycket LV
21.5	8 kap. 23 § LV
21.6	---
22 Bestämmelser om hantering av kundorder	
22.1	8 kap. 24 § LV
22.2	9 kap. 1 § LV
22.3	---
23 Krav på värdepappers-företag som utnämner anknutna ombud	
23.1	6 kap. LV (jfr 1 kap. 5 § 1)
23.2 första stycket	6 kap. 2 § 3 LV (jfr 1 kap. 5 § 1 LV)
23.2 andra stycket	Frivilligt, möjligheten har inte utnyttjats
23.2 tredje stycket	6 kap. 1 och 4 §§ LV
23.3	6 kap. 1 § LV
23.4 första stycket	6 kap. 1 och 4 §§ LV
23.4 andra stycket	Frivilligt, möjligheten att delegera har inte utnyttjats
23.5	6 kap. 1 § LV
23.6	6 kap. LV
24 Transaktioner med godtagbara motparter	
24.1–2	8 kap. 31 § första stycket LV
24.3	8 kap. 31 § andra stycket LV
24.4	8 kap. 31 § tredje stycket LV
24.5	---

25 Skyldighet att vidmakthålla marknadernas integritet, rapportera transaktioner och bevara uppgifter	
25.1	8 kap. 1 § samt 23 och 25 kap. LV
25.2	10 kap. 1 och 3 §§ LV
25.3 första stycket	10 kap. 4 § första stycket LV
25.3 andra stycket	23 kap. 4 § LV
25.4	10 kap. 4 § andra stycket LV
25.5	10 kap. 5 § LV
25.6	23 kap. 4 § LV
25.7	---
26 Övervakning av att MTF-plattformens regler följs och att andra rättsliga förpliktelser uppfylls	
26.1	8 kap. 10 § LV
26.2	10 § lagen (2005:377) om straff för marknadsmissbruk vid handel med finansiella instrument
27 Skyldighet för värdepappersföretag att offentliggöra fasta bud	
27.1 första stycket	9 kap. 2 § första stycket första meningen LV
27.1 andra stycket	Jfr 9 kap. 2 § första stycket första meningen och 2 § andra stycket LV
27.1 tredje stycket	9 kap. 2 § första stycket LV
27.1 fjärde stycket	Ingen motsvarighet
27.1 femte stycket	Ingen motsvarighet
27.2	Ingen motsvarighet
27.3 första–andra styckena	9 kap. 2 § första stycket andra meningen och 3 § LV
27.3 tredje stycket	9 kap. 4 § LV
27.3 fjärde stycket	9 kap. 4 § och 6 § första stycket LV

27.3 femte stycket	9 kap. 6 § andra stycket LV
27.3 sjätte stycket	9 kap. 5 § LV
27.4	23 kap. 1 § LV
27.5	9 kap. 7 § LV
27.6	9 kap. 8 § LV
27.7	---
28 Offentliggörande från värdepappersföretag efter avslutade transaktioner	
28.1–2	9 kap. 9 § LV
28.3	---
29 Informationskrav före handel på en MTF-plattform	
29.1	11 kap. 10 § LV
29.2	11 kap. 12 § 3 LV
29.3	---
30 Krav på MTF-plattformar om information efter handel	
30.1	11 kap. 11 § LV
30.2	11 kap. 12 § 4 LV
30.3	---
KAPITEL III Värdepappersföretagens rättigheter	
31 Frihet att tillhandahålla investeringstjänster och utföra investeringsverksamhet	
31.1	4 kap. 1 och 3 §§ LV
31.2 första stycket	5 kap. 4 § LV
31.2 andra stycket	5 kap. 6 § LV
31.3	5 kap. 4 § LV
31.4	5 kap. 5 § LV
31.5	4 kap. 2 § 1 LV
31.6	5 kap. 7 § LV
32 Etablering av filialer	
32.1	4 kap. 1 och 3 §§ LV
32.2 första stycket	5 kap. 1 § LV
32.2 andra stycket	4 kap. 3 § andra stycket LV

