

Repeals and revocations relating to Northern Ireland

<i>Short title and chapter</i>	<i>Extent of repeal or revocation</i>
Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (N.I. 6))	The whole Order.
Companies Consolidation (Consequential Provisions) (Northern Ireland) Order 1986 (S.I. 1986/1035 (N.I. 9))	The whole Order.
Business Names (Northern Ireland) Order 1986 (S.I. 1986/1033 (N.I. 7))	The whole Order.
Industrial Relations (Northern Ireland) Order 1987 (S.I. 1987/936 N.I. 9))	Article 3.
Finance Act 1988 (c. 39)	In section 117(3), the words from “and for” to the end.
Companies (Northern Ireland) Order 1989 (S.I. 1989/2404 (N.I. 18))	The whole Order.
Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19))	In Schedule 7, in the entry relating to Article 166(4), the word “office”. In Schedule 9, Part I.
European Economic Interest Groupings Regulations (Northern Ireland) 1989 (S.R. 1989/216)	The whole Regulations.
Companies (Northern Ireland) Order 1990 (S.I. 1990/593 (N.I. 5))	The whole Order.
Companies (No. 2) (Northern Ireland) Order 1990 (S.I. 1990/1504 (N.I. 10))	Parts II to IV. Part VI. Schedules 1 to 6.
Criminal Justice Act 1993 (c. 36)	In Schedule 5, Part 2. Schedule 6.
Financial Provisions (Northern Ireland) Order 1993 (S.I. 1993/1252 (N.I. 5))	Article 15.
Deregulation and Contracting Out Act 1994 (c. 40)	Section 13(2). Schedule 6.
Pensions (Northern Ireland) Order 1995 (S.I. 1995/3213 (N.I. 22))	In Schedule 3, paragraph 7.
Deregulation and Contracting Out (Northern Ireland) Order 1996 (S.I. 1996/1632 (N.I. 11))	Article 11. Schedule 2. In Schedule 5, paragraph 4.

<i>Short title and chapter</i>	<i>Extent of repeal or revocation</i>
Youth Justice and Criminal Evidence Act 1999 (c. 23)	In Schedule 4, paragraph 18.
Limited Liability Partnerships Act (Northern Ireland) 2002 (c. 12 (N.I.))	The whole Act.
Open-Ended Investment Companies Act (Northern Ireland) 2002 (c. 13)	The whole Act.
Company Directors Disqualification (Northern Ireland) Order 2002 (S.I. 2002/3150 (N.I. 4))	In Schedule 3, paragraphs 3 to 5.
Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27)	Section 11(2). In Schedule 2, paragraphs 11 to 15.
Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (S.I. 2005/1452 (N.I. 7))	Article 4(2).
Companies (Audit, Investigations and Community Enterprise) (Northern Ireland) Order 2005 (S.I. 2005/1967 (N.I. 17))	The whole Order.
Other repeals	
<i>Short title and chapter</i>	<i>Extent of repeal or revocation</i>
Limited Partnerships Act 1907 (c. 24)	In section 16(1) – (a) the words “, and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding 5p for each inspection”, and (b) the words from “and there shall be paid for such certificate” to the end. In section 17 – (a) the words “(but as to fees with the concurrence of the Treasury)”, and (b) paragraph (a).
Business Names Act 1985 (c. 7)	The whole Act.
Companies Act 1989 (c. 40)	Sections 24 to 54. Schedules 11 to 13.
Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c. 40)	In Schedule 4, paragraph 74(2).

<i>Short title and chapter</i>	<i>Extent of repeal or revocation</i>
Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27)	Sections 1 to 6. In Schedule 2, Part 1.
Civil Partnership Act 2004 (c. 33)	In Schedule 27, paragraph 128.

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2006 No. 3386

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) (Amendment) Regulations 2006

<i>Made</i> - - - -	<i>18th December 2006</i>
<i>Laid before Parliament</i>	<i>18th December 2006</i>
<i>Coming into force</i> - -	<i>1st November 2007</i>

The Treasury make these Regulations in exercise of the powers conferred on them by sections 286(1), (4A), (4B), (4C) and (4D), 292(3)(a) and 428(3) of the Financial Services and Markets Act 2000(a):

Citation and commencement

1. These Regulations may be cited as the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) (Amendment) Regulations 2006 and come into force on 1st November 2007.

Amendment of the Recognition Requirements for Investment Exchanges and Clearing Houses Regulations

2. The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001(b) are amended as follows.

3. In regulation 3(1), at the appropriate place, insert—

““branch” in relation to an investment firm has the meaning given in Article 4.1.26 of the markets in financial instruments directive(c) and in relation to a credit institution has the meaning given in Article 4.3 of the banking consolidation directive(d);

“central counterparty”, “clearing” and “settlement” have the same meaning as in the markets in financial instruments directive;

“the Commission Regulation” means Commission Regulation 1287/2006 of 10 August 2006(e);

“competent authority”, in relation to an investment firm or credit institution, means the competent authority in relation to that firm or institution for the purposes of the markets in financial instruments directive;

(a) 2000 c.8; section 286(4A) – (4D) was inserted, and section 292(3)(a) was amended, by S.I. 2006/2975.

(b) S.I. 2001/995.

(c) OJ No L 145, 30.4.2004, p.1.

(d) OJ No L 177, 30.6.2006, p.1.

(e) OJ No L 241, 2.9.2006, p.1.

“credit institution” means—

- (a) a credit institution authorised under the banking consolidation directive, or
- (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA State;

“disorderly trading conditions” has the same meaning as in the markets in financial instruments directive;

“financial instrument” has the meaning given in Article 4.1.17 of the markets in financial instruments directive;

“multilateral trading facility” has the meaning given in Article 4.1.15 of the markets in financial instruments directive;

“regulated market” has the meaning given in Article 4.1.14 of the markets in financial instruments directive;

“transferable securities” has the meaning given in Article 4.1.18 of the markets in financial instruments directive;

“UK firm” means an investment firm or credit institution which has a Part IV permission to carry on one or more regulated activities.”.

4. In paragraph 1(2) of the Schedule for “may” substitute “must”.

5. In paragraph 2 of the Schedule, after sub-paragraph (2), insert—

“(3) The persons who effectively direct the business and operations of the exchange must be of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it.

(4) The persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, must be suitable.”.

6. In paragraph 3(2) of the Schedule—

(a) in paragraph (b) after “assessment” insert “, mitigation”;

(b) after paragraph (c) insert—

“(ca) the technical operation of the exchange, including contingency arrangements for disruption to its facilities;”.

7. In paragraph 4(2) of the Schedule—

(a) in paragraph (a), after “investors” insert “and is in accordance with paragraph 7B”;

(b) after paragraph (a) insert—

“(aa) it has transparent and non-discretionary rules and procedures—

(i) to provide for fair and orderly trading, and

(ii) to establish objective criteria for the efficient execution of orders;”;

(c) paragraph (b) is revoked;

(d) in paragraph (d) after “arrangements” insert “, which comply with paragraph 7D;”;

(e) after paragraph (e) insert—

“(ea) appropriate arrangements are made to—

(i) identify conflicts between the interests of the exchange, its owners and operators and the interests of the persons who make use of its facilities or the interests of the financial markets operated by it, and

(ii) manage such conflicts so as to avoid adverse consequences for the operation of the financial markets operated by the exchange and for the persons who make use of its facilities;”;

- (f) in paragraph (f) after “measures” insert “(including the monitoring of transactions effected on the exchange)”.

8. After paragraph 4 of the Schedule insert—

“Provision of pre-trade information about share trading

4A.—(1) The exchange must make arrangements for—

- (a) current bid and offer prices for shares, and
- (b) the depth of trading interest in shares at the prices which are advertised through its systems,

to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours, subject to the requirements contained in Chapter IV of the Commission Regulation.

(2) If an exchange decides to give investment firms and credit institutions required to publish their quotes in shares—

- (a) in accordance with Article 27 of the markets in financial instruments directive, or
- (b) by the Authority,

access to the arrangements referred to in sub-paragraph (1), it must do so on reasonable commercial terms and on a non-discriminatory basis.

(3) The Authority may waive the requirements of sub-paragraph (1) in the circumstances specified—

- (a) in the case of shares to be traded on a multilateral trading facility operated by the exchange, in Article 29.2 of the markets in financial instruments directive and Chapter IV of the Commission Regulation; or
- (b) in the case of shares to be traded on a regulated market operated by the exchange, in Article 44.2 of that directive and Chapter IV of the Commission Regulation.

(4) In this paragraph, “shares” means shares admitted to trading on a regulated market.

Provision of post-trade information about share trading

4B.—(1) The exchange must make arrangements for the price, volume and time of transactions executed in shares to be made available to the public as soon as possible after the time of the transaction on reasonable commercial terms, subject to the requirements contained in Chapter IV of the Commission Regulation.

(2) If an exchange decides to give investment firms and credit institutions required to make public details of their transactions in shares—

- (a) in accordance with Article 28 of the markets in financial instruments directive, or
- (b) by the Authority,

access to the arrangements referred to in sub-paragraph (1), it must do so on reasonable commercial terms and on a non-discriminatory basis.

(3) The Authority may permit exchanges to defer the publication required by sub-paragraph (1) in the circumstances specified, and subject to the requirements contained—

- (a) in the case of shares traded on a multilateral trading facility operated by an exchange, in Article 30.2 of the markets in financial instruments directive and Chapter IV of the Commission Regulation; or
- (b) in the case of shares traded on a regulated market operated by an exchange, in Article 45.2 of that directive and Chapter IV of the Commission Regulation.

(4) If the Authority permits exchanges to defer the publication required by sub-paragraph (1), those exchanges must ensure that the existence of and the terms of the permission are disclosed to users and members of their facilities and to investors.

(5) In this paragraph, “shares” means shares admitted to trading on a regulated market.”.

9. After paragraph 7 of the Schedule insert—

“Admission of financial instruments to trading

7A.—(1) The exchange must make clear and transparent rules concerning the admission of financial instruments to trading on any financial market operated by it.

(2) The rules must ensure that all financial instruments admitted to trading on a regulated market operated by the exchange are capable of being traded in a fair, orderly and efficient manner (in accordance with Chapter V of the Commission Regulation, where applicable).

(3) The rules must ensure that—

(a) all transferable securities admitted to trading on a regulated market operated by the exchange are freely negotiable (in accordance with Chapter V of the Commission Regulation, where applicable); and

(b) all contracts for derivatives admitted to trading on a regulated market operated by the exchange are designed so as to allow for their orderly pricing as well as for the existence of effective settlement conditions.

(4) The exchange must maintain arrangements to provide sufficient publicly available information (or satisfy itself that sufficient information is publicly available) to enable the users of a multilateral trading facility operated by it to form investment judgments, taking into account both the nature of the users and the types of instrument traded.

(5) The exchange must maintain effective arrangements to verify that issuers of transferable securities admitted to trading on a regulated market operated by it comply with the disclosure obligations.

(6) The exchange must maintain arrangements to assist users of a regulated market operated by it to obtain access to information made public under the disclosure obligations.

(7) The exchange must maintain arrangements regularly to review whether the financial instruments admitted to trading on a regulated market operated by it comply with the admission requirements for those instruments.

(8) The rules must provide that where an exchange, without obtaining the consent of the issuer, admits to trading on a regulated market operated by it a transferable security which has been admitted to trading on another regulated market, the exchange—

(a) must inform the issuer of that security as soon as is reasonably practicable, and

(b) may not require the issuer of that security to demonstrate compliance with the disclosure obligations.

(9) The rules must provide that where an exchange, without obtaining the consent of the issuer, admits to trading on a multilateral trading facility operated by it a transferable security which has been admitted to trading on a regulated market, it may not require the issuer of that security to demonstrate compliance with the disclosure obligations.

(10) In this paragraph—

“derivatives” has the same meaning as in the markets in financial instruments directive;

“the disclosure obligations” are the initial, ongoing and ad hoc disclosure requirements contained in the relevant articles and given effect—

(a) in the UK by Part 6 of the Act and Part 6 rules (within the meaning of section 73A of the Act(a)); or

(b) in another EEA State by legislation transposing the relevant articles in that State.

“issuer” has the same meaning as in the markets in financial instruments directive;

“the relevant articles” means—

(a) Section 73A was inserted by S.I. 2006/381, and is prospectively amended by Schedule 15 to the Companies Act 2006 (c. 46).

- (a) Article 6.1 to 6.4 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation(a),
 - (b) Articles 3, 5, 7, 8, 10, 14 and 16 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectuses to be published when securities are offered to the public or admitted to trading(b),
 - (c) Articles 4 to 6, 14, 16 to 19 and 30 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market(c), and
 - (d) Community legislation made under the provisions mentioned in paragraphs (a) to (c).
- (11) This paragraph is without prejudice to the generality of paragraph 4.

Access to the exchange's facilities

7B.—(1) The exchange must make transparent and non-discriminatory rules, based on objective criteria, governing access to, or membership of, its facilities.

(2) In particular those rules must specify the obligations for users or members of its facilities arising from—

- (a) the constitution and administration of the exchange;
- (b) rules relating to transactions on the market;
- (c) its professional standards for staff of any investment firm or credit institution having access to or membership of a financial market operated by the exchange;
- (d) conditions established under sub-paragraph (3)(c) for access to or membership of a financial market operated by the exchange by persons other than investment firms or credit institutions; and
- (e) the rules and procedures for clearing and settlement of transactions concluded on a financial market operated by the exchange.

(3) Rules of the exchange about access to, or membership of, a financial market operated by it must permit the exchange to give access to or admit to membership (as the case may be) only—

- (a) an investment firm,
- (b) a credit institution, or
- (c) a person who—
 - (i) is fit and proper,
 - (ii) has a sufficient level of trading ability and competence,
 - (iii) where applicable, has adequate organisational arrangements, and
 - (iv) has sufficient resources for the role he is to perform, taking account of the exchange's arrangements under paragraph 4(2)(d).

(4) Rules under this paragraph must enable—

- (a) an investment firm authorised under Article 5 of the markets in financial instruments directive, or
- (b) a credit institution authorised under the banking consolidation directive,

by the competent authority of another EEA State (including a branch established in the United Kingdom of such a firm or institution) to have direct or remote access to, or

(a) OJ No L 96, 12.4.2003, p.16.
 (b) OJ No L 345, 31.12.2003, p. 64.
 (c) OJ No L 390, 31.12.2004, p.38.

membership of, any financial market operated by the exchange on the same terms as a UK firm.

(5) The exchange must make arrangements regularly to provide the Authority with a list of the users or members of its facilities.

(6) This paragraph is without prejudice to the generality of paragraph 4.

Access to central counterparty, clearing and settlement facilities

7C.—(1) This paragraph applies to an exchange which provides central counterparty, clearing or settlement facilities.

(2) The exchange must make transparent and non-discriminatory rules, based on objective criteria, governing access to those facilities.

(3) The rules under sub-paragraph (2) must enable an investment firm or a credit institution authorised by the competent authority of another EEA State (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

(4) The exchange may refuse access to those facilities on legitimate commercial grounds.

Choice of settlement facilities

7D.—(1) The rules of the exchange must permit a user or member of a regulated market operated by it to use whatever settlement facility he chooses for a transaction.

(2) Sub-paragraph (1) only applies where—

- (a) such links and arrangements exist between the chosen settlement facility and any other settlement facility as are necessary to ensure the efficient and economic settlement of the transaction; and
- (b) the exchange is satisfied that the smooth and orderly functioning of the financial markets will be maintained.

Suspension and removal of financial instruments from trading

7E. The rules of the exchange must provide that the exchange must not exercise its power to suspend or remove from trading on a regulated market operated by it any financial instrument which no longer complies with its rules, where such step would be likely to cause significant damage to the interests of investors or the orderly functioning of the financial markets.”.

