

## I

(Acts whose publication is obligatory)

**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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the Opinion of the European Economic and Social Committee <sup>(2)</sup>,

Having regard to the opinion of the European Central Bank <sup>(3)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(4)</sup>,

Whereas:

(1) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field <sup>(5)</sup> sought to establish the conditions under which authorised investment firms and banks could provide specified services or establish branches in other Member States on the basis of home country authorisation and supervision. To this end, that Directive aimed to harmonise the initial authorisation and operating requirements for investment firms including conduct of business rules. It also provided for the harmonisation of some conditions governing the operation of regulated markets.

(2) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the Community should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. In view of the preceding, Directive 93/22/EEC should be replaced by a new Directive.

(3) Due to the increasing dependence of investors on personal recommendations, it is appropriate to include the provision of investment advice as an investment service requiring authorisation.

(4) It is appropriate to include in the list of financial instruments certain commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments.

(5) It is necessary to establish a comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. A coherent and risk-sensitive framework for regulating the main types of order-execution arrangement currently active in the European financial marketplace should be provided for. It is necessary to recognise the emergence of a new generation of organised trading systems alongside regulated markets which should be subjected to obligations designed to preserve the efficient and orderly functioning of financial markets. With a view to establishing a proportionate regulatory framework provision should be made for the inclusion of a new investment service which relates to the operation of an MTF.

<sup>(1)</sup> OJ C 71 E, 25.3.2003, p. 62.

<sup>(2)</sup> OJ C 220, 16.9.2003, p. 1.

<sup>(3)</sup> OJ C 144, 20.6.2003, p. 6.

<sup>(4)</sup> Opinion of the European Parliament of 25 September 2003 (not yet published in the Official Journal), Council Common Position of 8 December 2003 (OJ C 60 E, 9.3.2004, p. 1), Position of the European Parliament of 30 March 2004 (not yet published in the Official Journal) and Decision of the Council of 7 April 2004.

<sup>(5)</sup> OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

- (6) Definitions of regulated market and MTF should be introduced and closely aligned with each other to reflect the fact that they represent the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller. The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a 'technical' system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest. The requirement that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term 'non-discretionary rules' means that these rules leave the investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract, meaning that execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.
- (7) The purpose of this Directive is to cover undertakings the regular occupation or business of which is to provide investment services and/or perform investment activities on a professional basis. Its scope should not therefore cover any person with a different professional activity.
- (8) Persons administering their own assets and undertakings, who do not provide investment services and/or perform investment activities other than dealing on own account unless they are market makers or they deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis, by providing a system accessible to third parties in order to engage in dealings with them should not be covered by the scope of this Directive.
- (9) References in the text to persons should be understood as including both natural and legal persons.
- (10) Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession<sup>(1)</sup>, First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of direct insurance other than life assurance<sup>(2)</sup> and Council Directive 2002/83/EC of 5 November 2002 concerning life assurance<sup>(3)</sup> should be excluded.
- (11) Persons who do not provide services for third parties but whose business consists in providing investment services solely for their parent undertakings, for their subsidiaries, or for other subsidiaries of their parent undertakings should not be covered by this Directive.
- (12) Persons who provide investment services only on an incidental basis in the course of professional activity should also be excluded from the scope of this Directive, provided that activity is regulated and the relevant rules do not prohibit the provision, on an incidental basis, of investment services.
- (13) Persons who provide investment services consisting exclusively in the administration of employee-participation schemes and who therefore do not provide investment services for third parties should not be covered by this Directive.
- (14) It is necessary to exclude from the scope of this Directive central banks and other bodies performing similar functions as well as public bodies charged with or intervening in the management of the public debt, which concept covers the investment thereof, with the exception of bodies that are partly or wholly State-owned the role of which is commercial or linked to the acquisition of holdings.
- (15) It is necessary to exclude from the scope of this Directive collective investment undertakings and pension funds whether or not coordinated at Community level, and the depositaries or managers of such undertakings, since they are subject to specific rules directly adapted to their activities.

<sup>(1)</sup> OJ 56, 4.4. 1964, p. 878/64. Directive as amended by the 1972 Act of Accession.

<sup>(2)</sup> OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2002/87/EC.

<sup>(3)</sup> OJ L 345, 19.12.2002, p. 1.

- (16) In order to benefit from the exemptions from this Directive the person concerned should comply on a continuous basis with the conditions laid down for such exemptions. In particular, if a person provides investment services or performs investment activities and is exempted from this Directive because such services or activities are ancillary to his main business, when considered on a group basis, he should no longer be covered by the exemption related to ancillary services where the provision of those services or activities ceases to be ancillary to his main business.
- (17) Persons who provide the investment services and/or perform investment activities covered by this Directive should be subject to authorisation by their home Member States in order to protect investors and the stability of the financial system.
- (18) Credit institutions that are authorised under Directive 2000/12/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 <sup>(1)</sup> should not need another authorisation under this Directive in order to provide investment services or perform investment activities. When a credit institution decides to provide investment services or perform investment activities the competent authorities, before granting an authorisation, should verify that it complies with the relevant provisions of this Directive.
- (19) In cases where an investment firm provides one or more investment services not covered by its authorisation, or performs one or more investment activities not covered by its authorisation, on a non-regular basis it should not need an additional authorisation under this Directive.
- (20) For the purposes of this Directive, the business of the reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors.
- (21) In the context of the forthcoming revision of the Capital Adequacy framework in Basel II, Member States recognise the need to re-examine whether or not investment firms who execute client orders on a matched principal basis are to be regarded as acting as principals, and thereby be subject to additional regulatory capital requirements.
- (22) The principles of mutual recognition and of home Member State supervision require that the Member States' competent authorities should not grant or should withdraw authorisation where factors such as the content of programmes of operations, the geographical distribution or the activities actually carried on indicate clearly that an investment firm has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities. An investment firm which is a legal person should be authorised in the Member State in which it has its registered office. An investment firm which is not a legal person should be authorised in the Member State in which it has its head office. In addition, Member States should require that an investment firm's head office must always be situated in its home Member State and that it actually operates there.
- (23) An investment firm authorised in its home Member State should be entitled to provide investment services or perform investment activities throughout the Community without the need to seek a separate authorisation from the competent authority in the Member State in which it wishes to provide such services or perform such activities.
- (24) Since certain investment firms are exempted from certain obligations imposed by Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions <sup>(2)</sup>, they should be obliged to hold either a minimum amount of capital or professional indemnity insurance or a combination of both. The adjustments of the amounts of that insurance should take into account adjustments made in the framework of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation <sup>(3)</sup>. This particular treatment for the purposes of capital adequacy should be without prejudice to any decisions regarding the appropriate treatment of these firms under future changes to Community legislation on capital adequacy.
- (25) Since the scope of prudential regulation should be limited to those entities which, by virtue of running a trading book on a professional basis, represent a source of counterparty risk to other market participants, entities which deal on own account in financial instruments, including those commodity derivatives covered by this Directive, as well as those that provide investment services in commodity derivatives to the clients of their main business on an ancillary basis to their main business when considered on a group basis, provided that this main business is not the provision of investment services within the meaning of this Directive, should be excluded from the scope of this Directive.

<sup>(1)</sup> OJ L 126, 26.5.2000, p. 1. Directive as last amended by Directive 2002/87/EC.

<sup>(2)</sup> OJ L 141, 11.6.1993, p. 1. Directive as last amended by Directive 2002/87/EC.

<sup>(3)</sup> OJ L 9, 15.1.2003, p. 3.

- (26) In order to protect an investor's ownership and other similar rights in respect of securities and his rights in respect of funds entrusted to a firm those rights should in particular be kept distinct from those of the firm. This principle should not, however, prevent a firm from doing business in its name but on behalf of the investor, where that is required by the very nature of the transaction and the investor is in agreement, for example stock lending.
- (27) Where a client, in line with Community legislation and in particular Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements<sup>(1)</sup>, transfers full ownership of financial instruments or funds to an investment firm for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, such financial instruments or funds should likewise no longer be regarded as belonging to the client.
- (28) The procedures for the authorisation, within the Community, of branches of investment firms authorised in third countries should continue to apply to such firms. Those branches should not enjoy the freedom to provide services under the second paragraph of Article 49 of the Treaty or the right of establishment in Member States other than those in which they are established. In view of cases where the Community is not bound by any bilateral or multilateral obligations it is appropriate to provide for a procedure intended to ensure that Community investment firms receive reciprocal treatment in the third countries concerned.
- (29) The expanding range of activities that many investment firms undertake simultaneously has increased potential for conflicts of interest between those different activities and the interests of their clients. It is therefore necessary to provide for rules to ensure that such conflicts do not adversely affect the interests of their clients.
- (30) A service should be considered to be provided at the initiative of a client unless the client demands it in response to a personalised communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction. A service can be considered to be provided at the initiative of the client notwithstanding that the client demands it on the basis of any communication containing a promotion or offer of financial instruments made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.
- (31) One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties).
- (32) By way of derogation from the principle of home country authorisation, supervision and enforcement of obligations in respect of the operation of branches, it is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.
- (33) It is necessary to impose an effective 'best execution' obligation to ensure that investment firms execute client orders on terms that are most favourable to the client. This obligation should apply to the firm which owes contractual or agency obligations to the client.
- (34) Fair competition requires that market participants and investors be able to compare the prices that trading venues (i.e. regulated markets, MTFs and intermediaries) are required to publish. To this end, it is recommended that Member States remove any obstacles which may prevent the consolidation at European level of the relevant information and its publication.
- (35) When establishing the business relationship with the client the investment firm might ask the client or potential client to consent at the same time to the execution policy as well as to the possibility that his orders may be executed outside a regulated market or an MTF.
- (36) Persons who provide investment services on behalf of more than one investment firm should not be considered as tied agents but as investment firms when they fall under the definition provided in this Directive, with the exception of certain persons who may be exempted.
- (37) This Directive should be without prejudice to the right of tied agents to undertake activities covered by other Directives and related activities in respect of financial services or products not covered by this Directive, including on behalf of parts of the same financial group.

<sup>(1)</sup> OJ L 168, 27.6.2002, p. 43.

- (38) The conditions for conducting activities outside the premises of the investment firm (door-to-door selling) should not be covered by this Directive.
- (39) Member States' competent authorities should not register or should withdraw the registration where the activities actually carried on indicate clearly that a tied agent has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities.
- (40) For the purposes of this Directive eligible counterparties should be considered as acting as clients.
- (41) For the purposes of ensuring that conduct of business rules (including rules on best execution and handling of client orders) are enforced in respect of those investors most in need of these protections, and to reflect well-established market practice throughout the Community, it is appropriate to clarify that conduct of business rules may be waived in the case of transactions entered into or brought about between eligible counterparties.
- (42) In respect of transactions executed between eligible counterparties, the obligation to disclose client limit orders should only apply where the counter party is explicitly sending a limit order to an investment firm for its execution.
- (43) Member States shall protect the right to privacy of natural persons with respect to the processing of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data.<sup>(1)</sup>
- (44) With the two-fold aim of protecting investors and ensuring the smooth operation of securities markets, it is necessary to ensure that transparency of transactions is achieved and that the rules laid down for that purpose apply to investment firms when they operate on the markets. In order to enable investors or market participants to assess at any time the terms of a transaction in shares that they are considering and to verify afterwards the conditions in which it was carried out, common rules should be established for the publication of details of completed transactions in shares and for the disclosure of details of current opportunities to trade in shares. These rules are needed to ensure the effective integration of Member State equity markets, to promote the efficiency of the overall price formation process for equity instruments, and to assist the effective operation of 'best execution' obligations. These considerations require a comprehensive transparency regime applicable to all transactions in shares irrespective of their execution by an investment firm on a bilateral basis or through regulated markets or MTFs. The obligations for investment firms under this Directive to quote a bid and offer price and to execute an order at the quoted price do not relieve investment firms of the obligation to route an order to another execution venue when such internalisation could prevent the firm from complying with 'best execution' obligations.
- (45) Member States should be able to apply transaction reporting obligations of the Directive to financial instruments that are not admitted to trading on a regulated market.
- (46) A Member State may decide to apply the pre- and post-trade transparency requirements laid down in this Directive to financial instruments other than shares. In that case those requirements should apply to all investment firms for which that Member State is the home Member State for their operations within the territory of that Member State and those carried out cross-border through the freedom to provide services. They should also apply to the operations carried out within the territory of that Member State by the branches established in its territory of investment firms authorised in another Member State.
- (47) Investment firms should all have the same opportunities of joining or having access to regulated markets throughout the Community. Regardless of the manner in which transactions are at present organised in the Member States, it is important to abolish the technical and legal restrictions on access to regulated markets.
- (48) In order to facilitate the finalisation of cross-border transactions, it is appropriate to provide for access to clearing and settlement systems throughout the Community by investment firms, irrespective of whether transactions have been concluded through regulated markets in the Member State concerned. Investment firms which wish to participate directly in other Member States' settlement systems should comply with the relevant operational and commercial requirements for membership and the prudential measures to uphold the smooth and orderly functioning of the financial markets.