32.3	5 kap. 2 § första stycket första meningen och andra stycket LV
32.4	5 kap. 2 § första stycket andra meningen LV
32.5	5 kap. 2 § tredje stycket LV
32.6	4 kap. 1 § LV
32.7 första stycket	8 kap. 2 § LV
32.7 andra stycket	23 kap. 1 § LV
32.8	Jfr 23 kap. 5 § LV
32.9	5 kap. 3 § LV
33 Tillträde till reglerade marknader	
33.1	14 kap. 3 och 13 kap. 1 § andra stycket LV
33.2	14 kap. 3 och 13 kap. 1 § andra stycket LV
34 Tillträde till central motpart och andra system för clearing och avveckling samt rätt att välja avvecklingssystem	
34.1	20 kap. 1 § och 21 kap. 1 § LV
34.2	13 kap. 6 § andra stycket
34.3	---
35 Bestämmelser om central motpart och system för clearing och avveckling för MTF-plattformar	
35 1–2	En uttrycklig bestämmelse med detta innehåll är inte nödvändig (se s. 282 i huvudbetänkandet)

AVDELNING III Reglerade marknader	
36 Auktorisation och tillämplig lagstiftning	
36.1	12 kap. 1 och 2 §§, 10 § andra stycket samt 13 § 1 och 3 LV
36.2	23 kap. 1 § LV
36.3	23 kap. 1 § LV

36.4	---
36.5	25 kap. 1 och 5 §§ LV
37 Krav på ledning för den reglerade marknaden	
37.1	12 kap. 2 § 4 och 4 § samt 25 kap. 4 § LV
37.2	12 kap. 2 § 4 LV
38 Krav avseende personer som utövar ett betydande inflytande på förvaltningen av en reglerad marknad	
38.1	12 kap. 2 § 3 LV
38.2	24 kap. 5 § och 23 kap. 1 § LV
38.3	24 kap. 7–10 §§ LV
39 Organisatoriska krav på den reglerade marknaden	
a	13 kap. 1 § tredje stycket LV
b	13 kap. 1 § tredje stycket LV
c	13 kap. 1 § tredje stycket LV
d	13 kap. 6 § LV
e	13 kap. 6 § LV
f	12 kap. 8 § LV
40 Upptagande av finansiella instrument till handel	
40.1 första stycket	15 kap. 1 § LV
40.1 andra stycket	15 kap. 2 § LV
40.2	15 kap. 2 § LV
40.3	15 kap. 6 och 8 §§ LV
40.4	15 kap. 8 § LV
40.5	15 kap. 4 och 5 §§ LV
40.6	---
41 Stopp för handel med instrument och avförande av ett instrument från handel	
41.1 första stycket	15 kap. 9 § och 22 kap. 1 § LV
41.1 andra stycket	15 kap. 9 § samt 22 kap. 1 och 8 §§ LV
41.2	22 kap. 3 och 8 §§ LV

42 Tillträde till reglerade marknader	
42. 1	13 kap. 1 § andra stycket och 14 kap. 1 § LV
42.2	13 kap. 6 § samt 14 kap. 2 och 3 §§ LV
42.3	14 kap. 2 § LV
42.4	En uttrycklig bestämmelse med detta innehåll är inte nödvändig (se s. 403 f i huvudbetänkandet)
42.5	13 kap. 6 § LV
42.6	12 kap. 11 och 12 §§ LV
42.7	23 kap. 1 § och 11 § 1 LV
43 Övervakning av att den reglerade marknadens regler följs och andra rättsliga förpliktelser fullgörs	
43.1	13 kap. 2 och 7 §§ samt 14 kap. 7 § LV
43.2	10 § lagen om straff för marknadsmissbruk vid handel med finansiella instrument
44 Krav på reglerade marknader om information före handeln	
44.1 första stycket	13 kap. 10 § LV
44.1 andra stycket	13 kap. 12 § LV
44.2	13 kap. 17 § 4 LV
44.3	---
45 Krav på reglerade marknader om information efter handeln	
45.1 första stycket	13 kap. 11 § LV
45.1 andra stycket	13 kap. 12 § LV
45.2	13 kap. 17 § 5 LV
45.3	---
46 Bestämmelser om central motpart och andra system för clearing och avveckling	

46.1–2	En uttrycklig bestämmelse med detta innehåll är inte nödvändig (se s. 286 f i huvudbetänkandet)
47 Förteckning över reglerade marknader	
47	Förordning med instruktion till Finansinspektionen (se s. 286 f i huvudbetänkandet)