10. In paragraph 8 of the Schedule for sub-paragraph (1) substitute—

“(1) The exchange must have—

- (a) effective arrangements (which include the monitoring of transactions effected on the exchange) for monitoring and enforcing compliance with its rules, including rules in relation to the provision of clearing services in respect of transactions other than transactions effected on the exchange;
- (b) effective arrangements for monitoring and enforcing compliance with the arrangements made by it as mentioned in paragraph 4(2)(d); and
- (c) effective arrangements for monitoring transactions effected on the exchange in order to identify disorderly trading conditions.”.

11. After paragraph 9 of the Schedule insert—

“Operation of a multilateral trading facility

9A.—(1) An exchange operating a multilateral trading facility must also operate a regulated market.

(2) An exchange operating a multilateral trading facility must comply with those requirements of—

(a) Chapter I of Title II of the markets in financial instruments directive, and

(b) Commission Directive 2006/73/EC of 10 August 2006(a),

which are applicable to a market operator (within the meaning of the directive) operating such a facility.

(3) The requirements of this paragraph do not apply for the purposes of section 292(3)(a) of the Act (requirements for overseas investment exchanges and overseas clearing houses)."

12. In paragraph 10(3) of the Schedule omit "by a recognised clearing house".

13. After paragraph 21 of the Schedule insert—

"Access to central counterparty, clearing and settlement facilities

21A.—(1) The clearing house must make transparent and non-discriminatory rules, based on objective criteria, governing access to central counterparty, clearing or settlement facilities provided by it.

(2) The rules under sub-paragraph (1) must enable an investment firm or a credit institution authorised by the competent authority of another EEA State (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

(3) The clearing house may refuse access to those facilities on legitimate commercial grounds."

Kevin Brennan

Dave Watts

18th December 2006

Two of the Lords Commissioners of Her Majesty's Treasury

(a) OJ No L 241, 2.9.2006, p.26.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement in part Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ No L 145, 30.4.2004, p.1) ("the Directive"). The Directive is also implemented by other statutory instruments including the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations (S.I. 2006/....), the Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2006 (S.I. 2006/....), the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006 (S.I. 2006/3384) and the Financial Services and Markets Act 2000 (EEA Passport Rights) (Amendment) Regulations 2006 (S.I. 2006/3385), and by the Financial Services Authority ("FSA") using powers under the Financial Services and Markets Act 2000 (c. 8).

The Regulations amend the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (S.I. 2001/995) ("the principal Regulations"). The main amendments are as follows.

- New requirements concerning the suitability of the persons who effectively direct the business and operations of an exchange and persons who are in a position to exercise significant influence over the management of an exchange are added into paragraph 2 of the Schedule to the principal Regulations (transposing obligations in Articles 37(1) and 38(1) of the Directive).
- New paragraphs 4A and 4B of the Schedule to the principal Regulations contain requirements for exchanges to make information available to the public about transactions in shares in accordance with the Directive and Commission Regulation 1287/2006 of 10 August 2006 (OJ No L 241, 2.9.2006, p.1). They also enable the FSA to waive or defer the publication requirements as permitted in the Directive and Commission Regulation (transposing Articles 29, 30, 44 and 45 of the Directive).
- New paragraph 7A of the Schedule to the principal Regulations contains requirements for exchanges' rules governing admission of financial instruments to trading and requirements for exchanges relating to information disclosure obligations (transposing obligations in Articles 14 and 40 of the Directive).
- New paragraph 7B of the Schedule to the principal Regulations contains requirements for exchanges' rules about access to, or membership of, their facilities (transposing Article 42 of the Directive).
- New paragraphs 7C and 21A of the Schedule to the principal Regulations contain requirements for exchanges and clearing houses providing central counterparty, clearing or settlement services. Exchanges and clearing houses must secure that investment firms and credit institutions established in other EEA States have access to the facilities on equal terms to UK firms and institutions (transposing Article 34(1) of the Directive).
- New paragraph 7D of the Schedule to the principal Regulations requires exchanges' rules to permit users and members to have a choice of settlement facilities, as required by Article 34(2) of the Directive, and subject to the limitations in that Article.
- New paragraph 7E of the Schedule to the principal Regulations restricts the power of exchanges to suspend or remove financial instruments from trading (transposing Article 41(1) of the Directive).
- New paragraph 9A of the Schedule to the principal Regulations requires exchanges operating a multilateral trading facility also to operate a regulated market. Exchanges operating a multilateral trading facility are also required to comply with the applicable requirements of Chapter I of Title II of the Directive and Community legislation made under that Chapter (transposing Article 5(2) of the Directive).

The Regulations also contain other amendments transposing the Directive, making consequential amendments and inserting definitions for the purposes of the amendments.

A transposition note has been prepared which sets out how the main elements of the Directive will be transposed into UK law. A Regulatory Impact Assessment of the effect of this instrument and the other instruments transposing the Directive on the costs of business has been prepared. Both may be obtained from the Financial Services Strategy Team, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. They are also available on HM Treasury's website (www.hm-treasury.gov.uk). Copies of both documents have been placed in the libraries of both Houses of Parliament.

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MARKETS (MiFID) (CONSEQUENTIAL AMENDMENTS) INSTRUMENT 2007**Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 138 (General rule-making power);
 - (2) section 156 (General supplementary powers);
 - (3) section 157(1) (Guidance); and
 - (4) paragraph 17 of Schedule 1 (Fees).
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 1 November 2007.

Amendments to the Handbook

- D. The modules of the FSA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Fees manual (FEES)	Annex B
Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU)	Annex C
Conduct of Business sourcebook (COBS)	Annex D
Market Conduct sourcebook (MAR)	Annex E
Supervision manual (SUP)	Annex F
Credit Unions sourcebook (CRED)	Annex G
Electronic Money sourcebook (ELM)	Annex H
Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC)	Annex I

Citation

- E. This instrument may be cited as the Markets (MiFID) (Consequential Amendments) Instrument 2007.

By order of the Board
26 July 2007

Annex A

Amendments to the Glossary of definitions

In this Annex, striking through indicates deleted text.

~~*alternative trading system*~~ a system that brings together multiple buying and selling interests in *designated investments* (other than *life policies*, *personal pension schemes*, *stakeholder pension schemes* or rights to or interests in any of those investments), in the system and according to non-discretionary rules set by the system's operator in a way that results in a contract but does not include: (a) a system that is operated by an *RIE* or that is a *regulated market* or an *EEA commodities market*; or (b) a *bilateral system*.

ATS ~~*alternative trading system*~~.

ATS operator a *firm* that operates an *ATS* or that has accepted responsibility for the operation of an *ATS* by an *appointed representative*.

~~*bilateral system*~~ a system that brings together buying and selling interests in the way described in the definition of an *alternative trading system*, where a single *person* enters into one side of every transaction effected using the system, on his own account and not merely as a central counterparty interposed between a buyer and seller, or would enter into every trade in that way but for *client* orders that are crossed occasionally. This definition includes such a system where, rather than a single *person*, it is one of a number of *persons* in the same *group* that enters into one side of every transaction effected using the system.

~~*CESR ATS standards*~~ the Standards for the Regulation of Alternative Trading Systems published by the Committee of European Securities Regulators.

~~*large order, quote or transaction*~~ (in relation to an *ATS*) an order, quote or transaction relating to an investment traded on an *ATS*, the publication of details of which at the time of the order, quote or transaction might significantly affect the price of the relevant investment to the detriment of the *person* placing the order, providing the quote or entering into the transaction (as the case may be).

~~*price taking system*~~ an *ATS* that facilitates transactions by reference to prices established on a market or another *ATS*.

Annex B

Amendments to the Fees manual (FEES)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Late Payments

- 2.2.1 R If a *person* does not pay the total amount of a periodic fee (including fees relating to ~~*transactions reported*~~ *transaction reports* to the *FSA* using the *FSA's* Transaction Reporting System (see SUP 17)), *FOS* levy or case fee, or share of the *FSCS* levy, on the date on which it is due, under the relevant provision in FEES 4, 5 or 6, that *person* must pay an additional amount as follows: ...

...

Annex C

Amendments to Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2.2.68 G Counterparty risk *rules* only partially capture the risk of settlement failure as the quantification of risk is only based on mark-to-market values and does not take account of the volatility of the securities over the settlement period. A securities *firm's* assessment of its exposure to counterparty risk should take into account:

- (1) ...
- (2) the types of execution venues which it uses; for example, the London Stock Exchange or a retail service provider (RSP) have more depth than ~~alternative trading systems (ATS)~~ multilateral trading facilities; and

...

Annex D

Amendments to the Conduct of Business sourcebook (COBS)

In this Annex, underlining indicates new text.

- 11.4.4 G *MAR 5.8.2EU* sets out the conditions required for an arrangement to make *client limit the orders* public under this section. *MAR 5.8.3G* and *MAR 5.8.4G* provide guidance on these conditions.

Annex E

Amendments to the Market Conduct sourcebook (MAR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Disapplication of the pre-trade transparency requirements

5.7.1 R ~~(1)~~ ~~Unless disapplication of this rule under MAR 5.7.6 G is relevant, Unless (2),(3) or (4) applies,~~ in respect of shares *admitted to trading* on a *regulated market*, a *firm* operating an *MTF* must make public, on reasonable commercial terms and on a continuous basis during *normal trading hours*:

~~(1)~~ ~~(a)~~ the current bid and offer prices which are advertised through its systems; and

~~(2)~~ ~~(b)~~ the depth of trading interests at those prices.

[Note: Article 29(1) of MiFID]

~~(2)~~ Paragraph (1) does not apply to systems operated by an MTF to the extent that those systems satisfy one of the criteria in (a) or (b), subject to (c):

~~(a)~~ they must be based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is regarded generally by market participants as a reliable reference price;

~~(b)~~ they formalise negotiated transactions, each of which meets the criteria in (i) and (ii), subject to the provisions in (iii) and (iv):

~~(i)~~ it is made at or within the current volume weighted spread reflected on the order book or the quotes of the market makers of the MTF operating that system or, where the share is not traded continuously, within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator;

~~(ii)~~ it is subject to conditions other than the current market price of the share.

~~(iii)~~ For the purposes of (b), the other conditions specified in the rules of the MTF for a transaction of this kind must also have been fulfilled.

~~(iv)~~ Negotiated transaction has the meaning given in Article 19 of the MiFID Regulation.

[Note: Article 19 of the MiFID Regulation is reproduced in MAR 5.7.9]

EU.]

(c) In the case of systems having functionality other than as described in (a) or (b), the disapplication does not apply to that other functionality.

(3) Paragraph (1) does not apply in relation to orders held in an order management facility maintained by the MTF pending their being disclosed to the market.

(4) (a) Paragraph (1) does not apply in relation to orders that are large in scale compared to normal market size for the share or type of share in question.

(b) An order will be considered to be large in scale if it meets the criteria set out in Article 20 of the MiFID Regulation.

[Note: Article 20 of the MiFID Regulation is reproduced in MAR 5.7.10EU.]

...

5.7.6 G The obligation in *MAR 5.7.1R(1)* to make public certain pre-trade information ~~will not be~~ is disappplied in *MAR 5.7.1R(2)* based on the market model or the type and size of orders in the cases identified in the *MiFID Regulation*, and as reproduced for reference in *MAR 5.7.8EU* In particular, the obligation ~~will not be~~ is disappplied in respect of transactions that are large in scale compared with the normal market size for the share or type of share in question.

...

5.8 Provisions common to pre- and post-trade transparency requirements for shares

5.8.2 EU ...

5.8.3 G The FSA considers that for the purposes of ensuring that published information is reliable, monitored continuously for errors, and corrected as soon as errors are detected (see *MAR 5.8.2EU(a)*), a verification process should be established which does not need to be external from the organisation of the publishing entity, but which should be an independent cross-check of the accuracy of the information generated by the trading process. This process should have the capability to at least identify price and volume anomalies, be systematic and conducted in real-time. The chosen process should be reasonable and proportionate in relation to the business.

5.8.4 G (1) In respect of arrangements facilitating the consolidation of data as required in *MAR 5.8.2EU(b)*, the FSA considers information as being made public in accordance with *MAR 5.8.2EU(b)*, if it:

(a) is accessible by automated electronic means in a machine-readable way;

- (b) utilises technology that facilitates consolidation of the data and permits commercially viable usage; and
- (c) is accompanied by instructions outlining how users can access the information.

(2) The FSA considers that an arrangement fulfils the 'machine-readable' criteria where the data:

- (a) is in a physical form that is designed to be read by a computer;
- (b) is in a location on a computer storage device where that location is known in advance by the party wishing to access the data; and
- (c) is in a format that is known in advance by the party wishing to access the data.

(3) The FSA considers that publication on a non-machine-readable website would not meet the *MiFID* requirements.

(4) The FSA considers that information that is made public in accordance with *MAR 5.8.2EU* should conform to a consistent and structured format based on industry standards. *Firms* operating an *MTF* can choose the structure that they use.

...

5.9.1 R (1) In respect of shares *admitted to trading* on a *regulated market*, ~~and subject to the deferred publication provisions in *MAR 5.9.6EU* and *MAR 5.9.7R*,~~ unless *MAR 5.9.1 R(2)* applies and *MAR 5.9.7R* is satisfied, a *firm* operating an *MTF* must make public, on reasonable commercial terms and as close to real-time as possible, the price, volume and time of the transactions which are advertised through its systems. This requirement does not apply to the details of a transaction executed on an *MTF* that is made public under the systems of a *regulated market*.

[Note: article 30(1) of *MiFID*]

(2) A *firm* may defer publication of trade information required in (1) for no longer than the period specified in Table 4 in Annex II of the *MiFID Regulation* for the class of share and transaction concerned, provided that the following criteria in (a) and (b) are satisfied and subject to the provision in (c):

- (a) the transaction is between an *investment firm dealing on own account* and a *client* of that firm;
- (b) the size of the transaction is equal to or exceeds the relevant minimum qualifying size, as specified in Table 4 in Annex II.
- (c) In order to determine the relevant minimum qualifying size for the purposes of point (b), all shares *admitted to trading* on a *regulated*

market must be classified in accordance with their average daily turnover to be calculated in accordance with Article 33 of the MiFID Regulation.

Note: Table 4 of Annex II of the MiFID regulation is reproduced in MAR 7 Annex 1.

...

5.9.6A G The deferred publication of information, referred to in MAR 5.9.6EU, is authorised by the FSA, to the extent set out in that provision, and, in particular, is given effect in MAR 5.9.1 R(2).

...

6.9.5 EU ...

6.9.6 G For the purposes of ensuring that published information is reliable, monitored continuously for errors, and corrected as soon as errors are detected (see MAR 6.9.5EU(a)), and in respect of arrangements facilitating the consolidation of data as required in MAR 6.9.5EU(b), the guidance in MAR 5.8.3G and 5.8.4G applies equally to firms falling within this chapter, and should be read as if references to provisions and types of firm in MAR 5 were references to the corresponding provisions and types of firm in this chapter.

...

Deferred publication of large transactions

7.2.1 R (1) Unless (2) applies, the information required by MAR 7.1.2R 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.

[Note: article 28(1) of MiFID]

(2) A firm may defer publication of trade information required in (1), for no longer than the period specified in Table 4 in Annex II of the MiFID Regulation for the class of share and transaction concerned, provided that the criteria in (a) and (b) are satisfied, subject to the provision in (c):

(a) the transaction is between an investment firm dealing on own account and a client of that firm;

(b) the size of the transaction is equal to or exceeds the relevant minimum qualifying size, as specified in Table 4 in Annex II.

(c) In order to determine the relevant minimum qualifying size for the purposes of (b), all shares admitted to trading on a regulated market must be classified in accordance with their average daily turnover to be calculated in accordance with Article 33 of the MiFID

Regulation.