<sup>(1)</sup> OJ L 281, 23.11.1995, p. 31.

- (49) The authorisation to operate a regulated market should extend to all activities which are directly related to the display, processing, execution, confirmation and reporting of orders from the point at which such orders are received by the regulated market to the point at which they are transmitted for subsequent finalisation, and to activities related to the admission of financial instruments to trading. This should also include transactions concluded through the medium of designated market makers appointed by the regulated market which are undertaken under its systems and in accordance with the rules that govern those systems. Not all transactions concluded by members or participants of the regulated market or MTF are to be considered as concluded within the systems of a regulated market or MTF. Transactions which members or participants conclude on a bilateral basis and which do not comply with all the obligations established for a regulated market or an MTF under this Directive should be considered as transactions concluded outside a regulated market or an MTF for the purposes of the definition of systematic internaliser. In such a case the obligation for investment firms to make public firm quotes should apply if the conditions established by this Directive are met.
- (50) Systematic internalisers might decide to give access to their quotes only to retail clients, only to professional clients, or to both. They should not be allowed to discriminate within those categories of clients.
- (51) Article 27 does not oblige systematic internalisers to publish firm quotes in relation to transactions above standard market size.
- (52) Where an investment firm is a systematic internaliser both in shares and in other financial instruments, the obligation to quote should only apply in respect of shares without prejudice to Recital 46.
- (53) It is not the intention of this Directive to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.
- (54) The standard market size for any class of share should not be significantly disproportionate to any share included in that class.
- (55) Revision of Directive 93/6/EEC should fix the minimum capital requirements with which regulated markets should comply in order to be authorised, and in so doing should take into account the specific nature of the risks associated with such markets.
- (56) Operators of a regulated market should also be able to operate an MTF in accordance with the relevant provisions of this Directive.
- (57) The provisions of this Directive concerning the admission of instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities<sup>(1)</sup>. A regulated market should not be prevented from applying more demanding requirements in respect of the issuers of securities or instruments which it is considering for admission to trading than are imposed pursuant to this Directive.
- (58) Member States should be able to designate different competent authorities to enforce the wide-ranging obligations laid down in this Directive. Such authorities should be of a public nature guaranteeing their independence from economic actors and avoiding conflicts of interest. In accordance with national law, Member States should ensure appropriate financing of the competent authority. The designation of public authorities should not exclude delegation under the responsibility of the competent authority.
- (59) Any confidential information received by the contact point of one Member State through the contact point of another Member State should not be regarded as purely domestic.
- (60) It is necessary to enhance convergence of powers at the disposal of competent authorities so as to pave the way towards an equivalent intensity of enforcement across the integrated financial market. A common minimum set of powers coupled with adequate resources should guarantee supervisory effectiveness.

<sup>(1)</sup> OJ L 184, 6.7.2001, p. 1. Directive as last amended by European Parliament and Council Directive 2003/71/EC (OJ L 345, 31.12.2003, p. 64.).

- (61) With a view to protecting clients and without prejudice to the right of customers to bring their action before the courts, it is appropriate that Member States encourage public or private bodies established with a view to settling disputes out-of-court, to cooperate in resolving cross-border disputes, taking into account Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes<sup>(1)</sup>. When implementing provisions on complaints and redress procedures for out-of-court settlements, Member States should be encouraged to use existing cross-border cooperation mechanisms, notably the Financial Services Complaints Network (FIN-Net).
- (62) Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC.
- (63) It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.
- (64) At its meeting on 17 July 2000, the Council set up the Committee of Wise Men on the Regulation of European Securities Markets. In its final report, the Committee of Wise Men proposed the introduction of new legislative techniques based on a four-level approach, namely framework principles, implementing measures, cooperation and enforcement. Level 1, the Directive, should confine itself to broad general 'framework' principles while Level 2 should contain technical implementing measures to be adopted by the Commission with the assistance of a committee.
- (65) The Resolution adopted by the Stockholm European Council of 23 March 2001 endorsed the final report of the Committee of Wise Men and the proposed four-level approach to make the regulatory process for Community securities legislation more efficient and transparent.
- (66) According to the Stockholm European Council, Level 2 implementing measures should be used more frequently, to ensure that technical provisions can be kept up to date with market and supervisory developments, and deadlines should be set for all stages of Level 2 work.
- (67) The Resolution of the European Parliament of 5 February 2002 on the implementation of financial services legislation also endorsed the Committee of Wise Men's report, on the basis of the solemn declaration made before Parliament the same day by the Commission and the letter of 2 October 2001 addressed by the Internal Market Commissioner to the chairman of Parliament's Committee on Economic and Monetary Affairs with regard to the safeguards for the European Parliament's role in this process.
- (68) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>(2)</sup>.
- (69) The European Parliament should be given a period of three months from the first transmission of draft implementing measures to allow it to examine them and to give its opinion. However, in urgent and duly justified cases, this period could be shortened. If, within that period, a resolution is passed by the European Parliament, the Commission should re-examine the draft measures.
- (70) With a view to taking into account further developments in the financial markets the Commission should submit reports to the European Parliament and the Council on the application of the provisions concerning professional indemnity insurance, the scope of the transparency rules and the possible authorisation of specialised dealers in commodity derivatives as investment firms.
- (71) The objective of creating an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the Community and governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the European financial system as a whole. Since this objective may be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective,

(<sup>1</sup>) OJ L 115, 17.4.1998, p. 31.

(<sup>2</sup>) OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS DIRECTIVE:

## TITLE I

### DEFINITIONS AND SCOPE

#### Article 1

##### Scope

1. This Directive shall apply to investment firms and regulated markets.

2. The following provisions shall also apply to credit institutions authorised under Directive 2000/12/EC, when providing one or more investment services and/or performing investment activities:

- Articles 2(2), 11, 13 and 14,
- Chapter II of Title II excluding Article 23(2) second subparagraph,
- Chapter III of Title II excluding Articles 31(2) to 31(4) and 32(2) to 32(6), 32(8) and 32(9),
- Articles 48 to 53, 57, 61 and 62, and
- Article 71(1).

#### Article 2

##### Exemptions

1. This Directive shall not apply to:

- (a) insurance undertakings as defined in Article 1 of Directive 73/239/EEC or assurance undertakings as defined in Article 1 of Directive 2002/83/EC or undertakings carrying on the reinsurance and retrocession activities referred to in Directive 64/225/EEC;
- (b) persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;
- (d) persons who do not provide any investment services or activities other than dealing on own account unless they are market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;
- (e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;

- (f) persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (g) the members of the European System of Central Banks and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;
- (h) collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings;
- (i) persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;
- (j) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;
- (k) persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;
- (l) firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;
- (m) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;
- (n) 'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998.

2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.

3. In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may, in respect of exemptions (c) (i), and (k) define the criteria for determining when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner.

### Article 3

#### Optional exemptions

1. Member States may choose not to apply this Directive to any persons for which they are the home Member State that:

— are not allowed to hold clients' funds or securities and which for that reason are not allowed at any time to place themselves in debit with their clients, and

— are not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and the provision of investment advice in relation to such financial instruments, and

— in the course of providing that service, are allowed to transmit orders only to:

(i) investment firms authorised in accordance with this Directive;

(ii) credit institutions authorised in accordance with Directive 2000/12/EC;

(iii) branches of investment firms or of credit institutions which are authorised in a third country and which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those laid down in this Directive, in Directive 2000/12/EC or in Directive 93/6/EEC;

(iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings;

(v) investment companies with fixed capital, as defined in Article 15(4) of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent<sup>(1)</sup>, the securities of which are listed or dealt in on a regulated market in a Member State;

provided that the activities of those persons are regulated at national level.

2. Persons excluded from the scope of this Directive according to paragraph 1 cannot benefit from the freedom to provide services and/or activities or to establish branches as provided for in Articles 31 and 32 respectively.

### Article 4

#### Definitions

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

1) 'Investment firm' means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

Member States may include in the definition of investment firms undertakings which are not legal persons, provided that:

(a) their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons, and

(b) they are subject to equivalent prudential supervision appropriate to their legal form.

However, where a natural person provides services involving the holding of third parties' funds or transferable securities, he may be considered as an investment firm for the purposes of this Directive only if, without prejudice to the other requirements imposed in this Directive and in Directive 93/6/EEC, he complies with the following conditions:

(a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;

<sup>(1)</sup> OJ L 26, 31.1.1977, p. 1. Directive as last amended by the 1994 Act of Accession.

- (b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;
- (c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;
- (d) where the firm has only one proprietor, he must make provision for the protection of investors in the event of the firm's cessation of business following his death, his incapacity or any other such event;
- 2) 'Investment services and activities' means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;
- The Commission shall determine, acting in accordance with the procedure referred to in Article 64(2):
- the derivative contracts mentioned in Section C 7 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls
  - the derivative contracts mentioned in Section C 10 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls;
- 3) 'Ancillary service' means any of the services listed in Section B of Annex I;
- 4) 'Investment advice' means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;
- 5) 'Execution of orders on behalf of clients' means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients;
- 6) 'Dealing on own account' means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;
- 7) 'Systematic internaliser' means an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF;
- 8) 'Market maker' means a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him;
- 9) 'Portfolio management' means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments;
- 10) 'Client' means any natural or legal person to whom an investment firm provides investment and/or ancillary services;
- 11) 'Professional client' means a client meeting the criteria laid down in Annex II;
- 12) 'Retail client' means a client who is not a professional client;
- 13) 'Market operator' means a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself;
- 14) 'Regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III;
- 15) 'Multilateral trading facility (MTF)' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II;
- 16) 'Limit order' means an order to buy or sell a financial instrument at its specified price limit or better and for a specified size;
- 17) 'Financial instrument' means those instruments specified in Section C of Annex I;
- 18) 'Transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
- (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
  - (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
  - (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;

- 19) 'Money-market instruments' means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;
- 20) 'Home Member State' means:
- (a) in the case of investment firms:
- (i) if the investment firm is a natural person, the Member State in which its head office is situated;
- (ii) if the investment firm is a legal person, the Member State in which its registered office is situated;
- (iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;
- (b) in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;
- 21) 'Host Member State' means the Member State, other than the home Member State, in which an investment firm has a branch or performs services and/or activities or the Member State in which a regulated market provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same Member State;
- 22) 'Competent authority' means the authority, designated by each Member State in accordance with Article 48, unless otherwise specified in this Directive;
- 23) 'Credit institutions' means credit institutions as defined under Directive 2000/12/EC;
- 24) 'UCITS management company' means a management company as defined in 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) <sup>(1)</sup>;
- 25) 'Tied agent' means a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf it acts, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments and/or provides advice to clients or prospective clients in respect of those financial instruments or services;
- 26) 'Branch' means a place of business other than the head office which is a part of an investment firm, which has no legal personality and which provides investment services and/or activities and which may also perform ancillary services for which the investment firm has been authorised; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State shall be regarded as a single branch;
- 27) 'Qualifying holding' means any direct or indirect holding in an investment firm which represents 10% or more of the capital or of the voting rights, as set out in Article 92 of Directive 2001/34/EC, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;
- 28) 'Parent undertaking' means a parent undertaking as defined in Articles 1 and 2 of Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts <sup>(2)</sup>;
- 29) 'Subsidiary' means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
- 30) 'Control' means control as defined in Article 1 of Directive 83/349/EEC;
- 31) 'Close links' means a situation in which two or more natural or legal persons are linked by:
- (a) participation which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking,
- (b) control which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings.
- A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.
2. In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may clarify the definitions laid down in paragraph 1 of this Article.