AVDELNING IV Behöriga myndigheter	
KAPITEL I Utnämning, befogenheter och prövningsförfaranden	
48 Utnämning av behöriga myndigheter	
48.1	6 kap. 1 § (Bolagsverket) och 23 kap. 1 § LV (Finansinspektionen)
48.2	Frivilligt, möjligheten att delegera har inte utnyttjats
48.3	---
49 Samarbete mellan myndigheter i samma medlemsstat	
49	Ingen motsvarighet
50 De behöriga myndigheternas befogenheter	
50.1	23 och 25 kap. LV
50.2 a	23 kap. 1 och 2 §§ LV
50.2 b	23 kap. 2 § LV
50.2 c	23 kap. 3 § LV
50.2 d	23 kap. 2 § LV
50.2 e	25 kap. 1 § LV

50.2 f	En uttrycklig bestämmelse med detta innehåll är inte nödvändig (bestämmelser om kvarstad och beslag har tidigare ansetts tillgodose syftena bakom frysningsinstitutet, se s. 430 i huvudbetänkandet)
50.2 g	25 kap. 4 och 6 §§ LV och lagen (1986:436) om näringsförbud (se s. 430 ff i huvudbetänkandet)
50.2 h	23 kap. 2 § LV
50.2 i	25 kap. 1 § LV
50.2 j	22 kap. 2 § LV
50.2 k	Ingen motsvarighet men får anses genomförd genom Finansinspektionens möjligheter att ingripa mot en börs (se s. 433 f i huvudbetänkandet)
50.2 l	En uttrycklig bestämmelse med detta innehåll är inte nödvändig (se s. 434 f i huvudbetänkandet)
50.2 m	23 kap. 6 § LV
51 Administrativa sanktioner	
51.1	25 kap. LV
51.2	25 kap. LV
51.3	Ingen motsvarighet (jfr 8 kap. 5 § sekretesslagen (1980:100) och s. 436 i huvudbetänkandet)
52 Rätt att överklaga	
52.1	26 kap. 1 och 2 §§ LV samt 20 § förvaltningslagen (1986:223)
52.2	Marknadsföringslagen (1995:450), Allmänna reklamationsnämnden m.fl. (se s. 469 f i huvudbetänkandet)
53 System för investerares klagomål utanför domstol	

53	Marknadsföringslagen, Allmänna reklamationsnämnden m.fl. (se s. 469 f i huvudbetänkandet)
54 Tystnadsplikt	
	Ingen direkt motsvarighet men artikeln får anses genomförd genom 1 kap. 3 § och 8 kap. 5 § sekretesslagen
55 Förhållande till revisorer	
55.1	23 kap. 7 och 8 §§ LV
55.2	23 kap. 7 och 8 §§ LV
KAPITEL II Samarbete mellan behöriga myndigheter i skilda medlemsstater	
56 Skyldighet att samarbeta	23 kap. 4 och 5 §§ LV
57 Samarbete avseende tillsynsverksamhet, kontroll på plats eller vid utredningar	14 kap. 6 § andra stycket och 23 kap. 4 och 5 §§ LV
58 Informationsutbyte	23 kap. 4 och 5 §§ LV
59 Vägran att samarbeta	23 kap. 4 och 5 §§ LV
60 Samråd mellan myndigheter före beviljande av auktorisation	
60.1–2	3 kap. 12 § LV
60.3	3 kap. 12 § och 23 kap. 4 och 5 §§ LV
61 Värdmedlemsstaternas befogenheter	
61.1	23 kap. 1 § LV
61.2	23 kap. 1 och 2 §§ LV
62 Försiktighetsåtgärder som värdmedlemsstaten är skyldig att vidta	
62.1	25 kap. 11 § LV
62.2	25 kap. 10 § LV

62.3	25 kap. 11 och 14 §§ LV
62.4	20 och 21 §§ förvaltningslagen
KAPITEL III Samarbete med tredje land	
63 Informationsutbyte med tredje land	
63.1	Förordning med instruktion för Finansinspektionen och sekretesslagen
63.2	Sekretesslagen

AVDELNING V Slutbestämmelser	
64 Kommittologiförfarande	---
65 Kommissionens rapporter	---
66 Ändring av direktiv 85/611/EEG	7 kap. 3 § lagen om investeringsfonder
67 Ändring av direktiv 93/6/EEG	3 kap. 7 § LV
68 Ändring av direktiv 2000/12/EG	4 kap. 1 § LV
69 Upphävande av direktiv 93/22/EEG	---
70 Införlivande i nationell lagstiftning	---
71 Övergångsbestämmelser	Punkterna 2–9 i övergångsbestämmelserna till LV
72 Ikraftträdande	---
73 Adressater	---