[Note: Table 4 of Annex II of the *MiFID Regulation* is reproduced in *MAR 7 Annex 1.*]

...

7.2.6A G The deferred publication of information, referred to in *MAR 7.2.6EU*, is authorised by the *FSA*, to the extent set out in that provision, and, in particular, is given effect in *MAR 7.2.1R(2)*.

Arrangements for making information public

7.2.12 EU ...

7.2.12A G (1) The *FSA* considers that for the purposes of ensuring that published information is reliable, monitored continuously for errors, and corrected as soon as errors are detected (see *MAR 7.2.12EU(a)*), and in respect of arrangements facilitating the consolidation of data as required in *MAR 7.2.12EU(b)*, the guidance in *MAR 5.8.3G* and *MAR 5.8.4G* (subject to additional guidance in (2)) applies equally to *firms* falling within this chapter, and should be read as if references to provisions and types of *firm* in *MAR 5* were references to the corresponding provisions and types of *firm* in this chapter.

(2) In addition to *MAR 5.8.4G*, as applied to *firms* in this chapter under (1), for the purposes of facilitating the consolidation of transparency data with similar data from other sources, the *FSA* considers information as being made public in accordance with *MAR 7.2.12EU(b)*, if, in addition to *MAR 5.8.4G(1)(a)* to (c), each trade is published through only one primary publication channel.

Annex F

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

SUP 13A Annex 1G Application of the Handbook to Incoming EEA Firms

...		
(1) Module of Handbook	(2) Potential application to an incoming EEA firm with respect to activities carried on from an establishment of the firm (or its appointed representative) in the United Kingdom	(3) Potential application to an incoming EEA firm with respect to activities carried on other than from an establishment of the firm (or its appointed representative) in the United Kingdom
...		
MAR	...	
	MAR 5 (Alternative Trading Systems Multilateral Trading Facilities) Does not apply (<i>MAR 5.1.1G</i>).	MAR 5 (Alternative Trading Systems Multilateral Trading Facilities) Does not apply (<i>MAR 5.1.1G</i>).

SUP TP 1.2

(1)	(2) Material to which the transitional provisions applies	(3)	(4) Transitional Provisions	(5) Transitional provisions: dates in force	(6) Handbook provision: coming into force
...					
15	SUP 17	R	Transaction Reporting	From commencement	Commencement
			(1) A firm: to whom SUP 17 applies under SUP 17.1.1 (1)(c); and		
			(2) which was authorised under the Financial Services Act 1986 immediately before commencement otherwise than through membership of the SFA;		
			must comply with SUP 17 as if it were:		
			(1) an investment		

				management firm, if it was a member of IMRO immediately before commencement, or		
			(2)	a personal investment firm, otherwise. [deleted]		
...						

SUP Sch 2 Notification requirements

Handbook reference	Matter to be notified	Contents of notification	Trigger event	Time allowed
...				
SUP 17	<p>Transaction reporting This applies to (a) securities and futures firm; or (b) a personal investment firm; or (c) an investment firm (including a credit institution which is an investment firm) not within (a) or (b) excluding a firm to whom the ISD does not apply under Article 2(2) of the ISD.</p> <p>This does not apply to</p> <p>(a) an incoming EEA firm in relation to its passported activities; or</p> <p>(b) an oil market participant in relation to its oil market activity. <u>a MiFID investment firm; (b) a third country investment firm; (c) a person who is the operator of an approved reporting mechanism or of a regulated market or MTF that is used by a firm to report transactions to the FSA; or (d) a firm acting in its capacity as a manager or</u></p>	<p>A transaction report as specified in SUP 17.6. <u>SUP 17.1.4R, SUP 17.4.1EU and SUP 17.4.2R.</u></p>	<p>Entering into a reportable transaction (as defined in SUP 17.5), whether on its own account or on behalf of another, subject to exceptions in SUP 17.4 <u>Executing a transaction,</u> subject to the exceptions in <u>SUP 17.2.1R and SUP 17.2.3R.</u></p>	<p>As soon as practicable and in any event before the end of the next business day after the day on which the firm entered into the transaction, subject to SUP 17.7.10 (Failure of reporting system) <u>As quickly as possible and by not later than the close of the working day following the day upon which that transaction took place.</u></p>

	<p><u>operator of a collective investment undertaking, pension scheme, occupational pension scheme, a personal pension scheme or a stakeholder pension scheme .</u></p>			
SUP 17	<p>Transaction reporting This applies to (a) a <i>securities and futures firm</i>; or (b) a <i>personal investment firm</i>; or (c) an <i>investment firm</i> (including a <i>credit institution</i> which is an <i>investment firm</i>) not within (a) or (b) excluding a <i>firm</i> to whom the <i>ISD</i> does not apply under Article 2(2) of the <i>ISD</i>. This does not apply to: (a) an <i>incoming EEA firm</i> in relation to its <i>passport activities</i>; or (b) an <i>oil market participant</i> in relation to its <i>oil market activities</i></p>	<p>The fact of intending to use one of the systems specified</p>	<p>Before using one of the reporting systems listed in SUP 17.7.8: (1) CEDCOM system operated by Clearstream Banking AG, Frankfurt; (2) CGO – Central Gils Office; (3) CRESTCo Limited; (4) EUCLID operated by Euroclear SA (input directly into EUCLID or through SWIFT); (5) the FSA's Direct Reporting System; (6) SEQUAL 2000 system of Thomson Financial Services; (7) Tradepoint Financial Networks Plc; (8) Trade Registration System of The London International Financial Futures and Options Exchange (LIFFE); (9) TRAX</p>	<p>Before using the system specified</p>

			system of the International Securities Market Association; and (10) Jiway Limited	
<i>SUP 17</i>	Transaction reporting	Whether the <i>firm</i> will adopt:	Failure of a reporting system	Before the end of the <i>business day</i> after the <i>day</i> when the failure occurs.
	<p>This applies to (a) a <i>securities and futures firm</i>; or (b) a <i>personal investment firm</i>; or (c) an <i>investment firm</i> (including a <i>credit institution</i> which is an <i>investment firm</i>) not within (a) or (b) excluding a <i>firm</i> to whom the <i>ISD</i> does not apply under Article 2(2) of the <i>ISD</i>.</p> <p>This does not apply to: (a) an <i>incoming EEA firm</i> in relation to its <i>passport activities</i>; or (b) an <i>oil market participant</i> in relation to its <i>oil market activities</i>.</p>	<p>(1) <i>SUP 17.7.10 (1)</i>: make the <i>transaction report</i> through another reporting system, if the <i>firm</i> considers it reasonably practicable to do so;</p> <p>(2) <i>SUP 17.7.10 (2)</i>: make the <i>transaction report</i> by the end of the <i>business day</i> after the <i>day</i> when the failure is remedied, if the <i>firm</i> does not consider it reasonably practicable to comply with (1)</p>		
<i>SUP 17</i>	Transaction reporting This applies to (a) a <i>securities and futures firm</i> ; or (b) a <i>personal investment firm</i> ; or (c) an <i>investment firm</i> (including a <i>credit institution</i> which is an <i>investment firm</i>) not	The fact of the failure of the reporting system	Any failure of the <i>firm's</i> system or that of a <i>person</i> reporting on its behalf which prevents a <i>person</i> making a <i>transaction report</i> within the specified period	Without delay

	<p>within (a) or (b) excluding a <i>firm</i> to whom the <i>ISD</i> does not apply under Article 2(2) of the <i>ISD</i>. This does not apply to: (a) an <i>incoming EEA firm</i> in relation to its <i>passport activities</i>; or (b) an <i>oil market participant</i> in relation to its <i>oil market activities</i>.</p>		(SUP 17.6.1)	
...				

Annex G

Amendments to the Credit Unions sourcebook (CRED)

In this Annex, underlining indicates new text and striking through indicates deleted text.

CRED App 1.1.1

	Sourcebook or manual	Reference Code
...		
Business standards		
...		
Market conduct, including: Code of Market, Conduct Price stabilising rules, Inter-professional conduct, Alternative Trading Systems <u>Multilateral Trading Facilities</u>	<i>MAR</i>	

Annex H

Amendments to the Electronic Money sourcebook (ELM)

In this Annex, underlining indicates new text and striking through indicates deleted text.

Application of other parts of the Handbook to ELMIs

ELM 1.5.2 G

...

Block	Module	Application
...		
Business Standards	...	
...	Market Conduct (MAR)	<i>MAR 1</i> (The Code of Market Conduct) applies if an <i>ELMI</i> is seeking <i>guidance</i> as to whether or not <i>behaviour</i> amounts to <i>market abuse</i> . <i>MAR 2</i> (Price Stabilising Rules), <i>MAR 3</i> (Inter-Professional Conduct) and <i>MAR 4</i> (Endorsement of the Takeover Code) do not apply to an <i>ELMI</i> when <i>issuing e-money</i> . <i>MAR 5</i> (Alternative Trading Systems <u>Multilateral Trading Facilities</u>) will not apply to an <i>ELMI</i> , as there are restrictions on the type of business activities that an <i>ELMI</i> may carry on.

Annex I

Amendments to the Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC)

In this Annex, underlining indicates new text.

Arrangements for making information public

- 2.6.33 G The FSA considers that for the purposes of ensuring that published information is reliable, monitored continuously for errors, and corrected as soon as errors are detected (see REC 2.6.24EU(a)), a verification process should be established which does not need to be external from the organisation of the publishing entity, but which should be an independent cross-check of the accuracy of the information generated by the trading process. This process should have the capability to at least identify price and volume anomalies, be systematic and conducted in real-time. The chosen process should be reasonable and proportionate in relation to the business.
- 2.6.34 G (1) In respect of arrangements facilitating the consolidation of data as required in REC 2.6.24EU(b), the FSA considers information as being made public in accordance with REC 2.6.24EU(b), if it:
- (a) is accessible by automated electronic means in a machine-readable way;
 - (b) utilises technology that facilitates consolidation of the data and permits commercially viable usage; and
 - (c) is accompanied by instructions outlining how users can access the information.
- (2) The FSA considers that an arrangement fulfils the 'machine-readable' criteria where the data:
- (a) is in a physical form that is designed to be read by a computer;
 - (b) is in a location on a computer storage device where that location is known in advance by the party wishing to access the data; and
 - (c) is in a format that is known in advance by the party wishing to access the data.
- (3) The FSA considers that publication on a non-machine-readable website would not meet the MiFID requirements.
- (4) The FSA considers that information that is made public in accordance with REC 2.6.24EU should conform to a consistent and structured format based on industry standards. Regulated markets or market operators operating an MTF can choose the structure that they use.

COMMISSION DIRECTIVE 2006/73/EC**of 10 August 2006****implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive****(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC⁽¹⁾, and in particular Article 4(2), Article 13(10), Article 18(3), Article 19(10), Article 21(6), Article 22(3) and Article 24(5) thereof,

Whereas:

- (1) Directive 2004/39/EC establishes the framework for a regulatory regime for financial markets in the Community, governing, among other matters, operating conditions relating to the performance by investment firms of investment services and, where appropriate, ancillary services and investment activities; organisational requirements for investment firms performing such services and activities, and for regulated markets; reporting requirements in respect of transactions in financial instruments; and transparency requirements in respect of transactions in shares admitted to trading on a regulated market.
- (2) The rules for the implementation of the regime governing organisational requirements for investment firms performing investment services and, where appropriate, ancillary services and investment activities on a professional basis, and for regulated markets, should be consistent with the aim of Directive 2004/39/EC. They should be designed to ensure a high level of integrity, competence and soundness among investment firms and entities that operate regulated markets or MTFs, and to be applied in a uniform manner.
- (3) It is necessary to specify concrete organisational requirements and procedures for investment firms performing such services or activities. In particular, rigorous procedures should be provided for with regard to matters such as compliance, risk management, complaints handling, personal transactions, outsourcing and the identification, management and disclosure of conflicts of interest.
- (4) The organisational requirements and conditions for authorisation for investment firms should be set out in the form of a set of rules that ensures the uniform

application of the relevant provisions of Directive 2004/39/EC. This is necessary in order to ensure that investment firms have equal access on equivalent terms to all markets in the Community and to eliminate obstacles, linked to authorisation procedures, to cross-border activities in the field of investment services.

- (5) The rules for the implementation of the regime governing operating conditions for the performance of investment and ancillary services and investment activities should reflect the aim underlying that regime. That is to say, they should be designed to ensure a high level of investor protection to be applied in a uniform manner through the introduction of clear standards and requirements governing the relationship between an investment firm and its client. On the other hand, as regards investor protection, and in particular the provision of investors with information or the seeking of information from investors, the retail or professional nature of the client or potential client concerned should be taken into account.
- (6) The form of a Directive is necessary in order to enable the implementing provisions to be adjusted to the specificities of the particular market and legal system in each Member State.
- (7) In order to ensure the uniform application of the various provisions of Directive 2004/39/EC, it is necessary to establish a harmonised set of organisational requirements and operating conditions for investment firms. Consequently, Member States and competent authorities should not add supplementary binding rules when transposing and applying the rules specified in this Directive, save where this Directive makes express provision to this effect.
- (8) However, in exceptional circumstances, it should be possible for Member States to impose requirements on investment firms additional to those laid down in the implementing rules. However, such intervention should be restricted to those cases where specific risks to investor protection or to market integrity including those related to the stability of the financial system have not been adequately addressed by the Community legislation, and it should be strictly proportionate.
- (9) Any additional requirements retained or imposed by Member States in conformity with this Directive must not

⁽¹⁾ OJ L 145, 30.4.2004, p. 1. Directive as amended by Directive 2006/31/EC (OJ L 114, 27.4.2006, p. 60).

restrict or otherwise affect the rights of investment firms under Articles 31 and 32 of Directive 2004/39/EC.

multiple investment firms or other regulated entities are concentrated within a limited number of service providers.

- (10) The specific risks addressed by any additional requirements retained by Member States at the date of application of this Directive should be of particular importance to the market structure of the State in question, including the behaviour of firms and consumers in that market. The assessment of those specific risks should be made in the context of the regulatory regime put in place by Directive 2004/39/EC and its detailed implementing rules. Any decision to retain additional requirements should be made with proper regard to the objectives of that Directive to remove barriers to the cross-border provision of investment service by harmonising the initial authorisation and operating requirements for investment firms.
- (11) Investment firms vary widely in their size, their structure and the nature of their business. A regulatory regime should be adapted to that diversity while imposing certain fundamental regulatory requirements which are appropriate for all firms. Regulated entities should comply with their high level obligations and design and adopt measures that are best suited to their particular nature and circumstances.
- (12) However, a regulatory regime which entails too much uncertainty for investment firms may reduce efficiency. Competent authorities are expected to issue interpretative guidance on provisions on this Directive, with a view in particular to clarifying the practical application of the requirements of this Directive to particular kinds of firms and circumstances. Non-binding guidance of this kind might, among other things, clarify how the provisions of this Directive and Directive 2004/39/EC apply in the light of market developments. To ensure a uniform application of this Directive and Directive 2004/39/EC, the Commission may issue guidance by way of interpretative communications or other means. Furthermore, the Committee of European Securities Regulators may issue guidance in order to secure convergent application of this Directive and Directive 2004/39/EC by competent authorities.
- (13) The organisational requirements established under Directive 2004/39/EC are without prejudice to systems established by national law for the registration of individuals working within investment firms.
- (14) For the purposes of the provisions of this Directive requiring an investment firm to establish, implement and maintain an adequate risk management policy, the risks relating to the firm's activities, processes and systems should include the risks associated with the outsourcing of critical or important functions or of investment services or activities. Such risks should include those associated with the firm's relationship with the service provider, and the potential risks posed where the outsourced activities of
- (15) The fact that risk management and compliance functions are performed by the same person does not necessarily jeopardise the independent functioning of each function. The conditions that persons involved in the compliance function should not also be involved in the performance of the functions that they monitor, and that the method of determining the remuneration of such persons should not be likely to compromise their objectivity, may not be proportionate in the case of small investment firms. However, they would only be disproportionate for larger firms in exceptional circumstances.
- (16) A number of the provisions of Directive 2004/39/EC require investment firms to collect and maintain information relating to clients and services provided to clients. Where those requirements involve the collection and processing of personal data, firms should ensure that they comply with national measures implementing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 ⁽¹⁾ on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- (17) Where successive personal transactions are carried out on behalf of a person in accordance with prior instructions given by that person, the obligations under the provisions of this Directive relating to personal transactions should not apply separately to each such successive transaction if those instructions remain in force and unchanged. Similarly, those obligations should not apply to the termination or withdrawal of such instructions, provided that any financial instruments which had previously been acquired pursuant to the instructions are not disposed of at the same time as the instructions terminate or are withdrawn. However, those obligations should apply in relation to a personal transaction, or the commencement of successive personal transactions, carried out on behalf of the same person if those instructions are changed or if new instructions are issued.
- (18) Competent authorities should not make the authorisation to provide investment services or activities subject to a general prohibition on the outsourcing of one or more critical or important functions or investment services or activities. Investment firms should be allowed to outsource such activities if the outsourcing arrangements established by the firm comply with certain conditions.
- (19) For the purposes of the provisions of this Directive setting out conditions for outsourcing critical or important operational functions or investment services or activities, an outsourcing that would involve the delegation of functions to the extent that the firm becomes a letter box entity should be considered to undermine the conditions

⁽¹⁾ OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

with which the investment firm must comply in order to be and remain authorised in accordance with Article 5 of Directive 2004/39/EC.