<sup>(1)</sup> OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2001/108/EC of the European Parliament and of the Council (OJ L 41, 13.2.2002, p. 35).

<sup>(2)</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

**TITLE II****AUTHORISATION AND OPERATING CONDITIONS FOR INVESTMENT FIRMS****CHAPTER I****CONDITIONS AND PROCEDURES FOR AUTHORISATION***Article 5***Requirement for authorisation**

1. Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis be subject to prior authorisation in accordance with the provisions of this Chapter. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 48.
2. By way of derogation from paragraph 1, Member States shall allow any market operator to operate an MTF, subject to the prior verification of their compliance with the provisions of this Chapter, excluding Articles 11 and 15.
3. Member States shall establish a register of all investment firms. This register shall be publicly accessible and shall contain information on the services and/or activities for which the investment firm is authorised. It shall be updated on a regular basis.
4. Each Member State shall require that:
  - any investment firm which is a legal person have its head office in the same Member State as its registered office,
  - any investment firm which is not a legal person or any investment firm which is a legal person but under its national law has no registered office have its head office in the Member State in which it actually carries on its business.
5. In the case of investment firms which provide only investment advice or the service of reception and transmission of orders under the conditions established in Article 3, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the granting of an authorisation, in accordance with the conditions laid down in Article 48(2).

*Article 6***Scope of authorisation**

1. The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex I. Authorisation shall in no case be granted solely for the provision of ancillary services.

2. An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension of its authorisation.

3. The authorisation shall be valid for the entire Community and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Community, either through the establishment of a branch or the free provision of services.

*Article 7***Procedures for granting and refusing requests for authorisation**

1. The competent authority shall not grant authorisation unless and until such time as it is fully satisfied that the applicant complies with all requirements under the provisions adopted pursuant to this Directive.
2. The investment firm shall provide all information, including a programme of operations setting out inter alia the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the investment firm has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Chapter.
3. An applicant shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted.

*Article 8***Withdrawal of authorisations**

The competent authority may withdraw the authorisation issued to an investment firm where such an investment firm:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted, such as compliance with the conditions set out in Directive 93/6/EEC;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive governing the operating conditions for investment firms;
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

*Article 9***Persons who effectively direct the business**

1. Member States shall require the persons who effectively direct the business of an investment firm to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the investment firm.

Where the market operator that seeks authorisation to operate an MTF and the persons that effectively direct the business of the MTF are the same as those that effectively direct the business of the regulated market, those persons are deemed to comply with the requirements laid down in the first subparagraph.

2. Member States shall require the investment firm to notify the competent authority of any changes to its management, along with all information needed to assess whether the new staff appointed to manage the firm are of sufficiently good repute and sufficiently experienced.

3. The competent authority shall refuse authorisation if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the firm pose a threat to its sound and prudent management.

4. Member States shall require that the management of investment firms is undertaken by at least two persons meeting the requirements laid down in paragraph 1.

By way of derogation from the first subparagraph, Member States may grant authorisation to investment firms that are natural persons or to investment firms that are legal persons managed by a single natural person in accordance with their constitutive rules and national laws. Member States shall nevertheless require that alternative arrangements be in place which ensure the sound and prudent management of such investment firms.

*Article 10***Shareholders and members with qualifying holdings**

1. The competent authorities shall not authorise the performance of investment services or activities by an investment firm until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an investment firm, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings.

Where close links exist between the investment firm and other natural or legal persons, the competent authority shall grant authorisation only if those links do not prevent the effective exercise of the supervisory functions of the competent authority.

2. The competent authority shall refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

3. Member States shall require any natural or legal person that proposes to acquire or sell, directly or indirectly, a qualifying holding in an investment firm, first to notify, in accordance with the second subparagraph, the competent authority of the size of the resulting holding. Such persons shall likewise be required to notify the competent authority if they propose to increase or reduce their qualifying holding, if in consequence the proportion of the voting rights or of the capital that they hold would reach or fall below or exceed 20%, 33% or 50% or the investment firm would become or cease to be their subsidiary.

Without prejudice to paragraph 4, the competent authority shall have up to three months from the date of the notification of a proposed acquisition provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the investment firm, it is not satisfied as to the suitability of the persons referred to in the first subparagraph. If the competent authority does not oppose the plan, it may fix a deadline for its implementation.

4. If the acquirer of any holding referred to in paragraph 3 is an investment firm, a credit institution, an insurance undertaking or a UCITS management company authorised in another Member State, or the parent undertaking of an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, or a person controlling an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, and if, as a result of that acquisition, the undertaking would become the acquirer's subsidiary or come under his control, the assessment of the acquisition shall be subject to the prior consultation provided for in Article 60.

5. Member States shall require that, if an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in the first subparagraph of paragraph 3, that investment firm is to inform the competent authority without delay.

At least once a year, investment firms shall also inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders and members or as a result of compliance with the regulations applicable to companies whose transferable securities are admitted to trading on a regulated market.

6. Member States shall require that, where the influence exercised by the persons referred to in the first subparagraph of paragraph 1 is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation.

Such measures may consist in applications for judicial orders and/or the imposition of sanctions against directors and those responsible for management, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall be taken in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.

#### Article 11

### Membership of an authorised Investor Compensation Scheme

The competent authority shall verify that any entity seeking authorisation as an investment firm meets its obligations under Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes<sup>(1)</sup> at the time of authorisation.

#### Article 12

### Initial capital endowment

Member States shall ensure that the competent authorities do not grant authorisation unless the investment firm has sufficient initial capital in accordance with the requirements of Directive 93/6/EEC having regard to the nature of the investment service or activity in question.

Pending the revision of Directive 93/6/EEC, the investment firms provided for in Article 67 shall be subject to the capital requirements laid down in that Article.

#### Article 13

### Organisational requirements

1. The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8.

2. An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons.

3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 18 from adversely affecting the interests of its clients.

4. An investment firm shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end the investment firm shall employ appropriate and proportionate systems, resources and procedures.

5. An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations.

An investment firm shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

6. An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

7. An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent.

<sup>(1)</sup> OJ L 84, 26.3.1997, p. 22.

8. An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the clients' rights and, except in the case of credit institutions, prevent the use of client funds for its own account.

9. In the case of branches of investment firms, the competent authority of the Member State in which the branch is located shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in paragraph 6 with regard to transactions undertaken by the branch.

10. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 2 to 9, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which specify the concrete organisational requirements to be imposed on investment firms performing different investment services and/or activities and ancillary services or combinations thereof.

#### Article 14

### Trading process and finalisation of transactions in an MTF

1. Member States shall require that investment firms or market operators operating an MTF, in addition to meeting the requirements laid down in Article 13, establish transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders.

2. Member States shall require that investment firms or market operators operating an MTF establish transparent rules regarding the criteria for determining the financial instruments that can be traded under its systems.

Member States shall require that, where applicable, investment firms or market operators operating an MTF provide, or are satisfied that there is access to, sufficient publicly available information to enable its users to form an investment judgement, taking into account both the nature of the users and the types of instruments traded.

3. Member States shall ensure that Articles 19, 21 and 22 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. However, the members of or participants in the MTF shall comply with the obligations provided for in Articles 19, 21 and 22 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.

4. Member States shall require that investment firms or market operators operating an MTF establish and maintain transparent rules, based on objective criteria, governing access to its facility. These rules shall comply with the conditions established in Article 42(3).

5. Member States shall require that investment firms or market operators operating an MTF clearly inform its users of their respective responsibilities for the settlement of the transactions executed in that facility. Member States shall require that investment firms or market operators operating an MTF have put in place the necessary arrangements to facilitate the efficient settlement of the transactions concluded under the systems of the MTF.

6. Where a transferable security, which has been admitted to trading on a regulated market, is also traded on an MTF without the consent of the issuer, the issuer shall not be subject to any obligation relating to initial, ongoing or ad hoc financial disclosure with regard to that MTF.

7. Member States shall require that any investment firm or market operator operating an MTF comply immediately with any instruction from its competent authority pursuant to Article 50(1) to suspend or remove a financial instrument from trading.

#### Article 15

### Relations with third countries

1. Member States shall inform the Commission of any general difficulties which their investment firms encounter in establishing themselves or providing investment services and/or performing investment activities in any third country.

2. Whenever it appears to the Commission, on the basis of information submitted to it under paragraph 1, that a third country does not grant Community investment firms effective market access comparable to that granted by the Community to investment firms from that third country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community investment firms. The Council shall act by a qualified majority.

3. Whenever it appears to the Commission, on the basis of information submitted to it under paragraph 1, that Community investment firms in a third country are not granted national treatment affording the same competitive opportunities as are available to domestic investment firms and that the conditions of effective market access are not fulfilled, the Commission may initiate negotiations in order to remedy the situation.

In the circumstances referred to in the first subparagraph, the Commission may decide, in accordance with the procedure referred to in Article 64(2), at any time and in addition to the initiation of negotiations, that the competent authorities of the Member States must limit or suspend their decisions regarding requests pending or future requests for authorisation and the acquisition of holdings by direct or indirect parent undertakings governed by the law of the third country in question. Such limitations or suspensions may not be applied to the setting-up of subsidiaries by investment firms duly authorised in the Community or by their subsidiaries, or to the acquisition of holdings in Community investment firms by such firms or subsidiaries. The duration of such measures may not exceed three months.

Before the end of the three-month period referred to in the second subparagraph and in the light of the results of the negotiations, the Commission may decide, in accordance with the procedure referred to in Article 64(2), to extend these measures.

4. Whenever it appears to the Commission that one of the situations referred to in paragraphs 2 and 3 obtains, the Member States shall inform it at its request:

- (a) of any application for the authorisation of any firm which is the direct or indirect subsidiary of a parent undertaking governed by the law of the third country in question;
- (b) whenever they are informed in accordance with Article 10(3) that such a parent undertaking proposes to acquire a holding in a Community investment firm, in consequence of which the latter would become its subsidiary.

That obligation to provide information shall lapse whenever agreement is reached with the third country concerned or when the measures referred to in the second and third subparagraphs of paragraph 3 cease to apply.

5. Measures taken under this Article shall comply with the Community's obligations under any international agreements, bilateral or multilateral, governing the taking-up or pursuit of the business of investment firms.

## CHAPTER II

### OPERATING CONDITIONS FOR INVESTMENT FIRMS

#### Section 1

##### General provisions

#### Article 16

##### Regular review of conditions for initial authorisation

1. Member States shall require that an investment firm authorised in their territory comply at all times with the

conditions for initial authorisation established in Chapter I of this Title.

2. Member States shall require competent authorities to establish the appropriate methods to monitor that investment firms comply with their obligation under paragraph 1. They shall require investment firms to notify the competent authorities of any material changes to the conditions for initial authorisation.

3. In the case of investment firms which provide only investment advice, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the review of the conditions for initial authorisation, in accordance with the conditions laid down in Article 48(2).

#### Article 17

##### General obligation in respect of on-going supervision

1. Member States shall ensure that the competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this Directive. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of investment firms with those obligations.

2. In the case of investment firms which provide only investment advice, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the regular monitoring of operational requirements, in accordance with the conditions laid down in Article 48(2).

#### Article 18

##### Conflicts of interest

1. Member States shall require investment firms to take all reasonable steps to identify conflicts of interest between themselves, including their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any investment and ancillary services, or combinations thereof.

2. Where organisational or administrative arrangements made by the investment firm in accordance with Article 13(3) to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the investment firm shall clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business on its behalf.

3. In order to take account of technical developments on financial markets and to ensure uniform application of paragraphs 1 and 2, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to:

- (a) define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest when providing various investment and ancillary services and combinations thereof;
- (b) establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the clients or potential clients of the investment firm.