Statens offentliga utredningar 2006

Kronologisk förteckning

1. Skola & Samhälle. U.
2. Omprövning av medborgarskap. Ju.
3. Stärkt konkurrenskraft och sysselsättning i hela landet. N.
4. Svenska partnerskap – en översikt. Rapport 1 till Organisationsutredningen för regional tillväxt. N.
5. Organisering av regional utvecklingspolitik – balansera utveckling och förvaltning.
   Rapport 2 till Organisationsutredningen för regional tillväxt. N.
6. Skyddsgrundsdirektivet och svensk rätt. En anpassning av svensk lagstiftning till EG-direktiv 2004/83/EG angående flyktingar och andra skyddsbehövande.UD.
7. Studieavgifter i högskolan. U.
8. Mångfald och räckvidd. U.
9. Kontroll av varor vid inre gräns. Fi.
10. Ett förnyat programkontor. U.
11. Spel i en föränderlig värld. Fi.
12. Rattfylleri och sjöfylleri. Ju.
13. Djurskydd vid hästavel. Jo.
14. Samernas sedvanemarker. Jo.
15. Detaljhandel med nikotinläkemedel. S.
16. Ny reglering om brandfarliga och explosiva varor. Fö.
17. Ny häkteslag. Ju.
18. Kustbevakningens personuppgiftsbehandling. Integritet – Effektivitet. Fö.
19. Att återta mitt språk. Åtgärder för att stärka det samiska språket. Ju.
20. Tonnageskatt. Fi.
21. Mediernas Vi och Dom. Mediernas betydelse för den strukturella diskrimineringen. Ju.
22. En sammanhållen diskrimineringslagstiftning. Del 1+2, särtryck av sammanfattningen, lättläst sammanfattning och daisy. Ju
23. Nya skatteregler för idrotten. Fi.
24. Avgift för matservice inom äldre- och handikappomsorgen. S.
25. Arbetslivsresurs. Ett statligt ägt bolag efter sammanslagning av Samhall Resurs AB (publ) och Arbetslivstjänster. N.
26. Sverige som värdland för internationella organisationer. UD.
27. Stöd till hälsobefrämjande tandvård. S.
28. Nya upphandlingsregler 2. Fi.
29. Teckenspråk och teckenspråkiga. Kunskaps- och forskningsöversikt. S.
30. Är rättvisan rättvis? Tio perspektiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet. Ju.
31. Anställ unga! U.
32. God sed vid lönebildning – Utvärdering av Medlingsinstitutet. N.
33. Andra vägar att finansiera nya vägar. N.
34. Den professionella orkestermusiken i Sverige. U.
35. Värdepapper och kontrolluppgifter. Fi.
36. För studenterna ...
    – om studentkårer, nationer och särskilda studentföreningar. U.
37. Om välfärdens gränser och det villkorade medborgarskapet. Ju.
38. Vuxnas lärande. En ny myndighet. U.
39. Ett utvidgat miljöansvar. M.
40. Utbildningens dilemma. Demokratiska ideal och andrafierande praxis. Ju.
41. Internationella sanktioner. UD.
42. Plats på scen. U.
43. Översyn av atomansvaret. M.
44. Bättre arbetsmiljöregler I. Samverkan, utbildning, avtal m.m. N.
45. Tänka framåt, men göra nu. Så stärker vi barnkulturen. + Bilaga/rapport: ”Det ser lite olika ut ...” En kartläggning av den offentligt finansierade kulturen för barn. U.