- (20) The outsourcing of investment services or activities or critical and important functions is capable of constituting a material change of the conditions for the authorisation of the investment firm, as referred to in Article 16(2) of Directive 2004/39/EC. If such outsourcing arrangements are to be put in place after the investment firm has obtained an authorisation according to the provisions included in Chapter I of Title II of Directive 2004/39/EC, those arrangements should be notified to the competent authority where required by Article 16(2) of Directive 2004/39/EC.
- (21) Investment firms are required by this Directive to give the responsible competent authority prior notification of any arrangement for the outsourcing of the management of retail client portfolios that it proposes to enter into with a service provider located in a third country, where certain specified conditions are not met. However, competent authorities are not expected to authorise or otherwise approve any such arrangement or its terms. The purpose of the notification, rather, is to ensure that the competent authority has the opportunity to intervene in appropriate cases. It is the responsibility of the investment firm to negotiate the terms of any outsourcing arrangement, and to ensure that those terms are consistent with the obligations of the firm under this Directive and Directive 2004/39/EC, without the formal intervention of the competent authority.
- (22) For the purposes of regulatory transparency, and in order to ensure an appropriate level of certainty for investment firms, this Directive requires each competent authority to publish a statement of its policy in relation to the outsourcing of retail portfolio management to service providers located in third countries. That statement must set out examples of cases where the competent authority is unlikely to object to such outsourcing, and must include an explanation of why outsourcing in such cases is unlikely to impair the ability of the firm to comply with the general conditions for outsourcing under this Directive. In providing that explanation, a competent authority should always indicate the reasons why outsourcing in the cases in question would not impede the effectiveness of its access to all the information relating to the outsourced service that is necessary for the authority to carry out its regulatory functions in respect of the investment firm.
- (23) Where an investment firm deposits funds it holds on behalf of a client with a qualifying money market fund, the units in that money market fund should be held in accordance with the requirements for holding financial instruments belonging to clients.
- (24) The circumstances which should be treated as giving rise to a conflict of interest should cover cases where there is a conflict between the interests of the firm or certain persons connected to the firm or the firm's group and the duty the firm owes to a client; or between the differing interests of two or more of its clients, to whom the firm owes in each case a duty. It is not enough that the firm may gain a benefit if there is not also a possible disadvantage to a client, or that one client to whom the firm owes a duty may make a gain or avoid a loss without there being a concomitant possible loss to another such client.
- (25) Conflicts of interest should be regulated only where an investment service or ancillary service is provided by an investment firm. The status of the client to whom the service is provided — as either retail, professional or eligible counterparty — is irrelevant for this purpose.
- (26) In complying with its obligation to draw up a conflict of interest policy under Directive 2004/39/EC which identifies circumstances which constitute or may give rise to a conflict of interest, the investment firm should pay special attention to the activities of investment research and advice, proprietary trading, portfolio management and corporate finance business, including underwriting or selling in an offering of securities and advising on mergers and acquisitions. In particular, such special attention is appropriate where the firm or a person directly or indirectly linked by control to the firm performs a combination of two or more of those activities.
- (27) Investment firms should aim to identify and manage the conflicts of interest arising in relation to their various business lines and their group's activities under a comprehensive conflicts of interest policy. In particular, the disclosure of conflicts of interest by an investment firm should not exempt it from the obligation to maintain and operate the effective organisational and administrative arrangements required under Article 13(3) of Directive 2004/39/EC. While disclosure of specific conflicts of interest is required by Article 18(2) of Directive 2004/39/EC, an over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be managed is not permitted.
- (28) Investment research should be a sub-category of the type of information defined as a recommendation in Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest⁽¹⁾, but it applies to financial instruments as defined in Directive 2004/39/EC. Recommendations, of the type so defined, which do not constitute investment research as defined in this Directive are nevertheless subject to the

⁽¹⁾ OJ L 339, 24.12.2003, p. 73.

provisions of Directive 2003/125/EC as to the fair presentation of investment recommendations and the disclosure of conflicts of interest.

- (29) The measures and arrangements adopted by an investment firm to manage the conflicts of interests that might arise from the production and dissemination of material that is presented as investment research should be appropriate to protect the objectivity and independence of financial analysts and of the investment research they produce. Those measures and arrangements should ensure that financial analysts enjoy an adequate degree of independence from the interests of persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom the investment research is disseminated.
- (30) Persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom investment research is disseminated should include corporate finance personnel and persons involved in sales and trading on behalf of clients or the firm.
- (31) Exceptional circumstances in which financial analysts and other persons connected with the investment firm who are involved in the production of investment research may, with prior written approval, undertake personal transactions in instruments to which the research relates should include those circumstances where, for personal reasons relating to financial hardship, the financial analyst or other person is required to liquidate a position.
- (32) Small gifts or minor hospitality below a level specified in the firm's conflicts of interest policy and mentioned in the summary description of that policy that is made available to clients should not be considered as inducements for the purposes of the provisions relating to investment research.
- (33) The concept of dissemination of investment research to clients or the public should not include dissemination exclusively to persons within the group of the investment firm.
- (34) Current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed.
- (35) The same requirements should apply to the substantial alteration of investment research produced by a third party as apply to the production of research.
- (36) Financial analysts should not become involved in activities other than the preparation of investment research where such involvement is inconsistent with the maintenance of that person's objectivity. The following involvements should ordinarily be considered as inconsistent with the maintenance of that person's objectivity: participating in investment banking activities such as corporate finance business and underwriting, participating in 'pitches' for new business or 'road shows' for new issues of financial instruments; or being otherwise involved in the preparation of issuer marketing.
- (37) Without prejudice to the provisions of this Directive relating to the production or dissemination of investment research, it is recommended that producers of investment research that are not investment firms should consider adopting internal policies and procedures designed to ensure that they also comply with the principles set out in this Directive as to the protection of the independence and objectivity of that research.
- (38) Requirements imposed by this Directive, including those relating to personal transactions, to dealing with knowledge of investment research and to the production or dissemination of investment research, apply without prejudice to other requirements of Directive 2004/39/EC and Directive 2003/6/EC of the European parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)⁽¹⁾ and their respective implementing measures.
- (39) For the purposes of the provisions of this Directive concerning inducements, the receipt by an investment firm of a commission in connection with investment advice or general recommendations, in circumstances where the advice or recommendations are not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the investment advice to the client.
- (40) This Directive permits investment firms to give or receive certain inducements only subject to specific conditions, and provided they are disclosed to the client, or are given to or by the client or a person on behalf of the client.
- (41) This Directive requires investment firms that provide investment services other than investment advice to new retail clients to enter into a written basic agreement with the client, setting out the essential rights and obligations of the firm and the client. However, it imposes no other obligations as to the form, content and performance of contracts for the provisions of investment or ancillary services.
- (42) This Directive sets out requirements for marketing communications only with respect to the obligation in Article 19(2) of Directive 2004/39/EC that information addressed to clients, including marketing communications, should be fair, clear and not misleading.
- (43) Nothing in this Directive requires competent authorities to approve the content and form of marketing communications. However, neither does it prevent them from doing so, insofar as any such pre-approval is based only on compliance with the obligation in Directive 2004/39/EC

⁽¹⁾ OJ L 96, 12.4.2003, p. 16.

that information to clients, including marketing communications, should be fair, clear and not misleading.

- (44) Appropriate and proportionate information requirements should be established which take account of the status of a client as either retail or professional. An objective of Directive 2004/39/EC is to ensure a proportionate balance between investor protection and the disclosure obligations which apply to investment firms. To this end, it is appropriate that less stringent specific information requirements be included in this Directive with respect to professional clients than apply to retail clients. Professional clients should, subject to limited exceptions, be able to identify for themselves the information that is necessary for them to make an informed decision, and to ask the investment firm to provide that information. Where such information requests are reasonable and proportionate investment firms should provide additional information.
- (45) Investment firms should provide clients or potential clients with adequate information on the nature of financial instruments and the risks associated with investing in them so that their clients can take each investment decision on a properly informed basis. The level of detail of this information may vary according to the client's categorisation as either a retail client or a professional client and the nature and risk profile of the financial instruments that are being offered, but should never be so general as to omit any essential elements. It is possible that for some financial instruments only the information referring to the type of an instrument will be sufficient whereas for some others the information will need to be product-specific.
- (46) The conditions with which information addressed by investment firms to clients and potential clients must comply in order to be fair, clear and not misleading should apply to communications intended for retail clients in a way that is appropriate and proportionate, taking into account, for example, the means of communication, and the information that the communication is intended to convey to the clients or potential clients. In particular, it would not be appropriate to apply such conditions to marketing communications which consist only of one or more of the following: the name of the firm, a logo or other image associated with the firm, a contact point, a reference to the types of investment services provided by the firm, or to its fees or commissions.
- (47) For the purposes of Directive 2004/39/EC and of this Directive, information should be considered to be misleading if it has a tendency to mislead the person or persons to whom it is addressed or by whom it is likely to be received, whether or not the person who provides the information considers or intends it to be misleading.
- (48) In determining what constitutes the provision of information in good time before a time specified in this Directive,

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

- (49) Nothing in this Directive obliges investment firms to provide all required information about the investment firm, financial instruments, costs and associated charges, or concerning the safeguarding of client financial instruments or client funds immediately and at the same time, provided that they comply with the general obligation to provide the relevant information in good time before the time specified in this Directive. Provided that the information is communicated to the client in good time before the provision of the service, nothing in this Directive obliges firms to provide it either separately, as part of a marketing communication, or by incorporating the information in a client agreement.
- (50) In cases where an investment firm is required to provide information to a client before the provision of a service, each transaction in respect of the same type of financial instrument should not be considered as the provision of a new or different service.
- (51) In cases where an investment firm providing portfolio management services is required to provide to retail clients or potential retail clients information on the types of financial instruments that may be included in the client portfolio and the types of transactions that may be carried out in such instruments, such information should state separately whether the investment firm will be mandated to invest in financial instruments not admitted to trading on a regulated market, in derivatives, or in illiquid or highly volatile instruments; or to undertake short sales, purchases with borrowed funds, securities financing transactions, or any transactions involving margin payments, deposit of collateral or foreign exchange risk.
- (52) The provision by an investment firm to a client of a copy of a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading⁽¹⁾ should not be treated as the provision by the firm of information to a client for the purposes of the operating conditions under Directive 2004/39/EC which relate to the quality and contents of such information, if the firm is not responsible under that directive for the information given in the prospectus.

⁽¹⁾ OJ L 345, 31.12.2003, p. 64.

- (53) The information which an investment firm is required to give to a retail client concerning costs and associated charges includes information about the arrangements for payment or performance of the agreement for the provision of investment services and any other agreement relating to a financial instrument that is being offered. For this purpose, arrangements for payment will generally be relevant where a financial instrument contract is terminated by cash settlement. Arrangements for performance will generally be relevant where, upon termination, a financial instrument requires the delivery of shares, bonds, a warrant, bullion or another instrument or commodity.
- (54) As regards collective investment undertakings covered by 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) ⁽¹⁾, it is not the purpose of this Directive to regulate the content of the simplified prospectus as defined by Article 28 of Directive 85/611/EEC. No information should be added to the simplified prospectus as a result of the implementation of this Directive.
- (55) The simplified prospectus provides, notably, sufficient information in relation to the costs and associated charges in respect to the UCITS itself. However, investment firms distributing units in UCITS should additionally inform their clients about all the other costs and associated charges related to their provision of investment services in relation to units in UCITS.
- (56) It is necessary to make different provision for the application of the suitability test in Article 19(4) of Directive 2004/39/EC and the appropriateness test in Article 19(5) of that Directive. These tests have different scope with regards to the investment services to which they relate, and have different functions and characteristics.
- (57) For the purposes of Article 19(4) of Directive 2004/39/EC, a transaction may be unsuitable for the client or potential client because of the risks of the financial instruments involved, the type of transaction, the characteristics of the order or the frequency of the trading. A series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client. In the case of portfolio management, a transaction might also be unsuitable if it would result in an unsuitable portfolio.
- (58) In accordance with Article 19(4) of Directive 2004/39/EC, a firm is required to assess the suitability of investment services and financial instruments to a client only when it is providing investment advice or portfolio management to that client. In the case of other investment services, the firm is required by Article 19(5) of that Directive to assess the appropriateness of an investment service or product for a client, and then only if the product is not offered on an execution-only basis under Article 19(6) of that Directive (which applies to non-complex products).
- (59) For the purposes of the provisions of this Directive requiring investment firms to assess the appropriateness of investment services or products offered or demanded, a client who has engaged in a course of dealings involving a specific type of product or service beginning before the date of application of Directive 2004/39/EC should be presumed to have the necessary experience and knowledge in order to understand the risks involved in relation to that product or investment service. Where a client engages in a course of dealings of that kind through the services of an investment firm, beginning after the date of application of that Directive, the firm is not required to make a new assessment on the occasion of each separate transaction. It complies with its duty under Article 19(5) of that Directive provided that it makes the necessary assessment of appropriateness before beginning that service.
- (60) A recommendation or request made, or advice given, by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation within the meaning of Article 19(4) of Directive 2004/39/EC.
- (61) For the purposes of determining whether a unit in a collective investment undertaking which does not comply with the requirements of Directive 85/611/EC, that has been authorised for marketing to the public, should be considered as non-complex, the circumstances in which valuation systems will be independent of the issuer should include where they are overseen by a depositary that is regulated as a provider of depositary services in a Member State.
- (62) Nothing in this Directive requires competent authorities to approve the content of the basic agreement between an investment firm and its retail clients. However, neither does it prevent them from doing so, insofar as any such approval is based only on the firm's compliance with its obligations under Directive 2004/39/EC to act honestly, fairly and professionally in accordance with the best interests of its clients, and to establish a record that sets out the rights and obligations of investment firms and their clients, and the other terms on which firms will provide services to their clients.
- (63) The records an investment firm is required to keep should be adapted to the type of business and the range of investment services and activities performed, provided that the record-keeping obligations set out in Directive 2004/39/EC and this Directive are fulfilled. For the purposes of the reporting obligations in respect of portfolio management, a contingent liability transaction is one that involves any actual or potential liability for the client that exceeds the cost of acquiring the instrument.