## Section 2

### Provisions to ensure investor protection

#### Article 19

#### **Conduct of business obligations when providing investment services to clients**

1. Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8.

2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

3. Appropriate information shall be provided in a comprehensible form to clients or potential clients about:

- the investment firm and its services,
- financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,
- execution venues, and
- costs and associated charges

so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.

4. When providing investment advice or portfolio management the investment firm shall obtain the necessary informa-

tion regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

5. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In case the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

In cases where the client or potential client elects not to provide the information referred to under the first subparagraph, or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format.

6. Member States shall allow investment firms when providing investment services that only consist of execution and/or the reception and transmission of client orders with or without ancillary services to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 5 where all the following conditions are met:

- the above services relate to shares admitted to trading on a regulated market or in an equivalent third country market, money market instruments, bonds or other forms of securitised debt (excluding those bonds or securitised debt that embed a derivative), UCITS and other non-complex financial instruments. A third country market shall be considered as equivalent to a regulated market if it complies with equivalent requirements to those established under Title III. The Commission shall publish a list of those markets that are to be considered as equivalent. This list shall be updated periodically,
- the service is provided at the initiative of the client or potential client,

- the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules; this warning may be provided in a standardised format,
- the investment firm complies with its obligations under Article 18.

7. The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

8. The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

9. In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article.

10. In order to ensure the necessary protection of investors and the uniform application of paragraphs 1 to 8, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those implementing measures shall take into account:

- (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;
- (b) the nature of the financial instruments being offered or considered;
- (c) the retail or professional nature of the client or potential clients.

#### Article 20

#### **Provision of services through the medium of another investment firm**

Member States shall allow an investment firm receiving an instruction to perform investment or ancillary services on

behalf of a client through the medium of another investment firm to rely on client information transmitted by the latter firm. The investment firm which mediates the instructions will remain responsible for the completeness and accuracy of the information transmitted.

The investment firm which receives an instruction to undertake services on behalf of a client in this way shall also be able to rely on any recommendations in respect of the service or transaction that have been provided to the client by another investment firm. The investment firm which mediates the instructions will remain responsible for the appropriateness for the client of the recommendations or advice provided.

The investment firm which receives client instructions or orders through the medium of another investment firm shall remain responsible for concluding the service or transaction, based on any such information or recommendations, in accordance with the relevant provisions of this Title.

#### Article 21

#### **Obligation to execute orders on terms most favourable to the client**

1. Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction.

2. Member States shall require investment firms to establish and implement effective arrangements for complying with paragraph 1. In particular Member States shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result in accordance with paragraph 1.

3. The order execution policy shall include, in respect of each class of instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue. It shall at least include those venues that enable the investment firm to obtain on a consistent basis the best possible result for the execution of client orders.

Member States shall require that investment firms provide appropriate information to their clients on their order execution policy. Member States shall require that investment firms obtain the prior consent of their clients to the execution policy.

Member States shall require that, where the order execution policy provides for the possibility that client orders may be executed outside a regulated market or an MTF, the investment firm shall, in particular, inform its clients about this possibility. Member States shall require that investment firms obtain the prior express consent of their clients before proceeding to execute their orders outside a regulated market or an MTF. Investment firms may obtain this consent either in the form of a general agreement or in respect of individual transactions.

4. Member States shall require investment firms to monitor the effectiveness of their order execution arrangements and execution policy in order to identify and, where appropriate, correct any deficiencies. In particular, they shall assess, on a regular basis, whether the execution venues included in the order execution policy provide for the best possible result for the client or whether they need to make changes to their execution arrangements. Member States shall require investment firms to notify clients of any material changes to their order execution arrangements or execution policy.

5. Member States shall require investment firms to be able to demonstrate to their clients, at their request, that they have executed their orders in accordance with the firm's execution policy.

6. In order to ensure the protection necessary for investors, the fair and orderly functioning of markets, and to ensure the uniform application of paragraphs 1, 3 and 4, the Commission shall, in accordance with the procedure referred to in Article 64(2), adopt implementing measures concerning:

- (a) the criteria for determining the relative importance of the different factors that, pursuant to paragraph 1, may be taken into account for determining the best possible result taking into account the size and type of order and the retail or professional nature of the client;
- (b) factors that may be taken into account by an investment firm when reviewing its execution arrangements and the circumstances under which changes to such arrangements may be appropriate. In particular, the factors for determining which venues enable investment firms to obtain on a consistent basis the best possible result for executing the client orders;
- (c) the nature and extent of the information to be provided to clients on their execution policies, pursuant to paragraph 3.

#### Article 22

##### Client order handling rules

1. Member States shall require that investment firms authorised to execute orders on behalf of clients implement

procedures and arrangements which provide for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm.

These procedures or arrangements shall allow for the execution of otherwise comparable client orders in accordance with the time of their reception by the investment firm.

2. Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. Member States may decide that investment firms comply with this obligation by transmitting the client limit order to a regulated market and/or MTF. Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article 44(2).

3. In order to ensure that measures for the protection of investors and fair and orderly functioning of markets take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which define:

- (a) the conditions and nature of the procedures and arrangements which result in the prompt, fair and expeditious execution of client orders and the situations in which or types of transaction for which investment firms may reasonably deviate from prompt execution so as to obtain more favourable terms for clients;
- (b) the different methods through which an investment firm can be deemed to have met its obligation to disclose not immediately executable client limit orders to the market.

#### Article 23

##### Obligations of investment firms when appointing tied agents

1. Member States may decide to allow an investment firm to appoint tied agents for the purposes of promoting the services of the investment firm, soliciting business or receiving orders from clients or potential clients and transmitting them, placing financial instruments and providing advice in respect of such financial instruments and services offered by that investment firm.

2. Member States shall require that where an investment firm decides to appoint a tied agent it remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the firm. Member States shall require the investment firm to ensure that a tied agent discloses the capacity in which he is acting and the firm which he is representing when contacting or before dealing with any client or potential client.

Member States may allow, in accordance with Article 13(6), (7) and (8), tied agents registered in their territory to handle clients' money and/or financial instruments on behalf and under the full responsibility of the investment firm for which they are acting within their territory or, in the case of a cross-border operation, in the territory of a Member State which allows a tied agent to handle clients' money.

Member States shall require the investment firms to monitor the activities of their tied agents so as to ensure that they continue to comply with this Directive when acting through tied agents.

3. Member States that decide to allow investment firms to appoint tied agents shall establish a public register. Tied agents shall be registered in the public register in the Member State where they are established.

Where the Member State in which the tied agent is established has decided, in accordance with paragraph 1, not to allow the investment firms authorised by their competent authorities to appoint tied agents, those tied agents shall be registered with the competent authority of the home Member State of the investment firm on whose behalf it acts.

Member States shall ensure that tied agents are only admitted to the public register if it has been established that they are of sufficiently good repute and that they possess appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant information regarding the proposed service to the client or potential client.

Member States may decide that investment firms can verify whether the tied agents which they have appointed are of sufficiently good repute and possess the knowledge as referred to in the third subparagraph.

The register shall be updated on a regular basis. It shall be publicly available for consultation.

4. Member States shall require that investment firms appointing tied agents take adequate measures in order to avoid any negative impact that the activities of the tied agent not covered by the scope of this Directive could have on the activities carried out by the tied agent on behalf of the investment firm.

Member States may allow competent authorities to collaborate with investment firms and credit institutions, their associations and other entities in registering tied agents and in monitoring compliance of tied agents with the requirements of paragraph 3. In particular, tied agents may be registered by an investment firm, credit institution or their associations and other entities under the supervision of the competent authority.

5. Member States shall require that investment firms appoint only tied agents entered in the public registers referred to in paragraph 3.

6. Member States may reinforce the requirements set out in this Article or add other requirements for tied agents registered within their jurisdiction.

#### Article 24

#### Transactions executed with eligible counterparties

1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Articles 19, 21 and 22(1) in respect of those transactions or in respect of any ancillary service directly related to those transactions.

2. Member States shall recognise as eligible counterparties for the purposes of this Article investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions authorised or regulated under Community legislation or the national law of a Member State, undertakings exempted from the application of this Directive under Article 2(1)(k) and (l), national governments and their corresponding offices including public bodies that deal with public debt, central banks and supranational organisations.

Classification as an eligible counterparty under the first subparagraph shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to Articles 19, 21 and 22.

3. Member States may also recognise as eligible counterparties other undertakings meeting pre-determined proportionate requirements, including quantitative thresholds. In the event of a transaction where the prospective counterparties are located in different jurisdictions, the investment firm shall defer to the status of the other undertaking as determined by the law or measures of the Member State in which that undertaking is established.

Member States shall ensure that the investment firm, when it enters into transactions in accordance with paragraph 1 with such undertakings, obtains the express confirmation from the prospective counterparty that it agrees to be treated as an eligible counterparty. Member States shall allow the investment firm to obtain this confirmation either in the form of a general agreement or in respect of each individual transaction.

4. Member States may recognise as eligible counterparties third country entities equivalent to those categories of entities mentioned in paragraph 2.

Member States may also recognise as eligible counterparties third country undertakings such as those mentioned in paragraph 3 on the same conditions and subject to the same requirements as those laid down at paragraph 3.

5. In order to ensure the uniform application of paragraphs 2, 3 and 4 in the light of changing market practice and to facilitate the effective operation of the single market, the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which define:

- (a) the procedures for requesting treatment as clients under paragraph 2;
- (b) the procedures for obtaining the express confirmation from prospective counterparties under paragraph 3;
- (c) the predetermined proportionate requirements, including quantitative thresholds that would allow an undertaking to be considered as an eligible counterparty under paragraph 3.

### Section 3

#### Market transparency and integrity

#### Article 25

#### **Obligation to uphold integrity of markets, report transactions and maintain records**

1. Without prejudice to the allocation of responsibilities for enforcing the provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>(1)</sup>, Member States shall ensure that appropriate measures are in place 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 which promotes the integrity of the market.

<sup>(1)</sup> OJ L 96, 12.4.2003, p. 16.

2. Member States shall require investment firms to keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering<sup>(2)</sup>.

3. Member States shall require investment firms which execute transactions in any financial instruments admitted to trading on a regulated market to report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. This obligation shall apply whether or not such transactions were carried out on a regulated market.

The competent authorities shall, in accordance with Article 58, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives this information.

4. The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned.

5. Member States shall provide for the reports to be made to the competent authority either by the investment firm itself, a third party acting on its behalf or by a trade-matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed. In cases where transactions are reported directly to the competent authority by a regulated market, an MTF, or a trade-matching or reporting system approved by the competent authority, the obligation on the investment firm laid down in paragraph 3 may be waived.

6. When, in accordance with Article 32(7), reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information.

<sup>(2)</sup> OJ L 166, 28.6.1991, p. 77. Directive as last amended by Directive 2001/97/EC of the European Parliament and of the Council (OJ L 344, 28.12.2001, p. 76).

7. In order to ensure that measures for the protection of market integrity are modified to take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 to 5, the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which define the methods and arrangements for reporting financial transactions, the form and content of these reports and the criteria for defining a relevant market in accordance with paragraph 3.

#### Article 26

### Monitoring of compliance with the rules of the MTF and with other legal obligations

1. Member States shall require that investment firms and market operators operating an MTF establish and maintain effective arrangements and procedures, relevant to the MTF, for the regular monitoring of the compliance by its users with its rules. Investment firms and market operators operating an MTF shall monitor the transactions undertaken by their users under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require investment firms and market operators operating an MTF to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. Member States shall also require investment firms and market operators operating an MTF to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

#### Article 27

### Obligation for investment firms to make public firm quotes

1. Member States shall require systematic internalisers in shares to publish a firm quote in those shares admitted to trading on a regulated market for which they are systematic internalisers and for which there is a liquid market. In the case of shares for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request.

The provisions of this Article shall be applicable to systematic internalisers when dealing for sizes up to standard market size. Systematic internalisers that only deal in sizes above standard market size shall not be subject to the provisions of this Article.