46. Jakten på makten. Ju.
47. Ökade möjligheter till trafiknykterhetskontroller vid gränserna. Ju.
48. Bidragsbrott. Fi.
49. Asylsökande barn med uppgivenhetssymtom – trauma, kultur, asylprocess. UD.
50. En ny lag om värdepappersmarknaden. + Författningsbilaga. Fi.
51. Tillgänglighet, mobil TV samt vissa andra radio- och TV-rättsliga frågor. + Daisy. U.
52. Diskrimineringens retorik. En studie av svenska valrörelser 1988–2002. Ju.
53. Partierna nominerar. Exkluderingens mekanismer – etnicitet och representation. Ju.
54. Teckenspråk och teckenspråkiga. Översyn av teckenspråkets ställning. S.
55. Ny associationsrätt för försäkringsföretag. + Författningsförslag. Fi.
56. Ansvarsfull servering – fri från diskriminering. S.
57. En bättre tillsyn av missbrukarvården. S.
58. Sanktionsavgift i stället för straff – områdena livsmedel, foder och djurskydd. Jo.
59. Arbetslivets (o)synliga murar. Ju.
60. På tröskeln till lönearbete. Diskriminering, exkludering och underordning av personer med utländsk bakgrund. Ju.
61. Asylförfarandet – genomförandet av asylprocedurdirektivet i svensk rätt. UD
62. Testa och öva i norra Sverige. Center i Arvidsjaur. N.
63. Forensiska institutet. Ny myndighet för kriminalteknik, rättsmedicin och rättspsykiatri. Ju.
64. Internationella kasinon i Sverige. En utvärdering. Fi.
65. Att ta ansvar för sina insatser. Socialtjänstens stöd till våldsutsatta kvinnor. S.
66. Hästtävlingar – på lika villkor. Jo.
67. Fritid till sjöss och i hamn. Förslag till finansiering av service till sjöfolk. N.
68. Klenoder i tiden. En utredning om samlingar kring scen och musik. U.
69. Uppföljning av kostnadsutjämningen för kommunernas LSS-verksamhet. Fi.
70. Oinskränkt produktskydd för patent på genteknikområdet. Ju.
71. Stöd till hälsobefrämjande tandvård del 2. S.
72. Öppna möjligheter med alkolås. N.
73. Den segregerande integrationen. Om social sammanhållning och dess hinder. Ju.
74 En ny lag om värdepappersmarknaden. Supplement. Fi.

Statens offentliga utredningar 2006

Systematisk förteckning

Finansdepartementet

Kontroll av varor vid inre gräns. [9]
Spel i en föränderlig värld. [11]
Tonnageskatt. [20]
Nya skatteregler för idrotten. [23]
Nya upphandlingsregler 2. [28]
Värdepapper och kontrolluppgifter. [35]
Bidragsbrott. [48]
En ny lag om värdepappersmarknaden. +Författningsbilaga. [50]
Ny associationsrätt för försäkringsföretag. + Författningsförslag. [55]
Internationella kasinon i Sveige. En utvärdering. [64]
Uppföljning av kostnadsutjämningen för kommunernas LSS-verksamhet. [69]
En ny lag om värdepappersmarknaden. Supplement. [74]

Utbildnings- och kulturdepartementet

Skola & Samhälle. [1]
Studieavgifter i högskolan. [7]
Mångfald och räckvidd. [8]
Ett förnyat programkontor. [10]
Anställ unga! [31]
Den professionella orkestermusiken i Sverige. [34]
För studenterna... – om studentkårer, nationer och särskilda studentföreningar. [36]
Vuxnas lärande. En ny myndighet. [38]
Plats på scen. [42]
Tänka framåt, men göra nu. Så stärker vi barnkulturen. + Bilaga/rapport: "Det ser lite olika ut..." En kartläggning av den offentligt finansierade kulturen för barn. [45]
Tillgänglighet, mobil TV samt vissa andra radio- och TV-rättsliga frågor. + Daisy. [51]
Klenoder i tiden. En utredning om samlingar kring scen och musik. [68]

Jordbruksdepartementet

Djurskydd vid hästavel. [13]
Samernas sedvanemarker. [14]
Sanktionsavgift i stället för straff – områdena livsmedel, foder och djurskydd. [58]
Hästtävlingar – på lika villkor. [66]

Miljö- och samhällsbyggnadsdepartementet

Ett utvidgat miljöansvar. [39]
Översyn av atomansvaret. [43]

Näringsdepartementet

Stärkt konkurrenskraft och sysselsättning i hela landet. [3]
Svenska partnerskap – en översikt. Rapport 1 till Organisationsutredningen för regional tillväxt. [4]
Organisering av regional utvecklingspolitik – balansera utveckling och förvaltning. Rapport 2 till Organisationsutredningen för regional tillväxt. [5]
Arbetslivsresurs. Ett statligt ägt bolag efter sammanslagning av Samhall Resurs AB (publ) och Arbetslivstjänster. [25]
God sed vid lönebildning – Utvärdering av Medlingsinstitutet. [32]
Andra vägar att finansiera nya vägar. [33]
Bättre arbetsmiljöregler I. Samverkan, utbildning, avtal m.m. [44]
Testa och öva i norra Sverige. Center i Arvidsjaur. [62]
Fritid till sjöss och i hamn. Förslag till finansiering av service till sjöfolk. [67]
Öppna möjligheter med alkolås. [72]