⁽¹⁾ OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council (OJ L 79, 24.3.2005, p. 9).

- (64) For the purposes of the provisions on reporting to clients, a reference to the type of the order should be understood as referring to its status as a limit order, market order, or other specific type of order.
- (65) For the purposes of the provisions on reporting to clients, a reference to the nature of the order should be understood as referring to orders to subscribe for securities, or to exercise an option, or similar client order.
- (66) When establishing its execution policy in accordance with Article 21(2) of Directive 2004/39/EC, an investment firm should determine the relative importance of the factors mentioned in Article 21(1) of that Directive, or at least establish the process by which it determines the relative importance of these factors, so that it can deliver the best possible result to its clients. In order to give effect to that policy, an investment firm should select the execution venues that enable it to obtain on a consistent basis the best possible result for the execution of client orders. An investment firm should apply its execution policy to each client order that it executes with a view to obtaining the best possible result for the client in accordance with that policy. The obligation under Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for the client should not be treated as requiring an investment firm to include in its execution policy all available execution venues.
- (67) For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client.
- (68) When an investment firm executes an order following specific instructions from the client, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the client instructions relate. The fact that the client has given specific instructions which cover one part or aspect of the order should not be treated as releasing the investment firm from its best execution obligations in respect of any other parts or aspects of the client order that are not covered by such instructions. An investment firm should not induce a client to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the client, when the firm ought reasonably to know that an instruction to that effect is likely to prevent it from obtaining the best possible result for that client. However, this should not prevent a firm inviting a client to choose between two or more specified trading venues, provided that those venues are consistent with the execution policy of the firm.
- (69) Dealing on own account with clients by an investment firm should be considered as the execution of client orders, and therefore subject to the requirements under Directive 2004/39/EC and this Directive and, in particular, those obligations in relation to best execution. However, if an investment firm provides a quote to a client and that quote would meet the investment firm's obligations under Article 21(1) of Directive 2004/39/EC if the firm executed that quote at the time the quote was provided, then the firm will meet those same obligations if it executes its quote after the client accepts it, provided that, taking into account the changing market conditions and the time elapsed between the offer and acceptance of the quote, the quote is not manifestly out of date.
- (70) The obligation to deliver the best possible result when executing client orders applies in relation to all types of financial instruments. However, given the differences in market structures or the structure of financial instruments, it may be difficult to identify and apply a uniform standard of and procedure for best execution that would be valid and effective for all classes of instrument. Best execution obligations should therefore be applied in a manner that takes into account the different circumstances associated with the execution of orders related to particular types of financial instruments. For example, transactions involving a customised OTC financial instrument that involve a unique contractual relationship tailored to the circumstances of the client and the investment firm may not be comparable for best execution purposes with transactions involving shares traded on centralised execution venues.
- (71) For the purposes of determining best execution when executing retail client orders, the costs related to execution should include an investment firm's own commissions or fees charged to the client for limited purposes, in cases where more than one venue listed in the firm's execution policy is capable of executing a particular order. In such cases, the firm's own commissions and costs for executing the order on each of the eligible execution venues should be taken into account in order to assess and compare the results for the client that would be achieved by executing the order on each such venue. However, it is not intended to require a firm to compare the results that would be achieved for its client on the basis of its own execution policy and its own commissions and fees, with results that might be achieved for the same client by any other investment firm on the basis of a different execution policy

or a different structure of commissions or fees. Nor is it intended to require a firm to compare the differences in its own commissions which are attributable to differences in the nature of the services that the firm provides to clients.

- (72) The provisions of this Directive that provide that costs of execution should include an investment firm's own commissions or fees charged to the client for the provision of an investment service should not apply for the purpose of determining what execution venues must be included in the firm's execution policy for the purposes of Article 21(3) of Directive 2004/39/EC.
- (73) It should be considered that an investment firm structures or charges its commissions in a way which discriminates unfairly between execution venues if it charges a different commission or spread to clients for execution on different execution venues and that difference does not reflect actual differences in the cost to the firm of executing on those venues.
- (74) The provisions of this Directive as to execution policy are without prejudice to the general obligation of an investment firm under Article 21(4) of Directive 2004/39/EC to monitor the effectiveness of its order execution arrangements and policy and assess the venues in its execution policy on a regular basis.
- (75) This Directive is not intended to require a duplication of effort as to best execution between an investment firm which provides the service of reception and transmission of order or portfolio management and any investment firm to which that investment firm transmits its orders for execution.
- (76) The best execution obligation under Directive 2004/39/EC requires investment firms to take all reasonable steps to obtain the best possible result for their clients. The quality of execution, which includes aspects such as the speed and likelihood of execution (fill rate) and the availability and incidence of price improvement, is an important factor in the delivery of best execution. Availability, comparability and consolidation of data related to execution quality provided by the various execution venues is crucial in enabling investment firms and investors to identify those execution venues that deliver the highest quality of execution for their clients. This Directive does not mandate the publication by execution venues of their execution quality data, as execution venues and data providers should be permitted to develop solutions concerning the provision of execution quality data. The Commission should submit a report by 1 November 2008 on the market-led developments in this area with a view to assessing availability, comparability and consolidation at a European level of information concerning execution quality.
- (77) For the purposes of the provisions of this Directive concerning client order handling, the reallocation of transactions should be considered as detrimental to a client if, as an effect of that reallocation, unfair precedence is given to the investment firm or to any particular client.
- (78) Without prejudice to Directive 2003/6/EC, for the purposes of the provisions of this Directive concerning client order handling, client orders should not be treated as otherwise comparable if they are received by different media and it would not be practicable for them to be treated sequentially. For the further purposes of those provisions, any use by an investment firm of information relating to a pending client order in order to deal on own account in the financial instruments to which the client order relates, or in related financial instruments, should be considered a misuse of that information. However, the mere fact that market makers or bodies authorised to act as counterparties confine themselves to pursuing their legitimate business of buying and selling financial instruments, or that persons authorised to execute orders on behalf of third parties confine themselves to carrying out an order dutifully, should not in itself be deemed to constitute a misuse of information.
- (79) Advice about financial instruments given in a newspaper, journal, magazine or any other publication addressed to the general public (including by means of the internet), or in any television or radio broadcast, should not be considered as a personal recommendation for the purposes of the definition of 'investment advice' in Directive 2004/39/EC.
- (80) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.
- (81) Generic advice about a type of financial instrument is not investment advice for the purposes of Directive 2004/39/EC, because this Directive specifies that, for the purposes of Directive 2004/39/EC, investment advice is restricted to advice on particular financial instruments. However, if an investment firm provides generic advice to a client about a type of financial instrument which it presents as suitable for, or based on a consideration of the circumstances of, that client, and that advice is not in fact suitable for the client, or is not based on a consideration of his circumstances, depending on the circumstances of the particular case, the firm is likely to be acting in contravention of Article 19(1) or (2) of Directive 2004/39/EC. In particular, a firm which gives a client such advice would be likely to contravene the requirement of Article 19(1) to act honestly, fairly and professionally in accordance with the best interests of its clients. Similarly or alternatively, such advice would be likely to contravene the requirement of Article 19(2) that information addressed by a firm to a client should be fair, clear and not misleading.

- (82) Acts carried out by an investment firm that are preparatory to the provision of an investment service or carrying out an investment activity should be considered as an integral part of that service or activity. This would include, for example, the provision of generic advice by an investment firm to clients or potential clients prior to or in the course of the provision of investment advice or any other investment service or activity.
- (83) The provision of a general recommendation (that is, one which is intended for distribution channels or the public) about a transaction in a financial instrument or a type of financial instrument constitutes the provision of an ancillary service within Section B(5) of Annex I of Directive 2004/39/EC, and consequently Directive 2004/39/EC and its protections apply to the provision of that recommendation.
- (84) The Committee of European Securities Regulators, established by Commission Decision 2001/527/EC ⁽¹⁾ has been consulted for technical advice.
- (85) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Subject-matter and scope

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

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

Article 2

Definitions

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

- (1) 'distribution channels' means distribution channels within the meaning of Article 1(7) of Commission Directive 2003/125/EC;
- (2) 'durable medium' means any instrument which enables a client to store information addressed personally to that

client in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

- (3) 'relevant person' in relation to an investment firm, means any of the following:
- (a) a director, partner or equivalent, manager or tied agent of the firm;
- (b) a director, partner or equivalent, or manager of any tied agent of the firm;
- (c) an employee of the firm or of a tied agent of the firm, as well as any other natural person whose services are placed at the disposal and under the control of the firm or a tied agent of the firm and who is involved in the provision by the firm of investment services and activities;
- (d) a natural person who is directly involved in the provision of services to the investment firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities;

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

(5) 'group', in relation to an investment firm, means the group of which that firm forms a part, consisting of a parent undertaking, its subsidiaries and the entities in which the parent undertaking or its subsidiaries hold a participation, as well as undertakings linked to each other by a relationship within the meaning of Article 12(1) of Council Directive 83/349/EEC on consolidated accounts ⁽²⁾;

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

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

- (a) the spouse of the relevant person or any partner of that person considered by national law as equivalent to a spouse;
- (b) a dependent child or stepchild of the relevant person;
- (c) any other relative of the relevant person who has shared the same household as that person for at least one year on the date of the personal transaction concerned;

⁽¹⁾ OJ L 191, 13.7.2001, p. 43.

⁽²⁾ OJ No L 193, 18.7.1983, p. 1.

- (8) 'securities financing transaction' has the meaning given in Commission Regulation (EC) No 1287/2006 ⁽¹⁾;
- (9) 'senior management' means the person or persons who effectively direct the business of the investment firm as referred to in Article 9(1) of Directive 2004/39/EC.

Article 3

Conditions applying to the provision of information

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

- (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on; and
- (b) the person to whom the information is to be provided, when offered the choice between information on paper or in that other durable medium, specifically chooses the provision of the information in that other medium.

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

- (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on;
- (b) the client must specifically consent to the provision of that information in that form;
- (c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;
- (d) the information must be up to date;
- (e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it.

3. For the purposes of this Article, the provision of information by means of electronic communications shall be treated as appropriate to the context in which the business between the firm and the client is, or is to be, carried on if there

is evidence that the client has regular access to the internet. The provision by the client of an e-mail address for the purposes of the carrying on of that business shall be treated as such evidence.

Article 4

Additional requirements on investment firms in certain cases

1. Member States may retain or impose requirements additional to those in this Directive only in those exceptional cases where such requirements are objectively justified and proportionate so as to address specific risks to investor protection or to market integrity that are not adequately addressed by this Directive, and provided that one of the following conditions is met:

- (a) the specific risks addressed by the requirements are of particular importance in the circumstances of the market structure of that Member State;
- (b) the requirement addresses risks or issues that emerge or become evident after the date of application of this Directive and that are not otherwise regulated by or under Community measures.

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

3. Member States shall notify to the Commission:

- (a) any requirement which it intends to retain in accordance with paragraph 1 before the date of transposition of this Directive; and
- (b) any requirement which it intends to impose in accordance with paragraph 1 at least one month before the date appointed for that requirement to come into force.

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

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

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

⁽¹⁾ See page 1 of this Official Journal.

CHAPTER II

ORGANISATIONAL REQUIREMENTS

SECTION 1

Organisation*Article 5*

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

General organisational requirements

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

- (a) to establish, implement and maintain decision-making procedures and an organisational structure which clearly and in documented manner specifies reporting lines and allocates functions and responsibilities;
- (b) to ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities;
- (c) to establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the investment firm;
- (d) to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them;
- (e) to establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the investment firm;
- (f) to maintain adequate and orderly records of their business and internal organisation;
- (g) to ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally.

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

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

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

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

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

Article 6

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

Compliance

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

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

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

- (a) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with the first subparagraph of paragraph 1, and the actions taken to address any deficiencies in the firm's compliance with its obligations;
- (b) to advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligations under Directive 2004/39/EC.

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

- (a) the compliance function must have the necessary authority, resources, expertise and access to all relevant information;
- (b) a compliance officer must be appointed and must be responsible for the compliance function and for any reporting as to compliance required by Article 9(2);
- (c) the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor;
- (d) the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so.

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

Article 7

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

Risk management

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

- (a) to establish, implement and maintain adequate risk management policies and procedures which identify the risks relating to the firm's activities, processes and systems, and where appropriate, set the level of risk tolerated by the firm;
- (b) to adopt effective arrangements, processes and mechanisms to manage the risks relating to the firm's activities, processes and systems, in light of that level of risk tolerance;
- (c) to monitor the following:
 - (i) the adequacy and effectiveness of the investment firm's risk management policies and procedures;
 - (ii) the level of compliance by the investment firm and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with point (b);
 - (iii) the adequacy and effectiveness of measures taken to address any deficiencies in those policies, procedures, arrangements, processes and mechanisms, including failures by the relevant persons to comply with such arrangements, processes and mechanisms or follow such policies and procedures.

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

- (a) implementation of the policy and procedures referred to in paragraph 1;
- (b) provision of reports and advice to senior management in accordance with Article 9(2).

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

Article 8

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

Internal audit

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

- (a) to establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the investment firm's systems, internal control mechanisms and arrangements;
- (b) to issue recommendations based on the result of work carried out in accordance with point (a);
- (c) to verify compliance with those recommendations;
- (d) to report in relation to internal audit matters in accordance with Article 9(2).

Article 9

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

Responsibility of senior management

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

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

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

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

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

Article 10

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

Complaints handling

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

Article 11

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

Meaning of personal transaction

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

- (a) that relevant person is acting outside the scope of the activities he carries out in that capacity;
- (b) the trade is carried out for the account of any of the following persons:
 - (i) the relevant person;
 - (ii) any person with whom he has a family relationship, or with whom he has close links;
 - (iii) a person whose relationship with the relevant person is such that the relevant person has a direct or indirect material interest in the outcome of the trade, other than a fee or commission for the execution of the trade.

Article 12

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

Personal transactions

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

- (a) entering into a personal transaction which meets at least one of the following criteria:
 - (i) that person is prohibited from entering into it under Directive 2003/6/EC;
 - (ii) it involves the misuse or improper disclosure of that confidential information;
 - (iii) it conflicts or is likely to conflict with an obligation of the investment firm under Directive 2004/39/EC;
 - (b) advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);
 - (c) without prejudice to Article 3(a) of Directive 2003/6/EC, disclosing, other than in the normal course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:
 - (i) to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);
 - (ii) to advise or procure another person to enter into such a transaction.
2. The arrangements required under paragraph 1 must in particular be designed to ensure that:
- (a) each relevant person covered by paragraph 1 is aware of the restrictions on personal transactions, and of the measures established by the investment firm in connection with

personal transactions and disclosure, in accordance with paragraph 1;

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

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

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

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

- (a) personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;
- (b) personal transactions in units in collective undertakings that comply with the conditions necessary to enjoy the rights conferred by Directive 85/611/EEC or are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.

SECTION 2

Outsourcing

Article 13

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

Meaning of critical and important operational functions

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

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

- (a) the provision to the firm of advisory services, and other services which do not form part of the investment business of the firm, including the provision of legal advice to the firm, the training of personnel of the firm, billing services and the security of the firm's premises and personnel;
- (b) the purchase of standardised services, including market information services and the provision of price feeds.

Article 14

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

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

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

- (a) the outsourcing must not result in the delegation by senior management of its responsibility;
- (b) the relationship and obligations of the investment firm towards its clients under the terms of Directive 2004/39/EC must not be altered;
- (c) the conditions with which the investment firm must comply in order to be authorised in accordance with Article 5 of Directive 2004/39/EC, and to remain so, must not be undermined;
- (d) none of the other conditions subject to which the firm's authorisation was granted must be removed or modified.