Systematic internalisers may decide the size or sizes at which they will quote. For a particular share each quote shall include

a firm bid and/or offer price or prices for a size or sizes which could be up to standard market size for the class of shares to which the share belongs. The price or prices shall also reflect the prevailing market conditions for that share.

Shares shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that share. The standard market size for each class of shares shall be a size representative of the arithmetic average value of the orders executed in the market for the shares included in each class of shares.

The market for each share shall be comprised of all orders executed in the European Union in respect of that share excluding those large in scale compared to normal market size for that share.

2. The competent authority of the most relevant market in terms of liquidity as defined in Article 25 for each share shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that share, the class of shares to which it belongs. This information shall be made public to all market participants.

3. Systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. They shall be entitled to update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes.

The quote shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

Systematic internalisers shall, while complying with the provisions set down in Article 21, execute the orders they receive from their retail clients in relation to the shares for which they are systematic internalisers at the quoted prices at the time of reception of the order.

Systematic internalisers shall execute the orders they receive from their professional clients in relation to the shares for which they are systematic internalisers at the quoted price at the time of reception of the order. However, they may execute those orders at a better price in justified cases provided that this price falls within a public range close to market conditions and provided that the orders are of a size bigger than the size customarily undertaken by a retail investor.

Furthermore, systematic internalisers may execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the conditions established in the fourth subparagraph, in respect of transactions where execution in several securities is part of one transaction or in respect of orders that are subject to conditions other than the current market price.

Where a systematic internaliser who quotes only one quote or whose highest quote is lower than the standard market size receives an order from a client of a size bigger than its quotation size, but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions of the previous two subparagraphs. Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with the provisions of Article 22, except where otherwise permitted under the conditions of the previous two subparagraphs.

4. The competent authorities shall check:

- (a) that investment firms regularly update bid and/or offer prices published in accordance with paragraph 1 and maintain prices which reflect the prevailing market conditions;
- (b) that investment firms comply with the conditions for price improvement laid down in the fourth subparagraph of paragraph 3.

5. Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the investors to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and the final settlement of the transaction.

6. In order to limit the risk of being exposed to multiple transactions from the same client systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They shall also be allowed, in a non-discriminatory way and in accordance with the provisions of Article 22, to limit the total number of transactions from different clients at the same time provided that this is allowable only where the number and/or volume of orders sought by clients considerably exceeds the norm.

7. In order to ensure the uniform application of paragraphs 1 to 6, in a manner which supports the efficient valuation of shares and maximises the possibility of investment firms of obtaining the best deal for their clients, the Commission shall, in accordance with the procedure referred to in Article 64(2), adopt implementing measures which:

- (a) specify the criteria for application of paragraphs 1 and 2;

(b) specify the criteria determining when a quote is published on a regular and continuous basis and is easily accessible as well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:

- (i) through the facilities of any regulated market which has admitted the instrument in question to trading;
- (ii) through the offices of a third party;
- (iii) through proprietary arrangements;

(c) specify the general criteria for determining those transactions where execution in several securities is part of one transaction or orders that are subject to conditions other than current market price;

(d) specify the general criteria for determining what can be considered as exceptional market circumstances that allow for the withdrawal of quotes as well as conditions for updating quotes;

(e) specify the criteria for determining what is a size customarily undertaken by a retail investor.

(f) specify the criteria for determining what constitutes considerably exceeding the norm as set down in paragraph 6;

(g) specify the criteria for determining when prices fall within a public range close to market conditions.

#### Article 28

##### Post-trade disclosure by investment firms

1. Member States shall, at least, require investment firms which, either on own account or on behalf of clients, conclude transactions in shares admitted to trading on a regulated market outside a regulated market or MTF, to make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public as close to real-time as possible, on a reasonable commercial basis, and in a manner which is easily accessible to other market participants.

2. Member States shall require that the information which is made public in accordance with paragraph 1 and the time-limits within which it is published comply with the requirements adopted pursuant to Article 45. Where the measures adopted pursuant to Article 45 provide for deferred reporting for certain categories of transaction in shares, this possibility shall apply *mutatis mutandis* to those transactions when undertaken outside regulated markets or MTFs.

3. In order to ensure the transparent and orderly functioning of markets and the uniform application of paragraph 1, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which:

- (a) specify the means by which investment firms may comply with their obligations under paragraph 1 including the following possibilities:
  - (i) through the facilities of any regulated market which has admitted the instrument in question to trading or through the facilities of an MTF in which the share in question is traded;
  - (ii) through the offices of a third party;
  - (iii) through proprietary arrangements;
- (b) clarify the application of the obligation under paragraph 1 to transactions involving the use of shares for collateral, lending or other purposes where the exchange of shares is determined by factors other than the current market valuation of the share.

#### Article 29

##### Pre-trade transparency requirements for MTFs

1. Member States shall, at least, require that investment firms and market operators operating an MTF make public current bid and offer prices and the depth of trading interests at these prices which are advertised through their systems in respect of shares admitted to trading on a regulated market. Member States shall provide for this information to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours.

2. Member States shall provide for the competent authorities to be able to waive the obligation for investment firms or market operators operating an MTF to make public the information referred to in paragraph 1 based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. In particular, the competent authorities shall be able to waive the obligation in respect of transactions that are large in scale compared with normal market size for the share or type of share in question.

3. In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures as regards:

- (a) the range of bid and offers or designated market-maker quotes, and the depth of trading interest at those prices, to be made public;
- (b) the size or type of orders for which pre-trade disclosure may be waived under paragraph 2;
- (c) the market model for which pre-trade disclosure may be waived under paragraph 2 and in particular, the applicabil-

ity of the obligation to trading methods operated by an MTF which conclude transactions under their rules by reference to prices established outside the systems of the MTF or by periodic auction.

Except where justified by the specific nature of the MTF, the content of these implementing measures shall be equal to that of the implementing measures provided for in Article 44 for regulated markets.

#### Article 30

##### Post-trade transparency requirements for MTFs

1. Member States shall, at least, require that investment firms and market operators operating an MTF make public the price, volume and time of the transactions executed under its systems in respect of shares which are admitted to trading on a regulated market. Member States shall require that details of all such transactions be made public, on a reasonable commercial basis, as close to real-time as possible. This requirement shall not apply to details of trades executed on an MTF that are made public under the systems of a regulated market.

2. Member States shall provide that the competent authority may authorise investment firms or market operators operating an MTF to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares. Member States shall require MTFs to obtain the competent authority's prior approval to proposed arrangements for deferred trade-publication, and shall require that these arrangements be clearly disclosed to market participants and the investing public.

3. In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures in respect of:

- (a) the scope and content of the information to be made available to the public;
- (b) the conditions under which investment firms or market operators operating an MTF may provide for deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed.

Except where justified by the specific nature of the MTF, the content of these implementing measures shall be equal to that of the implementing measures provided for in Article 45 for regulated markets.

## CHAPTER III

**RIGHTS OF INVESTMENT FIRMS***Article 31***Freedom to provide investment services and activities**

1. Member States shall ensure that any investment firm authorised and supervised by the competent authorities of another Member State in accordance with this Directive, and in respect of credit institutions in accordance with Directive 2000/12/EC, may freely perform investment services and/or activities as well as ancillary services within their territories, provided that such services and activities are covered by its authorisation. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements on such an investment firm or credit institution in respect of the matters covered by this Directive.

2. Any investment firm wishing to provide services or activities within the territory of another Member State for the first time, or which wishes to change the range of services or activities so provided, shall communicate the following information to the competent authorities of its home Member State:

- (a) the Member State in which it intends to operate;
- (b) a programme of operations stating in particular the investment services and/or activities as well as ancillary services which it intends to perform and whether it intends to use tied agents in the territory of the Member States in which it intends to provide services.

In cases where the investment firm intends to use tied agents, the competent authority of the home Member State of the investment firm shall, at the request of the competent authority of the host Member State and within a reasonable time, communicate the identity of the tied agents that the investment firm intends to use in that Member State. The host Member State may make public such information.

3. The competent authority of the home Member State shall, within one month of receiving the information, forward it to the competent authority of the host Member State designated as contact point in accordance with Article 56(1). The investment firm may then start to provide the investment service or services concerned in the host Member State.

4. In the event of a change in any of the particulars communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the home Member State shall inform the competent authority of the host Member State of those changes.

5. Member States shall, without further legal or administrative requirement, allow investment firms and market operators operating MTFs from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory.

6. The investment firm or the market operator that operates an MTF shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State of the MTF shall communicate, within one month, this information to the Member State in which the MTF intends to provide such arrangements.

The competent authority of the home Member State of the MTF shall, on the request of the competent authority of the host Member State of the MTF and within a reasonable delay, communicate the identity of the members or participants of the MTF established in that Member State.

*Article 32***Establishment of a branch**

1. Member States shall ensure that investment services and/or activities as well as ancillary services may be provided within their territories in accordance with this Directive and Directive 2000/12/EC through the establishment of a branch provided that those services and activities are covered by the authorisation granted to the investment firm or the credit institution in the home Member State. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements save those allowed under paragraph 7, on the organisation and operation of the branch in respect of the matters covered by this Directive.

2. Member States shall require any investment firm wishing to establish a branch within the territory of another Member State first to notify the competent authority of its home Member State and to provide it with the following information:

- (a) the Member States within the territory of which it plans to establish a branch;
- (b) a programme of operations setting out inter alia the investment services and/or activities as well as the ancillary services to be offered and the organisational structure of the branch and indicating whether the branch intends to use tied agents;
- (c) the address in the host Member State from which documents may be obtained;
- (d) the names of those responsible for the management of the branch.

In cases where an investment firm uses a tied agent established in a Member State outside its home Member State, such tied agent shall be assimilated to the branch and shall be subject to the provisions of this Directive relating to branches.

3. Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of an investment firm, taking into account the activities envisaged, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article 56(1) and inform the investment firm concerned accordingly.

4. In addition to the information referred to in paragraph 2, the competent authority of the home Member State shall communicate details of the accredited compensation scheme of which the investment firm is a member in accordance with Directive 97/9/EC to the competent authority of the host Member State. In the event of a change in the particulars, the competent authority of the home Member State shall inform the competent authority of the host Member State accordingly.

5. Where the competent authority of the home Member State refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the investment firm concerned within three months of receiving all the information.

6. On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the branch may be established and commence business.

7. The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 and in measures adopted pursuant thereto.

The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 19, 21, 22, 25, 27 and 28 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory.

8. Each Member State shall provide that, where an investment firm authorised in another Member State has established a branch within its territory, the competent authority of the home Member State of the investment firm, in the exercise of

its responsibilities and after informing the competent authority of the host Member State, may carry out on-site inspections in that branch.

9. In the event of a change in any of the information communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the host Member State shall also be informed of that change by the competent authority of the home Member State.

#### Article 33

##### Access to regulated markets

1. Member States shall require that investment firms from other Member States which are authorised to execute client orders or to deal on own account have the right of membership or have access to regulated markets established in their territory by means of any of the following arrangements:

- (a) directly, by setting up branches in the host Member States;
- (b) by becoming remote members of or having remote access to the regulated market without having to be established in the home Member State of the regulated market, where the trading procedures and systems of the market in question do not require a physical presence for conclusion of transactions on the market.

2. Member States shall not impose any additional regulatory or administrative requirements, in respect of matters covered by this Directive, on investment firms exercising the right conferred by paragraph 1.

#### Article 34

##### Access to central counterparty, clearing and settlement facilities and right to designate settlement system

1. Member States shall require that investment firms from other Member States have the right of access to central counterparty, clearing and settlement systems in their territory for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

Member States shall require that access of those investment firms to such facilities be subject to the same non-discriminatory, transparent and objective criteria as apply to local participants. Member States shall not restrict the use of those facilities to the clearing and settlement of transactions in financial instruments undertaken on a regulated market or MTF in their territory.

2. Member States shall require that regulated markets in their territory offer all their members or participants the right to designate the system for the settlement of transactions in financial instruments undertaken on that regulated market, subject to:

- (a) such links and arrangements between the designated settlement system and any other system or facility as are necessary to ensure the efficient and economic settlement of the transaction in question; and
- (b) agreement by the competent authority responsible for the supervision of the regulated market that technical conditions for settlement of transactions concluded on the regulated market through a settlement system other than that designated by the regulated market are such as to allow the smooth and orderly functioning of financial markets.

This assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national central banks as overseers of settlement systems or other supervisory authorities on such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.

3. The rights of investment firms under paragraphs 1 and 2 shall be without prejudice to the right of operators of central counterparty, clearing or securities settlement systems to refuse on legitimate commercial grounds to make the requested services available.

#### Article 35

#### **Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs**

1. Member States shall not prevent investment firms and market operators operating an MTF from entering into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2. The competent authority of investment firms and market operators operating an MTF may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in Article 34(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the national central banks as overseers of clearing and settlement systems or by other supervisory authorities with a competence in such systems.

### TITLE III

#### REGULATED MARKETS

##### Article 36

#### **Authorisation and applicable law**

1. Member States shall reserve authorisation as a regulated market to those systems which comply with the provisions of this Title.

Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in this Title.

In the case of a regulated market that is a legal person and that is managed or operated by a market operator other than the regulated market itself, Member States shall establish how the different obligations imposed on the market operator under this Directive are to be allocated between the regulated market and the market operator.

The operator of the regulated market shall provide all information, including a programme of operations setting out inter alia the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the regulated market has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Title.

2. Member States shall require the operator of the regulated market to perform tasks relating to the organisation and operation of the regulated market under the supervision of the competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of regulated markets with the provisions of this Title. They shall also ensure that competent authorities monitor that regulated markets comply at all times with the conditions for initial authorisation established under this Title.

3. Member States shall ensure that the market operator is responsible for ensuring that the regulated market that he manages complies with all requirements under this Title.

Member States shall also ensure that the market operator is entitled to exercise the rights that correspond to the regulated market that he manages by virtue of this Directive.

4. Without prejudice to any relevant provisions of Directive 2003/6/EC, the public law governing the trading conducted under the systems of the regulated market shall be that of the home Member State of the regulated market.

5. The competent authority may withdraw the authorisation issued to a regulated market where it:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has not operated for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;

- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive;
- (e) falls within any of the cases where national law provides for withdrawal.

#### Article 37

##### **Requirements for the management of the regulated market**

1. Member States shall require the persons who effectively direct the business and the operations of the regulated market to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management and operation of the regulated market. Member States shall also require the operator of the regulated market to inform the competent authority of the identity and any other subsequent changes of the persons who effectively direct the business and the operations of the regulated market.

The competent authority shall refuse to approve proposed changes where there are objective and demonstrable grounds for believing that they pose a material threat to the sound and prudent management and operation of the regulated market.

2. Member States shall ensure that, in the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of an already authorised regulated market in accordance with the conditions of this Directive are deemed to comply with the requirements laid down in paragraph 1.

#### Article 38

##### **Requirements relating to persons exercising significant influence over the management of the regulated market**

1. Member States shall require the persons who are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable.

2. Member States shall require the operator of the regulated market:

- (a) to provide the competent authority with, and to make public, information regarding the ownership of the regulated market and/or the market operator, and in particular, the identity and scale of interests of any parties in a position to exercise significant influence over the management;
- (b) to inform the competent authority of and to make public any transfer of ownership which gives rise to a change in the identity of the persons exercising significant influence over the operation of the regulated market.

3. The competent authority shall refuse to approve proposed changes to the controlling interests of the regulated market and/or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

#### Article 39

##### **Organisational requirements**

Member States shall require the regulated market:

- (a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;
- (b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;
- (c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;
- (d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;
- (e) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems;
- (f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

#### Article 40

##### **Admission of financial instruments to trading**

1. Member States shall require that regulated markets have clear and transparent rules regarding the admission of financial instruments to trading.

Those rules shall ensure that any financial instruments admitted to trading in a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.

2. In the case of derivatives, the rules shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

3. In addition to the obligations set out in paragraphs 1 and 2, Member States shall require the regulated market to establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under Community law in respect of initial, ongoing or ad hoc disclosure obligations.

Member States shall ensure that the regulated market establishes arrangements which facilitate its members or participants in obtaining access to information which has been made public under Community law.

4. Member States shall ensure that regulated markets have established the necessary arrangements to review regularly the compliance with the admission requirements of the financial instruments which they admit to trading.

5. A transferable security that has been admitted to trading on a regulated market can subsequently be admitted to trading on other regulated markets, even without the consent of the issuer and in compliance with the relevant provisions of Directive 2003/71/EC of the European Parliament and of the Council of.... on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC<sup>(1)</sup>. The issuer shall be informed by the regulated market of the fact that its securities are traded on that regulated market. The issuer shall not be subject to any obligation to provide information required under paragraph 3 directly to any regulated market which has admitted the issuer's securities to trading without its consent.

6. In order to ensure the uniform application of paragraphs 1 to 5, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures which:

- (a) specify the characteristics of different classes of instruments to be taken into account by the regulated market when assessing whether an instrument is issued in a manner consistent with the conditions laid down in the second subparagraph of paragraph 1 for admission to trading on the different market segments which it operates;
- (b) clarify the arrangements that the regulated market is to implement so as to be considered to have fulfilled its obligation to verify that the issuer of a transferable security complies with its obligations under Community law in respect of initial, ongoing or ad hoc disclosure obligations;

- (c) clarify the arrangements that the regulated market has to establish pursuant to paragraph 3 in order to facilitate its members or participants in obtaining access to information which has been made public under the conditions established by Community law.

#### Article 41

##### **Suspension and removal of instruments from trading**

1. Without prejudice to the right of the competent authority under Article 50(2)(j) and (k) to demand suspension or removal of an instrument from trading, the operator of the regulated market may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

Notwithstanding the possibility for the operators of regulated markets to inform directly the operators of other regulated markets, Member States shall require that an operator of a regulated market that suspends or removes from trading a financial instrument make public this decision and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States.

2. A competent authority which demands the suspension or removal of a financial instrument from trading on one or more regulated markets shall immediately make public its decision and inform the competent authorities of the other Member States. Except where it could cause significant damage to the investors' interests or the orderly functioning of the market the competent authorities of the other Member States shall demand the suspension or removal of that financial instrument from trading on the regulated markets and MTFs that operate under their authority.

#### Article 42

##### **Access to the regulated market**

1. Member States shall require the regulated market to establish and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the regulated market.

2. Those rules shall specify any obligations for the members or participants arising from:

- (a) the constitution and administration of the regulated market;
- (b) rules relating to transactions on the market;

<sup>(1)</sup> OJ L

- (c) professional standards imposed on the staff of the investment firms or credit institutions that are operating on the market;
- (d) the conditions established, for members or participants other than investment firms and credit institutions, under paragraph 3;
- (e) the rules and procedures for the clearing and settlement of transactions concluded on the regulated market.

3. Regulated markets may admit as members or participants investment firms, credit institutions authorised under Directive 2000/12/EC and other persons who:

- (a) are fit and proper;
- (b) have a sufficient level of trading ability and competence;
- (c) have, where applicable, adequate organisational arrangements;
- (d) have sufficient resources for the role they are to perform, taking into account the different financial arrangements that the regulated market may have established in order to guarantee the adequate settlement of transactions.

4. Member States shall ensure that, for the transactions concluded on a regulated market, members and participants are not obliged to apply to each other the obligations laid down in Articles 19, 21 and 22. However, the members or participants of the regulated market shall apply the obligations provided for in Articles 19, 21 and 22 with respect to their clients when they, acting on behalf of their clients, execute their orders on a regulated market.

5. Member States shall ensure that the rules on access to or membership of the regulated market provide for the direct or remote participation of investment firms and credit institutions.

6. Member States shall, without further legal or administrative requirements, allow regulated markets from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and trading on those markets by remote members or participants established in their territory.

The regulated market shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State shall communicate, within one month, this information to the Member State in which the regulated market intends to provide such arrangements.

The competent authority of the home Member State of the regulated market shall, on the request of the competent

authority of the host Member State and within a reasonable time, communicate the identity of the members or participants of the regulated market established in that Member State.

7. Member States shall require the operator of the regulated market to communicate, on a regular basis, the list of the members and participants of the regulated market to the competent authority of the regulated market.

#### Article 43

#### **Monitoring of compliance with the rules of the regulated market and with other legal obligations**

1. Member States shall require that regulated markets establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. Regulated markets shall monitor the transactions undertaken by their members or participants under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require the operators of the regulated markets to report significant breaches of their rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority of the regulated market. Member States shall also require the operator of the regulated market to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse on the regulated market and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through the systems of the regulated market.

#### Article 44

#### **Pre-trade transparency requirements for regulated markets**

1. Member States shall, at least, require regulated markets to make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares admitted to trading. Member States shall require this information to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours.

Regulated markets may give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first subparagraph to investment firms which are obliged to publish their quotes in shares pursuant to Article 27.

2. Member States shall provide that the competent authorities are to be able to waive the obligation for regulated markets to make public the information referred to in paragraph 1 based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. In particular, the competent authorities shall be able to waive the obligation in respect of transactions that are large in scale compared with normal market size for the share or type of share in question.

3. In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures as regards:

- (a) the range of bid and offers or designated market-maker quotes, and the depth of trading interest at those prices, to be made public;
- (b) the size or type of orders for which pre-trade disclosure may be waived under paragraph 2;
- (c) the market model for which pre-trade disclosure may be waived under paragraph 2, and in particular, the applicability of the obligation to trading methods operated by regulated markets which conclude transactions under their rules by reference to prices established outside the regulated market or by periodic auction.

#### Article 45

#### **Post-trade transparency requirements for regulated markets**

1. Member States shall, at least, require regulated markets to make public the price, volume and time of the transactions executed in respect of shares admitted to trading. Member States shall require details of all such transactions to be made public, on a reasonable commercial basis and as close to real-time as possible.

Regulated markets may give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first subparagraph to investment firms which are obliged to publish the details of their transactions in shares pursuant to Article 28.

2. Member States shall provide that the competent authority may authorise regulated markets to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares. Member States shall require regulated markets to obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall require that these arrangements be clearly disclosed to market participants and the investing public.

3. In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures in respect of:

- (a) the scope and content of the information to be made available to the public;
- (b) the conditions under which a regulated market may provide for deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed.

#### Article 46

#### **Provisions regarding central counterparty and clearing and settlement arrangements**

1. Member States shall not prevent regulated markets from entering into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2. The competent authority of a regulated market may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established in Article 34(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the national central banks as overseers of clearing and settlement systems or by other supervisory authorities with competence in relation to such systems.

#### Article 47

#### **List of regulated markets**

Each Member State shall draw up a list of the regulated markets for which it is the home Member State and shall forward that list to the other Member States and the Commission. A similar communication shall be effected in respect of each change to that list. The Commission shall publish a list of all regulated markets in the *Official Journal of the European Union* and update it at least once a year. The Commission shall also publish and update the list at its website, each time the Member States communicate changes to their lists.

**TITLE IV***Article 49*

## COMPETENT AUTHORITIES

**Cooperation between authorities in the same Member State**

## CHAPTER I

If a Member State designates more than one competent authority to enforce a provision of this Directive, their respective roles shall be clearly defined and they shall cooperate closely.

**DESIGNATION, POWERS AND REDRESS PROCEDURES**

Each Member State shall require that such cooperation also take place between the competent authorities for the purposes of this Directive and the competent authorities responsible in that Member State for the supervision of credit and other financial institutions, pension funds, UCITS, insurance and reinsurance intermediaries and insurance undertakings.

*Article 48***Designation of competent authorities**

Member States shall require that competent authorities exchange any information which is essential or relevant to the exercise of their functions and duties.

1. Each Member State shall designate the competent authorities which are to carry out each of the duties provided for under the different provisions of this Directive. Member States shall inform the Commission and the competent authorities of other Member States of the identity of the competent authorities responsible for enforcement of each of those duties, and of any division of those duties.

*Article 50***Powers to be made available to competent authorities**

2. The competent authorities referred to in paragraph 1 shall be public authorities, without prejudice to the possibility of delegating tasks to other entities where that is expressly provided for in Articles 5(5), 16(3), 17(2) and 23(4).