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

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

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

- (b) the service provider must carry out the outsourced services effectively, and to this end the firm must establish methods for assessing the standard of performance of the service provider;
- (c) the service provider must properly supervise the carrying out of the outsourced functions, and adequately manage the risks associated with the outsourcing;
- (d) appropriate action must be taken if it appears that the service provider may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;
- (e) the investment firm must retain the necessary expertise to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and must supervise those functions and manage those risks;
- (f) the service provider must disclose to the investment firm any development that may have a material impact on its ability to carry out the outsourced functions effectively and in compliance with applicable laws and regulatory requirements;
- (g) the investment firm must be able to terminate the arrangement for outsourcing where necessary without detriment to the continuity and quality of its provision of services to clients;
- (h) the service provider must cooperate with the competent authorities of the investment firm in connection with the outsourced activities;
- (i) the investment firm, its auditors and the relevant competent authorities must have effective access to data related to the outsourced activities, as well as to the business premises of the service provider; and the competent authorities must be able to exercise those rights of access;
- (j) the service provider must protect any confidential information relating to the investment firm and its clients;
- (k) the investment firm and the service provider must establish, implement and maintain a contingency plan for disaster recovery and periodic testing of backup facilities, where that is necessary having regard to the function, service or activity that has been outsourced.

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

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

firm controls the service provider or has the ability to influence its actions.

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

Article 15

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

Service providers located in third countries

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

- (a) the service provider must be authorised or registered in its home country to provide that service and must be subject to prudential supervision;
- (b) there must be an appropriate cooperation agreement between the competent authority of the investment firm and the supervisory authority of the service provider.

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

3. Without prejudice to paragraph 2, Member States shall publish or require competent authorities to publish a statement of policy in relation to outsourcing covered by paragraph 2. That statement shall set out examples of cases where the competent authority would not, or would be likely not to, object to an outsourcing under paragraph 2 where one or both of the conditions in points (a) and (b) of paragraph 1 are not met. It shall include a clear explanation as to why the competent authority considers that in such cases outsourcing would not impair the ability of investment firms to fulfil their obligations under Article 14.

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

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

SECTION 3

Safeguarding of client assets*Article 16*

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

Safeguarding of client financial instruments and funds

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

- (a) they must keep such records and accounts as are necessary to enable them at any time and without delay to distinguish assets held for one client from assets held for any other client, and from their own assets;
- (b) they must maintain their records and accounts in a way that ensures their accuracy, and in particular their correspondence to the financial instruments and funds held for clients;
- (c) they must conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties by whom those assets are held;
- (d) they must take the necessary steps to ensure that any client financial instruments deposited with a third party, in accordance with Article 17, are identifiable separately from the financial instruments belonging to the investment firm and from financial instruments belonging to that third party, by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection;
- (e) they must take the necessary steps to ensure that client funds deposited, in accordance with Article 18, in a central bank, a credit institution or a bank authorised in a third country or a qualifying money market fund are held in an account or accounts identified separately from any accounts used to hold funds belonging to the investment firm;
- (f) they must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.

2. If, for reasons of the applicable law, including in particular the law relating to property or insolvency, the arrangements made by investment firms in compliance with paragraph 1 to

safeguard clients' rights are not sufficient to satisfy the requirements of Article 13(7) and (8) of Directive 2004/39/EC, Member States shall prescribe the measures that investment firms must take in order to comply with those obligations.

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

Article 17

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

Depositing client financial instruments

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

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

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

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

- (a) the nature of the financial instruments or of the investment services connected with those instruments requires them to be deposited with a third party in that third country;
- (b) where the financial instruments are held on behalf of a professional client, that client requests the firm in writing to deposit them with a third party in that third country.

Article 18

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

Depositing client funds

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

- (a) a central bank;
- (b) a credit institution authorised in accordance with Directive 2000/12/EC;
- (c) a bank authorised in a third country;
- (d) a qualifying money market fund.

The first subparagraph shall not apply to a credit institution authorised under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) ⁽¹⁾ 0 in relation to deposits within the meaning of that Directive held by that institution.

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

- (a) its primary investment objective must be to maintain the net asset value of the undertaking either constant at par (net of earnings), or at the value of the investors' initial capital plus earnings;
- (b) it must, with a view to achieving that primary investment objective, invest exclusively in high quality money market instruments with a maturity or residual maturity of no more than 397 days, or regular yield adjustments consistent with such a maturity, and with a weighted average maturity of 60 days. It may also achieve this objective by investing on an ancillary basis in deposits with credit institutions;
- (c) it must provide liquidity through same day or next day settlement.

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

For the purposes of the second subparagraph, a rating agency shall be considered to be competent if it issues credit ratings in

respect of money market funds regularly and on a professional basis and is an eligible ECAI within the meaning of Article 81(1) of Directive 2006/48/EC.

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

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

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

Article 19

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

Use of client financial instruments

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

- (a) the client must have given his prior express consent to the use of the instruments on specified terms, as evidenced, in the case of a retail client, by his signature or equivalent alternative mechanism;
- (b) the use of that client's financial instruments must be restricted to the specified terms to which the client consents.

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

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

⁽¹⁾ OJ L 177, 30.6.2006, p. 1.

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

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

Article 20

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

Reports by external auditors

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

SECTION 4

Conflicts of interest

Article 21

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

Conflicts of interest potentially detrimental to a client

Member States shall ensure that, for the purposes of identifying the types of conflict of interest that arise in the course of providing investment and ancillary services or a combination thereof and whose existence may damage the interests of a client, investment firms take into account, by way of minimum criteria, the question of whether the investment firm or a relevant person, or a person directly or indirectly linked by control to the firm, is in any of the following situations, whether as a result of providing investment or ancillary services or investment activities or otherwise:

- (a) the firm or that person is likely to make a financial gain, or avoid a financial loss, at the expense of the client;
- (b) the firm or that person has an interest in the outcome of a service provided to the client or of a transaction carried out on behalf of the client, which is distinct from the client's interest in that outcome;
- (c) the firm or that person has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client;
- (d) the firm or that person carries on the same business as the client;

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

Article 22

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

Conflicts of interest policy

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

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

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

- (a) it must identify, with reference to the specific investment services and activities and ancillary services carried out by or on behalf of the investment firm, the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clients;
- (b) it must specify procedures to be followed and measures to be adopted in order to manage such conflicts.

3. Member States shall ensure that the procedures and measures provided for in paragraph 2(b) are designed to ensure that relevant persons engaged in different business activities involving a conflict of interest of the kind specified in paragraph 2(a) carry on those activities at a level of independence appropriate to the size and activities of the investment firm and of the group to which it belongs, and to the materiality of the risk of damage to the interests of clients.

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

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

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

Article 24

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

Investment research

- (c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
- (d) measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out investment or ancillary services or activities;
- (e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate investment or ancillary services or activities where such involvement may impair the proper management of conflicts of interest.

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

- (a) it is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;
- (b) if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2004/39/EC.

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

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

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

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

Article 23

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

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

Member States shall require investment firms to keep and regularly to update a record of the kinds of investment or ancillary service or investment activity carried out by or on behalf of the firm in which a conflict of interest entailing a material risk of damage to the interests of one or more clients has arisen or, in the case of an ongoing service or activity, may arise.

Article 25

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

Additional organisational requirements where a firm produces and disseminates investment research

1. Member States shall require investment firms which produce, or arrange for the production of, investment research that is intended or likely to be subsequently disseminated to clients of the firm or to the public, under their own responsibility or that of a member of their group, to ensure the implementation of all the measures set out in Article 22(3) in relation to the financial analysts involved in the production of the investment research and other relevant persons whose responsibilities or business interests may conflict with the

interests of the persons to whom the investment research is disseminated.

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

- (a) financial analysts and other relevant persons must not undertake personal transactions or trade, other than as market makers acting in good faith and in the ordinary course of market making or in the execution of an unsolicited client order, on behalf of any other person, including the investment firm, in financial instruments to which investment research relates, or in any related financial instruments, with knowledge of the likely timing or content of that investment research which is not publicly available or available to clients and cannot readily be inferred from information that is so available, until the recipients of the investment research have had a reasonable opportunity to act on it;
- (b) in circumstances not covered by point (a), financial analysts and any other relevant persons involved in the production of investment research must not undertake personal transactions in financial instruments to which the investment research relates, or in any related financial instruments, contrary to current recommendations, except in exceptional circumstances and with the prior approval of a member of the firm's legal or compliance function;
- (c) the investment firms themselves, financial analysts, and other relevant persons involved in the production of the investment research must not accept inducements from those with a material interest in the subject-matter of the investment research;
- (d) the investment firms themselves, financial analysts, and other relevant persons involved in the production of the investment research must not promise issuers favourable research coverage;
- (e) issuers, relevant persons other than financial analysts, and any other persons must not before the dissemination of investment research be permitted to review a draft of the investment research for the purpose of verifying the accuracy of factual statements made in that research, or for any other purpose other than verifying compliance with the firm's legal obligations, if the draft includes a recommendation or a target price.

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

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

- (a) the person that produces the investment research is not a member of the group to which the investment firm belongs;
- (b) the investment firm does not substantially alter the recommendations within the investment research;
- (c) the investment firm does not present the investment research as having been produced by it;
- (d) the investment firm verifies that the producer of the research is subject to requirements equivalent to the requirements under this Directive in relation to the production of that research, or has established a policy setting such requirements.

CHAPTER III

OPERATING CONDITIONS FOR INVESTMENT FIRMS

SECTION 1

Inducements

Article 26

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

Inducements

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

- (a) a fee, commission or non-monetary benefit paid or provided to or by the client or a person on behalf of the client;
- (b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied:
 - (i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service;

- (ii) the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service to the client and not impair compliance with the firm's duty to act in the best interests of the client;
- (c) proper fees which enable or are necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients.

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

SECTION 2

Information to clients and potential clients

Article 27

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

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

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

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

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

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

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

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

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

- (b) the sources of the information used for the comparison must be specified;
- (c) the key facts and assumptions used to make the comparison must be included.

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

- (a) that indication must not be the most prominent feature of the communication;
- (b) the information must include appropriate performance information which covers the immediately preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided if less than five years, or such longer period as the firm may decide, and in every case that performance information must be based on complete 12-month periods;
- (c) the reference period and the source of information must be clearly stated;
- (d) the information must contain a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- (e) where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency must be clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- (f) where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed.

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

- (a) the simulated past performance must be based on the actual past performance of one or more financial instruments or financial indices which are the same as, or underlie, the financial instrument concerned;
- (b) in respect of the actual past performance referred to in point (a), the conditions set out in points (a) to (c), (e) and (f) of paragraph 4 must be complied with;
- (c) the information must contain a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

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

- (a) the information must not be based on or refer to simulated past performance;
- (b) it must be based on reasonable assumptions supported by objective data;
- (c) where the information is based on gross performance, the effect of commissions, fees or other charges must be disclosed;
- (d) it must contain a prominent warning that such forecasts are not a reliable indicator of future performance.

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

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

Article 28

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

Information concerning client categorisation

1. Member States shall ensure that investment firms notify new clients, and existing clients that the investment firm has newly categorised as required by Directive 2004/39/EC, of their categorisation as a retail client, a professional client or an eligible counterparty in accordance with that Directive.
2. Member States shall ensure that investment firms inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that it would entail.
3. Member States shall permit investment firms, either on their own initiative or at the request of the client concerned:
 - (a) to treat as a professional or retail client a client that might otherwise be classified as an eligible counterparty pursuant to Article 24(2) of Directive 2004/39/EC;
 - (b) to treat as a retail client a client that is considered as a professional client pursuant to Section I of Annex II to Directive 2004/39/EC.

Article 29

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

General requirements for information to clients

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

- (a) the terms of any such agreement;
- (b) the information required by Article 30 relating to that agreement or to those investment or ancillary services.

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

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

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

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

- (a) the firm was unable to comply with the time limits specified in paragraphs 1 and 2 because, at the request of the client, the agreement was concluded using a means of distance communication which prevents the firm from providing the information in accordance with paragraph 1 or 2;
- (b) in any case where Article 3(3) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC⁽¹⁾ does not otherwise apply, the investment firm complies with the requirements of that Article in relation to the retail client or potential retail client, as if that client or potential client were a 'consumer' and the investment firm were a 'supplier' within the meaning of that Directive.

⁽¹⁾ OJ L 271, 9.10.2002, p. 16.

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

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

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

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

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

Article 30

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

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

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

- (a) the name and address of the investment firm, and the contact details necessary to enable clients to communicate effectively with the firm;
- (b) the languages in which the client may communicate with the investment firm, and receive documents and other information from the firm;
- (c) the methods of communication to be used between the investment firm and the client including, where relevant, those for the sending and reception of orders;
- (d) a statement of the fact that the investment firm is authorised and the name and contact address of the competent authority that has authorised it;

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

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

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

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

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

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

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

- (a) information on the method and frequency of valuation of the financial instruments in the client portfolio;
- (b) details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio;
- (c) a specification of any benchmark against which the performance of the client portfolio will be compared;
- (d) the types of financial instrument that may be included in the client portfolio and types of transaction that may be carried out in such instruments, including any limits;
- (e) the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion.

Article 31

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

Information about financial instruments

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

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

- (a) the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment;
- (b) the volatility of the price of such instruments and any limitations on the available market for such instruments;
- (c) the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments;
- (d) any margin requirements or similar obligations, applicable to instruments of that type.

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

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

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

5. In the case of financial instruments that incorporate a guarantee by a third party, the information about the guarantee shall include sufficient detail about the guarantor and the guarantee to enable the retail client or potential retail client to make a fair assessment of the guarantee.

Article 32

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

Information requirements concerning safeguarding of client financial instruments or client funds

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

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

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

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

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

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

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

the retail client, in a durable medium, with clear, full and accurate information on the obligations and responsibilities of the investment firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved.

Article 33

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

Information about costs and associated charges

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

- (a) the total price to be paid by the client in connection with the financial instrument or the investment service or ancillary service, including all related fees, commissions, charges and expenses, and all taxes payable via the investment firm or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it;
- (b) where any part of the total price referred to in point (a) is to be paid in or represents an amount of foreign currency, an indication of the currency involved and the applicable currency conversion rates and costs;
- (c) notice of the possibility that other costs, including taxes, related to transactions in connection with the financial instrument or the investment service may arise for the client that are not paid via the investment firm or imposed by it;
- (d) the arrangements for payment or other performance.

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

Article 34

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

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

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

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

SECTION 3

Assessment of suitability and appropriateness

Article 35

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

Assessment of suitability

1. Member States shall ensure that investment firms obtain from clients or potential clients such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:
 - (a) it meets the investment objectives of the client in question;
 - (b) it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;
 - (c) it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.
2. Where an investment firm provides an investment service to a professional client it shall be entitled to assume that, in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of paragraph 1(c).

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

3. The information regarding the financial situation of the client or potential client shall include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.
4. The information regarding the investment objectives of the client or potential client shall include, where relevant, information on the length of time for which the client wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.
5. Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 19(4) of Directive 2004/39/EC, the firm shall not recommend investment services or financial instruments to the client or potential client.

Article 36

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

Assessment of appropriateness

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

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

Article 37

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

Provisions common to the assessment of suitability or appropriateness

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

- (a) the types of service, transaction and financial instrument with which the client is familiar;
- (b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;
- (c) the level of education, and profession or relevant former profession of the client or potential client.

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

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

Article 38

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

Provision of services in non-complex instruments

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

- (a) it does not fall within Article 4(1)(18)(c) of, or points (4) to (10) of Section C of Annex I to, Directive 2004/39/EC;
- (b) there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
- (c) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;
- (d) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

Article 39

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

Retail client agreement

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

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

SECTION 4

Reporting to clients

Article 40

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

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

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

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

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

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

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

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

4. The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with Table 1 of Annex I to Regulation (EC) No 1287/2006:

- (a) the reporting firm identification;
- (b) the name or other designation of the client;

- (c) the trading day;
- (d) the trading time;
- (e) the type of the order;
- (f) the venue identification;
- (g) the instrument identification;
- (h) the buy/sell indicator;
- (i) the nature of the order if other than buy/sell;
- (j) the quantity;
- (k) the unit price;
- (l) the total consideration;
- (m) a total sum of the commissions and expenses charged and, where the retail client so requests, an itemised breakdown;
- (n) the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client;
- (o) if the client's counterparty was the investment firm itself or any person in the investment firm's group or another client of the investment firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.

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

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

Article 41

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

Reporting obligations in respect of portfolio management

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

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

- (a) the name of the investment firm;
- (b) the name or other designation of the retail client's account;
- (c) a statement of the contents and the valuation of the portfolio, including details of each financial instrument held, its market value, or fair value if market value is unavailable and the cash balance at the beginning and at the end of the reporting period, and the performance of the portfolio during the reporting period;
- (d) the total amount of fees and charges incurred during the reporting period, itemising at least total management fees and total costs associated with execution, and including, where relevant, a statement that a more detailed breakdown will be provided on request;
- (e) a comparison of performance during the period covered by the statement with the investment performance benchmark (if any) agreed between the investment firm and the client;
- (f) the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio;
- (g) information about other corporate actions giving rights in relation to financial instruments held in the portfolio;
- (h) for each transaction executed during the period, the information referred to in Article 40(4)(c) to (l) where relevant, unless the client elects to receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

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

- (a) where the client so requests, the periodic statement must be provided every three months;
- (b) in cases where paragraph 4 applies, the periodic statement must be provided at least once every 12 months;
- (c) where the agreement between an investment firm and a retail client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.

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

However, the exception provided for in point (b) shall not apply in the case of transactions in financial instruments covered by

Article 4(1)(18)(c) of, or any of points 4 to 10 of Section C in Annex I to, Directive 2004/39/EC.

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

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

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

Article 42

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

Additional reporting obligations for portfolio management or contingent liability transactions

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

Article 43

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

Statements of client financial instruments or client funds

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

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

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

- (a) details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;
- (b) the extent to which any client financial instruments or client funds have been the subject of securities financing transactions;
- (c) the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued.

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

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

SECTION 5

Best execution

Article 44

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

Best execution criteria

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

- (a) the characteristics of the client including the categorisation of the client as retail or professional;
- (b) the characteristics of the client order;
- (c) the characteristics of financial instruments that are the subject of that order;
- (d) the characteristics of the execution venues to which that order can be directed.

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

2. An investment firm satisfies its obligation under Article 21(1) of Directive 2004/39/EC to take all reasonable

steps to obtain the best possible result for a client to the extent that it executes an order or a specific aspect of an order following specific instructions from the client relating to the order or the specific aspect of the order.

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

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

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

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

Article 45

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

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

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

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

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

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

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

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

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

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

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

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

Article 46

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

Execution policy

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

Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain

the best possible result for the execution of its client orders on a consistent basis using the venues included in its execution policy.

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

- (a) an account of the relative importance the investment firm assigns, in accordance with the criteria specified in Article 44(1), to the factors referred to in Article 21(1) of Directive 2004/39/EC, or the process by which the firm determines the relative importance of those factors;
- (b) a list of the execution venues on which the firm places significant reliance in meeting its obligation to take all reasonable steps to obtain on a consistent basis the best possible result for the execution of client orders;
- (c) a clear and prominent warning that any specific instructions from a client may prevent the firm from taking the steps that it has designed and implemented in its execution policy to obtain the best possible result for the execution of those orders in respect of the elements covered by those instructions.

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

SECTION 6

Client order handling

Article 47

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

General principles

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

- (a) they must ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;
- (b) they must carry out otherwise comparable client orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise;
- (c) they must inform a retail client about any material difficulty relevant to the proper carrying out of orders promptly upon becoming aware of the difficulty.

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

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

Article 48

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

Aggregation and allocation of orders

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

- (a) it must be unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any client whose order is to be aggregated;
- (b) it must be disclosed to each client whose order is to be aggregated that the effect of aggregation may work to its disadvantage in relation to a particular order;
- (c) an order allocation policy must be established and effectively implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders and transactions, including how the volume and price of orders determines allocations and the treatment of partial executions.

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

Article 49

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

Aggregation and allocation of transactions for own account

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

2. Member States shall require that, where an investment firm aggregates a client order with a transaction for own account and

the aggregated order is partially executed, it allocates the related trades to the client in priority to the firm.

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

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

SECTION 7

Eligible counterparties

Article 50

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

Eligible counterparties

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

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

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

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

SECTION 8

Record-keeping*Article 51*

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

Retention of records

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

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

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

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

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

- (a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;
- (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
- (c) it must not be possible for the records otherwise to be manipulated or altered.

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

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

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

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

SECTION 9

Defined terms for the purposes of Directive 2004/39/EC*Article 52*

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

Investment advice

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

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

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

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

CHAPTER IV

FINAL PROVISIONS*Article 53***Transposition**

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

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

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

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

Article 54

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 55

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 10 August 2006.

For the Commission

Charlie McCREEVY

Member of the Commission



Recognised Investment Exchanges and Recognised Clearing Houses

Recognised Investment Exchanges and Recognised Clearing Houses

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REC 6A	EEA market operators in the United Kingdom
6A.1	Exercise of passport rights by EEA market operator
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REC 7	Fees
7.1	[deleted: the provisions in relation to Recognised Investment Exchanges and Recognised Clearing Houses are set out in FEES 1,2, 3 and 4]
7.2	[deleted: the provisions in relation to Recognised Investment Exchanges and Recognised Clearing Houses are set out in FEES 1,2, 3 and 4]
7.3	[deleted: the provisions in relation to Recognised Investment Exchanges and Recognised Clearing Houses are set out in FEES 1,2, 3 and 4]
7 Annex 1	[deleted: the provisions in relation to Recognised Investment Exchanges and Recognised Clearing Houses are set out in FEES 4 Annex 6R]
7 Annex 2	[deleted: the provisions in relation to Recognised Investment Exchanges and Recognised Clearing Houses are set out in FEES?3 Annex 3R]

Transitional Provisions and Schedules

TP 1	Transitional provisions
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Sch 3	Fees and other required payments
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Chapter 1

Introduction

1.1 Application

- 1.1.1** **G** The *rules* and *guidance* in this sourcebook apply to *recognised bodies* and to applicants for recognition as *recognised bodies* under Part XVIII of the *Act* (Recognised Investment Exchanges and Clearing Houses).
- 1.1.1A** **G** The *guidance* in **■ REC 6A** applies to *EEA market operators* exercising passporting rights in the *United Kingdom*.
- 1.1.2** **G**
- (1) *Recognised bodies* are *exempt persons* under section 285 of the *Act* (Exemption for recognised investment exchanges and clearing houses).
 - (2) *UK recognised bodies* must satisfy *recognition requirements* prescribed by the Treasury (in certain cases with the approval of the Secretary of State) in the *Recognition Requirements Regulations*. *UK RIEs* must also satisfy the *MiFID implementing requirements* in the *MiFID Regulation*. *Overseas recognised bodies* must satisfy *recognition requirements* laid down in section 292 of the *Act* (Overseas investment exchanges and overseas clearing houses).
 - (3) *Recognised bodies* must also comply with notification requirements in, and with *notification rules* made under, sections 293 (Notification requirements) and 295 (Notification: overseas investment exchanges and clearing houses) of the *Act*.
- 1.1.3** **G**
- (1) The *recognition requirements* for *UK recognised bodies* and the *MiFID implementing requirements* are set out, with *guidance*, in **■ REC 2**.
 - (2) The *notification rules* for *UK recognised bodies* are set out in **■ REC 3** together with *guidance* on those *rules*.
 - (3) *Guidance* on the *FSA's* approach to the supervision of *recognised bodies* is given in **■ REC 4**.
 - (4) *Guidance* for applicants (and potential applicants) for *UK recognised body* status is given in **■ REC 5**.
 - (5) The *recognition requirements*, *notification rules*, and *guidance* for *overseas recognised bodies* and *guidance* for applicants (and potential applicants) for *overseas recognised body* status are set out in **■ REC 6**.

- (5A) *Guidance for EEA market operators exercising their passporting rights in the United Kingdom* is set out in ■ REC 6A.
- (6) The *fees rules for recognised bodies* and applicants are set out in ■ FEES 1, ■ 2, ■ 3 and ■ 4 .

1.2 Purpose, status and quotations

Purpose

- 1.2.1 G The purpose of the *guidance* (other than in ■ REC 6A) in this sourcebook is to give information on the *recognition requirements*, other obligations on *recognised bodies* in or under the *Act* and the *MiFID implementing requirements*. The purpose of the guidance in ■ REC 6A is to give *EEA market operators* information about their passporting rights in the *United Kingdom*. Explanations of the purposes of the *rules* in this sourcebook are given in the chapters concerned.

Status

- 1.2.2 G
- (1) Most of the provisions in this sourcebook are marked with a G (to indicate *guidance*) or an R (to indicate a *rule*). Quotations from *UK* statute or statutory instruments are marked with the letters "UK" unless they form part of a piece of *guidance*. Quotations from the directly applicable *MiFID Regulation* are marked with the letters "EU". For a discussion of the status of provisions marked with a letter, see Chapter 6 of the Reader's Guide.
 - (2) Where the *guidance* states that the *FSA* may have regard to any factor in assessing or determining whether a *recognition requirement* is satisfied, or whether there is compliance with another obligation under the *Act*, or whether a *MiFID implementing requirement* is satisfied, it means that the *FSA* will take that factor into account so far as it is relevant.
 - (3) In determining whether a *recognised body* satisfies the *recognition requirements* or complies with other obligations in or under the *Act*, or a *UK RIE* satisfies the *MiFID implementing requirements*, the *FSA* will have regard to any relevant factor, including, but not limited to, the factors specifically discussed in the *guidance*.

Quotations

- 1.2.3 G
- (1) This sourcebook contains quotations from the *Act*, the *Recognition Requirements Regulations* and the *Companies Act 1989* and the *MiFID Regulation* and, where necessary, words have been added to, or substituted for, the text of these provisions to facilitate understanding.
 - (2) The additions and substitutions are enclosed in square brackets ([]). The omission of words within a quotation is indicated by three dots (...).

- (3) Any words in these quotations which have the same meaning as *Handbook* defined terms are shown in italics and their definitions may be found in the *Glossary*.
- (4) As these quotations contain provisions which impose obligations, they are printed in bold type. The use of bold type is not intended to indicate that these quotations are *rules* made by the FSA.
- (5) None of the editorial changes made by the FSA in these quotations can supersede or alter the meaning of the provision concerned.

Chapter 2

Recognition requirements

2.1 Introduction

2.1.1 **G** This chapter contains the *recognition requirements* for *UK recognised bodies* and sets out *guidance* on those requirements. This chapter also contains the *MiFID implementing requirements* for *UK RIEs*. (The *recognition requirements* for *overseas recognised bodies* are set out in **REC 6**.)

2.1.2 **G** These *recognition requirements* must be satisfied by applicants for *recognised body* status before recognition is granted and by all *UK recognised bodies* at all times while they are recognised. In addition the *MiFID implementing requirements* must be satisfied by applicants for *UK RIE* status before recognition is granted and by all *UK RIEs* at all times while they are recognised. The same standards apply both on initial recognition and throughout the period *recognised body* status is held. The terms *UK RIE* or *UK RCH* in the *guidance* should be taken, therefore, to refer also to an applicant when appropriate.

- 2.1.3** **G**
- (1) The paragraphs in the Schedule to the *Recognition Requirements Regulations* are grouped in this sourcebook in sections which give *guidance* on the same subject for both *UK RIEs* and *UK RCHs*.
 - (2) The table in **REC 2.1.4 G** indicates in which section each of those paragraphs (and the associated *guidance*) can be found.

2.1.4 **G** Table Location of recognition requirements and guidance

Recognition Requirements Regulations	Subject	Section in REC 2
Regulation 6	Method of satisfying recognition requirements	2.2
Part I of the Schedule	UK RIE recognition requirements	
Paragraph 1	Financial resources	2.3
Paragraph 2	Suitability	2.4
Paragraph 3	Systems and controls	2.5
Paragraphs 4(1) and 4(2)(aa)	General safeguards for investors	2.6
Paragraph 4(2)(a)	Access to facilities	2.7

Recognition Requirements Regulations	Subject	Section in REC 2
Paragraph 4(2)(b)	Proper markets	2.12
Paragraph 4(2)(c)	Availability of relevant information	2.12
Paragraph 4(2)(d)	Settlement	2.8
Paragraph 4(2)(e)	Transaction recording	2.9
Paragraph 4(2)(ea)	Conflicts	2.5
Paragraph 4(2)(f)	Financial crime and market abuse	2.10
Paragraph 4(2)(g)	Custody	2.11
Paragraph 4(3)	Definition of relevant information	2.12
Paragraph 4A	Provision of pre-trade information about share trading	2.6
Paragraph 4B	Provision of post-trade information about share trading	2.6
Paragraph 6	Promotion and maintenance of standards	2.13
Paragraph 7	Rules and consultation	2.14
Paragraph 7A	Admission of financial instruments to trading	2.12
Paragraph 7B and 7C	Access to facilities	2.7
Paragraph 7D	Settlement	2.8
Paragraph 7E	Suspension and removal of financial instruments from trading	2.6
Paragraph 8	Discipline	2.15
Paragraph 9	Complaints	2.16
Paragraph 9A	Operation of a multilateral trading facility	2.16A
Part II of the Schedule	UK RIE default rules in respect of market contracts	2.17
Part III of the Schedule	UK RCH recognition requirements	
Paragraph 16	Financial resources	2.3
Paragraph 17	Suitability	2.4
Paragraph 18	Systems and controls	2.5
Paragraph 19(1)	General safeguards for investors	2.6
Paragraph 19(2)(a)	Access to facilities	2.7
Paragraph 19(2)(b)	Clearing services	2.8
Paragraph 19(2)(c)	Transactions recording	2.9
Paragraph 19(2)(d)	Financial crime and market abuse	2.10
Paragraph 19(2)(e)	Custody	2.11
Paragraph 20	Promotion and maintenance of standards	2.13
Paragraph 21	Rules	2.14
Paragraph 22	Discipline	2.15
Paragraph 23	Complaints	2.16

Recognition Requirements Regulations	Subject	Section in REC 2
Part IV of the Schedule	UK RCH default rules in respect of market contracts	2.17

2.1.5

G

Recitals and articles from the *MiFID Regulation* (and the associated guidance) relevant to market transparency are set out in ■ REC 2.6. Articles from the *MiFID Regulation* relevant to admission to trading are set out in ■ REC 2.12.

2.2 Method of satisfying the recognition requirements

2.2.1



Recognition Requirements Regulations, Regulation 6

(1) In considering whether a [*UK recognised body*] or applicant satisfies *recognition requirements* applying to it under these [*Recognition Requirements Regulations*], the [*FSA*] may take into account all relevant circumstances including the constitution of the *person* concerned and its *regulatory provisions* and practices within the meaning of section 302(1) of the *Act*.

(2) Without prejudice to the generality of paragraph (1), a [*UK recognised body*] or applicant may satisfy *recognition requirements* applying to it under these [*Recognition Requirements Regulations*] by making arrangements for functions to be performed on its behalf by any other *person*.

(3) Where a [*UK recognised body*] or applicant makes arrangements of the kind mentioned in paragraph (2), the arrangements do not affect the responsibility imposed by the *Act* on the [*UK recognised body*] or applicant to satisfy *recognition requirements* applying to it under these [*Recognition Requirements Regulations*], but it is in addition a *recognition requirement* applying to the [*UK recognised body*] or applicant that the *person* who performs (or is to perform) the functions is a fit and proper *person* who is able and willing to perform them.