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Within the limits provided for in their national legal frameworks they shall exercise such powers:

Any delegation of tasks to entities other than the authorities referred to in paragraph 1 may not involve either the exercise of public authority or the use of discretionary powers of judgement. Member States shall require that, prior to delegation, competent authorities take all reasonable steps to ensure that the entity to which tasks are to be delegated has the capacity and resources to effectively execute all tasks and that the delegation takes place only if a clearly defined and documented framework for the exercise of any delegated tasks has been established stating the tasks to be undertaken and the conditions under which they are to be carried out. These conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. In any case, the final responsibility for supervising compliance with this Directive and with its implementing measures shall lie with the competent authority or authorities designated in accordance with paragraph 1.

- (a) directly; or
- (b) in collaboration with other authorities; or
- (c) under their responsibility by delegation to entities to which tasks have been delegated according to Article 48(2); or
- (d) by application to the competent judicial authorities.

2. The powers referred to in paragraph 1 shall be exercised in conformity with national law and shall include, at least, the rights to:

Member States shall inform the Commission and the competent authorities of other Member States of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

- (a) have access to any document in any form whatsoever and to receive a copy of it;
- (b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections;
- (d) require existing telephone and existing data traffic records;
- (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- (f) request the freezing and/or the sequestration of assets;

3. The Commission shall publish a list of the competent authorities referred to in paragraphs 1 and 2 in the *Official Journal of the European Union* at least once a year and update it continuously on its website.

- (g) request temporary prohibition of professional activity;
- (h) require authorised investment firms and regulated markets' auditors to provide information;
- (i) adopt any type of measure to ensure that investment firms and regulated markets continue to comply with legal requirements;
- (j) require the suspension of trading in a financial instrument;
- (k) require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;
- (l) refer matters for criminal prosecution;
- (m) allow auditors or experts to carry out verifications or investigations.

#### Article 51

##### **Administrative sanctions**

1. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 50.

3. Member States shall provide that the competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

#### Article 52

##### **Right of appeal**

1. Member States shall ensure that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right to apply to the courts. The right to apply to the courts shall also apply where, in respect of an application for authorisation which provides all the information required, no decision is taken within six months of its submission.

2. Member States shall provide that one or more of the following bodies, as determined by national law, may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

- (a) public bodies or their representatives;
- (b) consumer organisations having a legitimate interest in protecting consumers;
- (c) professional organisations having a legitimate interest in acting to protect their members.

#### Article 53

##### **Extra-judicial mechanism for investors' complaints**

1. Member States shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate.

2. Member States shall ensure that those bodies are not prevented by legal or regulatory provisions from cooperating effectively in the resolution of cross-border disputes.

#### Article 54

##### **Professional secrecy**

1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 48(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Directive.

2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

3. Without prejudice to cases covered by criminal law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Directive shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive and with other Directives applicable to investment firms, credit institutions, pension funds, UCITS, insurance and reinsurance intermediaries, insurance undertakings regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.

#### Article 55

##### Relations with auditors

1. Member States shall provide, at least, that any person authorised within the meaning of Eighth Council Directive 84/253/EEC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents<sup>(1)</sup>, performing in an investment firm the task described in Article 51 of Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies<sup>(2)</sup>, Article 37 of Directive 83/349/EEC or Article 31 of Directive 85/611/EEC or any other task prescribed by law, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which that person has become aware while carrying out that task and which is liable to:

- (a) constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of investment firms;

<sup>(1)</sup> OJ L 126, 12.5.1984, p. 20.

<sup>(2)</sup> OJ L 222, 14.8.1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

- (b) affect the continuous functioning of the investment firm;

- (c) lead to refusal to certify the accounts or to the expression of reservations.

That person shall also have a duty to report any facts and decisions of which the person becomes aware in the course of carrying out one of the tasks referred to in the first subparagraph in an undertaking having close links with the investment firm within which he is carrying out that task.

2. The disclosure in good faith to the competent authorities, by persons authorised within the meaning of Directive 84/253/EEC, of any fact or decision referred to in paragraph 1 shall not constitute a breach of any contractual or legal restriction on disclosure of information and shall not involve such persons in liability of any kind.

#### CHAPTER II

##### COOPERATION BETWEEN COMPETENT AUTHORITIES OF DIFFERENT MEMBER STATES

#### Article 56

##### Obligation to cooperate

1. Competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive, making use of their powers whether set out in this Directive or in national law.

Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate one single competent authority as a contact point for the purposes of this Directive. Member States shall communicate to the Commission and to the other Member States the names of the authorities which are designated to receive requests for exchange of information or cooperation pursuant to this paragraph.

2. When, taking into account the situation of the securities markets in the host Member State, the operations of a regulated market that has established arrangements in a host Member State have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the home and host competent authorities of the regulated market shall establish proportionate cooperation arrangements.

3. Member States shall take the necessary administrative and organisational measures to facilitate the assistance provided for in paragraph 1.

Competent authorities may use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.

4. Where a competent authority has good reasons to suspect that acts contrary to the provisions of this Directive, carried out by entities not subject to its supervision, are being or have been carried out on the territory of another Member State, it shall notify this in as specific a manner as possible to the competent authority of the other Member State. The latter authority shall take appropriate action. It shall inform the notifying competent authority of the outcome of the action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the competent authority that has forwarded the information.

5. In order to ensure the uniform application of paragraph 2 the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to establish the criteria under which the operations of a regulated market in a host Member State could be considered as of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State.

#### Article 57

#### **Cooperation in supervisory activities, on-the-spot verifications or in investigations**

A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation. In the case of investment firms that are remote members of a regulated market the competent authority of the regulated market may choose to address them directly, in which case it shall inform the competent authority of the home Member State of the remote member accordingly.

Where a competent authority receives a request with respect to an on-the-spot verification or an investigation, it shall, within the framework of its powers:

- (a) carry out the verifications or investigations itself; or
- (b) allow the requesting authority to carry out the verification or investigation; or
- (c) allow auditors or experts to carry out the verification or investigation.

#### Article 58

#### **Exchange of information**

1. Competent authorities of Member States having been designated as contact points for the purposes of this Directive in accordance with Article 56(1) shall immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities, designated in accordance to Article 48(1), set out in the provisions adopted pursuant to this Directive.

Competent authorities exchanging information with other competent authorities under this Directive may indicate at the time of communication that such information must not be disclosed without their express agreement, in which case such information may be exchanged solely for the purposes for which those authorities gave their agreement.

2. The competent authority having been designated as the contact point may transmit the information received under paragraph 1 and Articles 55 and 63 to the authorities referred to in Article 49. They shall not transmit it to other bodies or natural or legal persons without the express agreement of the competent authorities which disclosed it and solely for the purposes for which those authorities gave their agreement, except in duly justified circumstances. In this last case, the contact point shall immediately inform the contact point that sent the information.

3. Authorities as referred to in Article 49 as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles 55 and 63 may use it only in the course of their duties, in particular:

- (a) to check that the conditions governing the taking-up of the business of investment firms are met and to facilitate the monitoring, on a non-consolidated or consolidated basis, of the conduct of that business, especially with regard to the capital adequacy requirements imposed by Directive 93/6/EEC, administrative and accounting procedures and internal-control mechanisms;
- (b) to monitor the proper functioning of trading venues;
- (c) to impose sanctions;
- (d) in administrative appeals against decisions by the competent authorities;
- (e) in court proceedings initiated under Article 52; or
- (f) in the extra-judicial mechanism for investors' complaints provided for in Article 53.

4. The Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures concerning procedures for the exchange of information between competent authorities.

5. Articles 54, 58 and 63 shall not prevent a competent authority from transmitting to central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks; likewise such authorities or bodies shall not be prevented from communicating to the competent authorities such information as they may need for the purpose of performing their functions provided for in this Directive.

#### Article 59

##### Refusal to cooperate

A competent authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity as provided for in Article 57 or to exchange information as provided for in Article 58 only where:

- (a) such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of the State addressed;
- (b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
- (c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

In the case of such a refusal, the competent authority shall notify the requesting competent authority accordingly, providing as detailed information as possible.

#### Article 60

##### Inter-authority consultation prior to authorisation

1. The competent authorities of the other Member State involved shall be consulted prior to granting authorisation to an investment firm which is:

- (a) a subsidiary of an investment firm or credit institution authorised in another Member State; or
- (b) a subsidiary of the parent undertaking of an investment firm or credit institution authorised in another Member State; or
- (c) controlled by the same natural or legal persons as control an investment firm or credit institution authorised in another Member State.

2. The competent authority of the Member State responsible for the supervision of credit institutions or insurance undertakings shall be consulted prior to granting an authorisation to an investment firm which is:

- (a) a subsidiary of a credit institution or insurance undertaking authorised in the Community; or
- (b) a subsidiary of the parent undertaking of a credit institution or insurance undertaking authorised in the Community; or
- (c) controlled by the same person, whether natural or legal, who controls a credit institution or insurance undertaking authorised in the Community.

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders or members and the reputation and experience of persons who effectively direct the business involved in the management of another entity of the same group. They shall exchange all information regarding the suitability of shareholders or members and the reputation and experience of persons who effectively direct the business that is of relevance to the other competent authorities involved, for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

#### Article 61

##### Powers for host Member States

1. Host Member States may, for statistical purposes, require all investment firms with branches within their territories to report to them periodically on the activities of those branches.

2. In discharging their responsibilities under this Directive, host Member States may require branches of investment firms to provide the information necessary for the monitoring of their compliance with the standards set by the host Member State that apply to them for the cases provided for in Article 32(7). Those requirements may not be more stringent than those which the same Member State imposes on established firms for the monitoring of their compliance with the same standards.

#### Article 62

##### Precautionary measures to be taken by host Member States

1. Where the competent authority of the host Member State has clear and demonstrable grounds for believing that an investment firm acting within its territory under the freedom to provide services is in breach of the obligations arising from the provisions adopted pursuant to this Directive or that an investment firm that has a branch within its territory is in breach of the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authority of the host Member State, it shall refer those findings to the competent authority of the home Member State.

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the investment firm persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State, after informing the competent authority of the home Member State shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. This shall include the possibility of preventing offending investment firms from initiating any further transactions within their territories. The Commission shall be informed of such measures without delay.

2. Where the competent authorities of a host Member State ascertain that an investment firm that has a branch within its territory is in breach of the legal or regulatory provisions adopted in that State pursuant to those provisions of this Directive which confer powers on the host Member State's competent authorities, those authorities shall require the investment firm concerned to put an end to its irregular situation.

If the investment firm concerned fails to take the necessary steps, the competent authorities of the host Member State shall take all appropriate measures to ensure that the investment firm concerned puts an end to its irregular situation. The nature of those measures shall be communicated to the competent authorities of the home Member State.

If, despite the measures taken by the host Member State, the investment firm persists in breaching the legal or regulatory provisions referred to in the first subparagraph in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to penalise further irregularities and, in so far as necessary, to prevent that investment firm from initiating any further transactions within its territory. The Commission shall be informed of such measures without delay.

3. Where the competent authority of the host Member State of a regulated market or an MTF has clear and demonstrable grounds for believing that such regulated market or MTF is in breach of the obligations arising from the provisions adopted pursuant to this Directive, it shall refer those findings to the competent authority of the home Member State of the regulated market or the MTF.

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the said regulated market or the MTF persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State, after informing the competent authority of the home Member State, shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. This shall include the possibility of preventing the said regulated market or the MTF from making their arrangements

available to remote members or participants established in the host Member State. The Commission shall be informed of such measures without delay.

4. Any measure adopted pursuant to paragraphs 1, 2 or 3 involving sanctions or restrictions on the activities of an investment firm or of a regulated market shall be properly justified and communicated to the investment firm or to the regulated market concerned.

## CHAPTER III

### COOPERATION WITH THIRD COUNTRIES

#### Article 63

#### Exchange of information with third countries

1. Member States may conclude cooperation agreements providing for the exchange of information with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 54. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

Member States may transfer personal data to a third country in accordance to Chapter IV of Directive 95/46/EC.

Member States may also conclude cooperation agreements providing for the exchange of information with third country authorities, bodies and natural or legal persons responsible for:

- (i) the supervision of credit institutions, other financial organisations, insurance undertakings and the supervision of financial markets;
- (ii) the liquidation and bankruptcy of investment firms and other similar procedures;
- (iii) carrying out statutory audits of the accounts of investment firms and other financial institutions, credit institutions and insurance undertakings, in the performance of their supervisory functions, or which administer compensation schemes, in the performance of their functions;
- (iv) overseeing the bodies involved in the liquidation and bankruptcy of investment firms and other similar procedures;
- (v) overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions,

only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 54. Such exchange of information must be intended for the performance of the tasks of those authorities or bodies or natural or legal persons.

2. Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have transmitted it and, where appropriate, solely for the purposes for which those authorities gave their agreement. The same provision applies to information provided by third country competent authorities.

## TITLE V

### FINAL PROVISIONS

#### Article 64

#### Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>(1)</sup> (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof, provided that the implementing measures adopted in accordance with that procedure do not modify the essential provisions of this Directive.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of that period.

#### Article 65

#### Reports and review

1. Before.....(\*), the Commission shall, on the basis of public consultation and in the light of discussions with competent authorities, report to the European Parliament and Council on the possible extension of the scope of the provisions of the Directive concerning pre and post-trade transparency obligations to transactions in classes of financial instrument other than shares.

2. Before.....(\*\*), the Commission shall present a report to the European Parliament and to the Council on the application of Article 27.

<sup>(1)</sup> OJ L 191, 13.7.2001, p. 45.

(\*) 2 years after the entry into force of this Directive.

(\*\*) 3 years after the entry into force of this Directive.

3. Before.....(\*\*), the Commission shall, on the basis of public consultations and in the light of discussions with competent authorities, report to the European Parliament and Council on:

- (a) the continued appropriateness of the exemption under Article 2(1)(k) for undertakings whose main business is dealing on own account in commodity derivatives;
- (b) the content and form of proportionate requirements for the authorisation and supervision of such undertakings as investment firms within the meaning of this Directive;
- (c) the appropriateness of rules concerning the appointment of tied agents in performing investment services and/or activities, in particular with respect to the supervision on them;
- (d) the continued appropriateness of the exemption under of Article 2(1)(i).

4. Before.....(\*\*), the Commission shall present a report to the European Parliament and the Council on the state of the removal of the obstacles which may prevent the consolidation at the European level of the information that trading venues are required to publish.

5. On the basis of the reports referred to in paragraphs 1 to 4, the Commission may submit proposals for related amendments to this Directive.

6. Before.....(\*\*\*) the Commission shall, in the light of discussions with competent authorities, report to the European Parliament and Council on the continued appropriateness of the requirements for professional indemnity insurance imposed on intermediaries under Community law.

#### Article 66

#### Amendment of Directive 85/611/EEC

In Article 5 of Directive 85/611/EEC, paragraph 4 shall be replaced by the following:

'4. Articles 2(2), 12, 13 and 19 of Directive 2004/EC<sup>(1)</sup> of the European Parliament and of the Council of..... on markets in financial instruments(\*), shall apply to the provision of the services referred to in paragraph 3 of this Article by management companies

<sup>(1)</sup> OPECE to insert reference to this Directive.

(\*) OJ L.

(\*\*) 30 months after the entry into force of this Directive.

(\*\*\*) 1 year after the entry into force of this Directive.

## Article 67

**Amendment of Directive 93/6/EEC**

Directive 93/6/EEC shall be amended as follows:

1) Article 2(2) shall be replaced by the following:

'2. Investment firms shall mean all institutions that satisfy the definition in Article 4(1) of Directive 2004/EC<sup>(1)</sup> of the European Parliament and of the Council of..... on markets in financial instruments (\*), which are subject to the requirements imposed by the same Directive, excluding:

(a) credit institutions,

(b) local firms as defined in 20, and

(c) firms which are only authorised to provide the service of investment advice and/or receive and transmit orders from investors without in both cases holding money or securities belonging to their clients and which for that reason may not at any time place themselves in debit with their clients.

<sup>(1)</sup> OPECE to insert reference to this Directive.

(\*) OJ L'

2) Article 3(4) shall be replaced by the following:

'4. The firms referred to in point (b) of Article 2(2) shall have initial capital of EUR 50 000 in so far as they benefit from the freedom of establishment or to provide services under Articles 31 or 32 of Directive 2004/39/EC.;

3) In Article 3 the following paragraphs shall be inserted:

'(4a) Pending revision of Directive 93/6/EC, the firms referred to in point (c) of Article 2(2) shall have:

(a) initial capital of EUR 50 000; or

(b) professional indemnity insurance covering the whole territory of the Community or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 1 000 000 applying to each claim and in aggregate EUR 1 500 000 per year for all claims; or

(c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b).

The amounts referred to in this paragraph shall be periodically reviewed by the Commission in order to take account of changes in the European Index of Consumer Prices as published by Eurostat, in line with and at the same time as the adjustments made under Article 4(7) of

Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation (\*).

(4b) When an investment firm referred to in Article 2(2)(c), is also registered under Directive 2002/92/EC it has to comply with the requirement established by Article 4(3), of that Directive and in addition it has to have:

(a) initial capital of EUR 25 000; or

(b) professional indemnity insurance covering the whole territory of the Community or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 500 000 applying to each claim and in aggregate EUR 750 000 per year for all claims; or

(c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b).

(\*) OJ L 9, 15.1.2003, p. 3.'

## Article 68

**Amendment of Directive 2000/12/EC**

Annex I of Directive 2000/12/EC shall be amended as follows:

At the end of the Annex I the following sentence is added:

'The services and activities provided for in Section A and B of Annex I of Directive 2004/EC<sup>(1)</sup> of the European Parliament and of the Council of..... on markets in financial instruments (\*) when referring to the financial instruments provided for in Section C of Annex I of that Directive are subject to mutual recognition according to this Directive.

<sup>(1)</sup> OPECE to insert reference to this Directive.

(\*) OJ L'

## Article 69

**Repeal of Directive 93/22/EEC**

Directive 93/22/EEC shall be repealed with effect from (\*). References to Directive 93/22/EEC shall be construed as references to this Directive. References to terms defined in, or Articles of, Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive.

(\*) 24 months after the entry into force of this Directive.

*Article 70***Transposition**

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by..... (\*) at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

*Article 71***Transitional provisions**

1. Investment firms already authorised in their home Member State to provide investment services before the..... (\*), shall be deemed to be so authorised for the purpose of this Directive, if the laws of those Member States provide that to take up such activities they must comply with conditions comparable to those imposed in Articles 9 to 14.

2. A regulated market or a market operator already authorised in its home Member State before the..... (\*), shall be deemed to be so authorised for the purposes of this Directive, if the laws of such Member State provide that the regulated market or market operator (as the case may be) must comply with conditions comparable to those imposed in Title III.

3. Tied agents already entered in a public register before the..... (\*), shall be deemed to be so registered for the purposes of this Directive, if the laws of those Member States provide that tied agents must comply with conditions comparable to those imposed in Article 23.

4. Information communicated before the..... (\*), for the purposes of Articles 17, 18 or 30 of Directive 93/22/EEC shall be deemed to have been communicated for the purposes of Articles 31 and 32 of this Directive.

5. Any existing system falling under the definition of an MTF operated by a market operator of a regulated market, shall be authorised as an MTF at the request of the market operator of the regulated market provided it complies with rules equivalent to those required by this Directive for the authorisation and operation of MTFs, and provided that the request concerned is made within 18 months of the date referred to in Article 70.

6. Investment firms shall be authorised to continue considering existing professional clients as such provided that this categorisation has been granted by the investment firm on the basis of an adequate assessment of the expertise, experience and knowledge of the client which gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understands the risks involved. Those investment firms shall inform their clients about the conditions established in the Directive for the categorisation of clients.

*Article 72***Entry into force**

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

*Article 73***Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 21 April 2004

*For the European Parliament*

*The President*

P. COX

*For the Council*

*The President*

D. ROCHE

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(\*) 24 months after the entry into force of this Directive.

## ANNEX I

## LIST OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS

## Section A

**Investment services and activities**

- (1) Reception and transmission of orders in relation to one or more financial instruments.
- (2) Execution of orders on behalf of clients.
- (3) Dealing on own account.
- (4) Portfolio management.
- (5) Investment advice.
- (6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.
- (7) Placing of financial instruments without a firm commitment basis
- (8) Operation of Multilateral Trading Facilities.

## Section B

**Ancillary services**

- (1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;
- (2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;
- (3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;
- (4) Foreign exchange services where these are connected to the provision of investment services;
- (5) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;
- (6) Services related to underwriting.
- (7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex I related to the underlying of the derivatives included under Section C – 5, 6, 7 and 10 - where these are connected to the provision of investment or ancillary services.

## Section C

**Financial Instruments**

- (1) Transferable securities;
- (2) Money-market instruments;
- (3) Units in collective investment undertakings;
- (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;
- (5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

- (6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;
  - (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
  - (8) Derivative instruments for the transfer of credit risk;
  - (9) Financial contracts for differences.
  - (10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.
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## ANNEX II

**PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS DIRECTIVE**

Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered a professional client, the client must comply with the following criteria:

**I. Categories of client who are considered to be professionals**

The following should all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the Directive.

- (1) Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a non-Member State:
  - (a) Credit institutions
  - (b) Investment firms
  - (c) Other authorised or regulated financial institutions
  - (d) Insurance companies
  - (e) Collective investment schemes and management companies of such schemes
  - (f) Pension funds and management companies of such funds
  - (g) Commodity and commodity derivatives dealers
  - (h) Locals
  - (i) Other institutional investors
- (2) Large undertakings meeting two of the following size requirements on a company basis:

— balance sheet total:	EUR 20 000 000,
— net turnover:	EUR 40 000 000,
— own funds:	EUR 2 000 000.
- (3) National and regional governments, public bodies that manage public debt, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.
- (4) Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

The entities mentioned above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is an undertaking referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the firm, the client is deemed to be a professional client, and will be treated as such unless the firm and the client agree otherwise. The firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.

It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.

This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such agreement should specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.

## II. Clients who may be treated as professionals on request

### II.1. Identification criteria

Clients other than those mentioned in section I, including public sector bodies and private individual investors, may also be allowed to waive some of the protections afforded by the conduct of business rules.

Investment firms should therefore be allowed to treat any of the above clients as professionals provided the relevant criteria and procedure mentioned below are fulfilled. These clients should not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in section I.

Any such waiver of the protection afforded by the standard conduct of business regime shall be considered valid only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved.

The fitness test applied to managers and directors of entities licensed under Directives in the financial field could be regarded as an example of the assessment of expertise and knowledge. In the case of small entities, the person subject to the above assessment should be the person authorised to carry out transactions on behalf of the entity.

In the course of the above assessment, as a minimum, two of the following criteria should be satisfied:

- the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters,
- the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500 000,
- the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

### II.2. Procedure

The clients defined above may waive the benefit of the detailed rules of conduct only where the following procedure is followed:

- they must state in writing to the investment firm that they wish to be treated as a professional client, either generally or in respect of a particular investment service or transaction, or type of transaction or product,
- the investment firm must give them a clear written warning of the protections and investor compensation rights they may lose,
- they must state in writing, in a separate document from the contract, that they are aware of the consequences of losing such protections.

Before deciding to accept any request for waiver, investment firms must be required to take all reasonable steps to ensure that the client requesting to be treated as a professional client meets the relevant requirements stated in Section II.1 above.

However, if clients have already been categorised as professionals under parameters and procedures similar to those above, it is not intended that their relationships with investment firms should be affected by any new rules adopted pursuant to this Annex.

Firms must implement appropriate written internal policies and procedures to categorise clients. Professional clients are responsible for keeping the firm informed about any change, which could affect their current categorisation. Should the investment firm become aware however that the client no longer fulfils the initial conditions, which made him eligible for a professional treatment, the investment firm must take appropriate action.

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