2.2.2



Relevant circumstances

The *FSA* will usually expect :

- (1) the constitution, *regulatory provisions* and practices of the *UK recognised body* or applicant;
- (2) the nature (including complexity, diversity and risk) and scale of the *UK recognised body's* or applicant's business;
- (3) the size and nature of the market which is supported by the *UK recognised body's* or applicant's *facilities*;
- (4) the nature and status of the types of investor who use the *UK recognised body's* or applicant's *facilities* or have an interest in the market supported by the *UK recognised body's* or applicant's *facilities*; and
- (5) the nature and scale of the risks to the *regulatory objectives* associated with the matters described in (1) to (4);




to be among the relevant circumstances which it will take into account in considering whether a *UK recognised body* or applicant satisfies the *recognition requirements*.

Outsourcing

- 2.2.3 **G** It is the *UK recognised body's* responsibility to demonstrate to the *FSA* that a *person* who performs a function on behalf of the *UK recognised body* is fit and proper and able and willing to perform that function. The *recognition requirement* referred to in Regulation 6(3) applies to the *UK recognised body* and not to any *person* who performs any function on its behalf. In this context, for a *person* to be "fit and proper" does not necessarily imply that he is an *authorised person*, or qualified to be so, or that the required standard is the same as that required either for *authorised persons* or *recognised bodies*.
- 2.2.4 **G** If a *UK recognised body* makes arrangements for functions to be performed on its behalf by *persons* who are *authorised persons* or *recognised bodies*, this does not alter its obligations under Regulation 6.
- 2.2.5 **G** If a *person* who performs a function on behalf of a *UK recognised body* is himself carrying on a *regulated activity* in the *United Kingdom*, he will, unless he is a *person* to whom the *general prohibition* does not apply, need to be either an *authorised person* or an *exempt person*. The *person* to whom a function is delegated is not covered by the *UK recognised body's* exemption.
- 2.2.6 **G** In determining whether the *UK recognised body* meets the *recognition requirement* in Regulation 6(3), the *FSA* may have regard to whether that body has ensured that the *person* who performs that function on its behalf:
- (1) has sufficient resources to be able to perform the function (after allowing for any other activities);
 - (2) has adequate systems and controls to manage that function and to report on its performance to the *UK recognised body*;
 - (3) is managed by *persons* of sufficient skill, competence and integrity;
 - (4) understands the nature of the function it performs on behalf of the *UK recognised body* and its significance for the *UK recognised body's* ability to satisfy the *recognition requirements* and other obligations in or under the *Act*; and
 - (5) undertakes to perform that function in such a way as to enable the *UK recognised body* to continue to satisfy the *recognition requirements* and other obligations in or under the *Act*.
- 2.2.7 **G** In determining whether a *UK recognised body* continues to satisfy the *recognition requirements* where it has made arrangements for any function to be performed on its behalf by any *person*, the *FSA* may have regard, in addition to any of the matters described in the appropriate section of this chapter, to the arrangements made to exercise control over the performance of the function, including:

- (1) the contracts (and other relevant *documents*) between the *UK recognised body* and the *person* who performs the delegated function;
- (2) the arrangements made to monitor the performance of that function; and
- (3) the arrangements made to manage conflicts of interest and protect confidential regulatory information.

2.3 Financial resources

- 2.3.1**  Schedule to the Recognition Requirements Regulations, Paragraph 1
- (1)** The [UK RIE] must have financial resources sufficient for the proper performance of its [*relevant functions*] as a [UK RIE].
- (2)** In considering whether this requirement is satisfied, the [FSA] must (without prejudice to the generality of regulation 6(1)) take into account all the circumstances, including the [UK RIE's] connection with *any person* , and any activity carried on by the [UK RIE], whether or not it is an *exempt activity*.
- 2.3.2**  Schedule to the Recognition Requirements Regulations, Paragraph 16
- (1)** The [UK RCH] must have financial resources sufficient for the proper performance of its [*relevant functions*] as a [UK RCH].
- (2)** In considering whether this requirement is satisfied, the [FSA] may (without prejudice to the generality of regulation 6(1)) take into account all the circumstances, including the [UK RCH's] connection with *any person* , and any activity carried on by the [UK RCH], whether or not it is an *exempt activity*.
- 2.3.3**  In determining whether a *UK recognised body* has financial resources sufficient for the proper performance of its *relevant functions*, the *FSA* may have regard to:
- (1) the operational and other risks to which the *UK recognised body* is exposed;
 - (2) if the *UK recognised body* acts as a central counterparty or otherwise guarantees the performance of transactions in *specified investments*, the counterparty and market risks to which it is exposed in that capacity;
 - (3) the amount and composition of the *UK recognised body's* capital;
 - (4) the amount and composition of the *UK recognised body's* liquid financial assets;
 - (5) the amount and composition of the *UK recognised body's* other financial resources (such as insurance policies and guarantees, where appropriate);
 - (6) the financial benefits, liabilities, risks and exposures arising from the *UK recognised body's* connection with any *person*, including but not limited to, its connection with:

- (a) any *undertaking* in the same *group* as the *UK recognised body*;
 - (b) any other *person* with a significant shareholding or stake in the *UK recognised body*;
 - (c) any other *person* with whom the *UK recognised body* has made a significant investment whether in the form of equity, debt, or by means of any guarantee or other form of commitment;
 - (d) any *person* with whom it has a significant contractual relationship.
- (7) in relation to a *UK RIE*, the nature and extent of the transactions concluded on the *UK RIE*.

Accounting information and standards

2.3.4

G

The *FSA* will usually rely on a *UK recognised body's* published and internal *management accounts* and financial projections, provided that those accounts and projections are prepared in accordance with *UK*, *US* or international accounting standards.

Counterparty and market risks: principles

2.3.5

G

In assessing whether a *UK recognised body* has sufficient financial resources in relation to counterparty and market risks, the *FSA* may have regard to:

- (1) the amount and liquidity of its financial assets and the likely availability of liquid financial resources to the *UK recognised body* during periods of major market turbulence or other periods of major stress for the *UK financial system*; and
- (2) the nature and scale of the *UK recognised body's* exposures to counterparty and market risks and, where relevant, the counterparties to which it is exposed.

Operational and other risks: principles

2.3.6

G

In assessing whether a *UK recognised body* has sufficient financial resources in relation to operational and other risks, the *FSA* may have regard to the extent to which, after allowing for the financial resources necessary to cover counterparty and market risks, the *UK recognised body's* financial resources are sufficient and sufficiently liquid:

- (1) to enable the *UK recognised body* to continue carrying on properly the *regulated activities* that it expects to carry on; and
- (2) to ensure that it would be able to complete an orderly closure or transfer of its *exempt activities* without being prevented from doing so by insolvency or lack of available funds.

Operational and other risks: standard approach

PAGE
9

2.3.7

G

The *FSA* considers that a *UK recognised body* which (after allowing for the financial resources necessary to cover counterparty and market risks) has at any time:

- (1) liquid financial assets amounting to at least six months' operating costs; and
- (2) net capital of at least this amount;

will, at that time, have sufficient financial resources to meet the *recognition requirement* unless there are special circumstances indicating otherwise.

2.3.8

G

- (1) In this standard approach, the *FSA* assumes liquid financial assets are needed to cover the costs that would be incurred during an orderly run down of the *UK recognised body's* business as such, while continuing to satisfy all the *recognition requirements* and complying with any other obligations under the *Act* (including the obligations to pay periodic fees to the *FSA* under *REC 7*).
- (2) The calculation of operating costs may exclude non-cash costs (costs that do not involve an outflow of funds) and variable costs of the *UK recognised body's exempt activities* that would not be incurred if no *exempt activities* were performed. Fixed costs should be included in the assessment of operating costs. The *FSA* would normally expect the capital equal to the amount of liquid financial assets to be in the form of equity.




Operational and other risks: alternative approaches

2.3.9

G

The *FSA* recognises that *UK recognised bodies* may wish to satisfy the *recognition requirements* in different ways. The *FSA* does not prescribe any particular approach to calculating financial resources or to assessing their adequacy. It is willing to discuss with each *UK recognised body* the most appropriate way for it to meet the *recognition requirement* and each *UK recognised body* will need to be able to show the *FSA* that its financial resources are at all times sufficient to meet the *recognition requirement*.

2.4 Suitability

- 2.4.1**  Schedule to the Recognition Requirements Regulations, Paragraph 2
- (1)** The [UK RIE] must be a fit and proper *person* to perform the [*relevant functions*] of a [UK RIE].
- (2)** In considering whether this requirement is satisfied, the [FSA] may (without prejudice to the generality of regulation 6(1)) take into account all the circumstances, including the [UK RIE's] connection with *any person*.
- (3)** The persons who effectively direct the business and operations of the [UK RIE] must be of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it.
- (4)** The *persons* who are in a position to exercise significant influence over the management of the [UK RIE], whether directly or indirectly must be suitable.
- 2.4.2**  Schedule to the Recognition Requirements Regulations, Paragraph 17
- (1)** The [UK RCH] must be a fit and proper *person* to perform the [*relevant functions*] of a [UK RCH].
- (2)** In considering whether this requirement is satisfied, the [FSA] may (without prejudice to the generality of regulation 6(1)) take into account all the circumstances including the [UK RCH's] connection with *any person*.
- 2.4.3**  In determining whether a *UK recognised body* is a fit and proper *person*, the FSA may have regard to any relevant factor including, but not limited to:
- (1) the commitment shown by the *UK recognised body's governing body* to satisfying the *recognition requirements* and to complying with other obligations in or under the *Act*;
 - (2) its arrangements, policies and resources for fulfilling its obligations under the *Act* in relation to its activities as a *UK recognised body*;
 - (3) the extent to which its constitution and organisation provide for effective governance;
 - (4) the arrangements made to ensure that its *governing body* has effective oversight of the *UK recognised body's relevant functions*;

- (5) the access which its regulatory department has to the *governing body*;
- (6) the size and composition of its *governing body*, including:
 - (a) the number of members of the *governing body* who represent *members* of the *UK recognised body* or other *persons* and the types of *person* whom they represent;
 - (b) the number and responsibilities of any members of the *governing body* with executive roles within the *UK recognised body*; and
 - (c) the number of independent members of the *governing body*;
- (7) the structure and organisation of its *governing body*, including any distribution of responsibilities among its members and committees;
- (8) the integrity and competence of its *governing body* and *key individuals*;
- (9) breaches of any relevant law, regulation or code of practice by the *UK recognised body* or its *key individuals*;
- (10) its arrangements for ensuring that it employs individuals who are honest and demonstrate high standards of integrity;
- (11) the effectiveness of its arrangements to control conflicts of interest (see also *REC 2.5*); and
- (12) the independence of its regulatory department from its commercial and marketing departments.

2.4.4

G

In determining whether a *UK recognised body* is a fit and proper *person*, the FSA may have regard to its connections with:

- (1) any *undertaking* in the same *group*;
- (2) any owner or part-owner of the *UK recognised body*;
- (3) any *person* who has the right to appoint or remove members of the *governing body* or other *key individuals*;
- (4) any *person* who is able in practice to appoint or remove members of the *governing body* or other *key individuals*;
- (5) any *person* in accordance with whose instructions the *governing body* or any *key individual* is accustomed to act; and
- (6) any *key individual* in relation to the *UK recognised body* .

2.4.5

G

In assessing whether its connection with any *person* could affect whether a *UK recognised body* is a fit and proper *person*, the FSA may have regard to:

- (1) the reputation and standing of that other *person*, including his standing with any relevant *UK* or *overseas regulator*;

- (2) breaches of any law or regulation by that other *person*;
- (3) the roles of any of the *UK recognised body's key individuals* who have a position within organisations under the control or influence of that other *person*, including their responsibilities in that organisation and the extent and type of their access to its senior management or governing body;
- (4) the extent to which the *UK recognised body* operates as a distinct entity notwithstanding its connection with that other *person*;
- (5) the extent to which the *UK recognised body's governing body* is responsible for its day-to-day management and operations;

but nothing in this paragraph should be taken to imply any restriction on the ability of a *UK recognised body* to outsource any function to any *person* in a manner consistent with Regulation 6 of the Recognition Requirements Regulations.

2.4.6

G

In assessing whether the *persons* who effectively direct the business and operations of the *UK RIE* are of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it, the *FSA* may have regard to the repute and experience of the *UK RIE's key individuals*.

2.5 Systems and controls and conflicts

2.5.1



Schedule to the Recognition Requirements Regulations, paragraph 3

- (1) The [UK RIE] must ensure that the systems and controls used in the performance of its [*relevant functions*] are adequate, and appropriate for the scale and nature of its business.
- (2) Sub-paragraph (1) applies in particular to systems and controls concerning -
 - (a) the transmission of information;
 - (b) the assessment, mitigation and management of risks to the performance of the [UK RIE's *relevant functions*];
 - (c) the effecting and monitoring of transactions on the [UK RIE];
 - (ca) the technical operation of the [UK RIE], including contingency arrangements for disruption to its *facilities*;
 - (d) the operation of the arrangements mentioned in paragraph 4(2)(d); and
 - (e) (where relevant) the safeguarding and administration of assets belonging to users of the [UK RIE's] *facilities*.

2.5.1A



Schedule to the Recognition Requirements Regulations, paragraph 4(2)(ea)

- Without prejudice to the generality of sub-paragraph [4(1)], the [UK RIE] must ensure that -
- appropriate arrangements are made to -
- (i) identify conflicts between the interests of the [UK RIE], its owners and operators and the interests of the persons who make use of its *facilities* or the interests of the financial markets operated by it; and
 - (ii) manage such conflicts so as to avoid adverse consequences for the operation of the financial markets operated by the [UK RIE] and for the *persons* who make use of its *facilities*.

2.5.2



Schedule to the Recognition Requirements Regulations, paragraph 18

- (1) **The [UK RCH] must ensure that the systems and controls used in the performance of its [relevant functions] are adequate, and appropriate for the scale and nature of its business.**
- (2) **This requirement applies in particular to systems and controls concerning-**
 - (a) **the transmission of information;**
 - (b) **the assessment and management of risks to the performance of the [UK RCH's relevant functions];**
 - (c) **the operation of the arrangements mentioned in paragraph 19(2)(b); and**
 - (c) **(where relevant) the safeguarding and administration of assets belonging to users of the [UK RCH's] facilities.**

2.5.3



In assessing whether the systems and controls used by a *UK recognised body* in the performance of its *relevant functions* are adequate and appropriate for the scale and nature of its business, the *FSA* may have regard to the *UK recognised body's*:

- (1) arrangements for managing, controlling and carrying out its *relevant functions*, including:
 - (a) the distribution of duties and responsibilities among its *key individuals* and the departments of the *UK recognised body* responsible for performing its *relevant functions*;
 - (b) the staffing and resources of the departments of the *UK recognised body* responsible for performing its *relevant functions*;
 - (c) the arrangements made to enable *key individuals* to supervise the departments for which they are responsible;
 - (d) the arrangements for appointing and supervising the performance of *key individuals* (and their departments); and
 - (e) the arrangements by which the *governing body* is able to keep the allocation of responsibilities between, and the appointment, supervision and remuneration of, *key individuals* under review;
- (2) arrangements for the identification and management of conflicts of interest;
- (3) arrangements for internal and external audit; and
- (4) information technology systems.

2.5.4



The following paragraphs set out other matters to which the *FSA* may have regard in assessing the systems and controls used for the transmission of information, risk management, the effecting and monitoring of transactions, the operation of settlement arrangements (the matters covered in paragraphs 4(2)(d) and 19(2)(b) of the Schedule to the Recognition Requirements Regulations) and the safeguarding and administration of assets.

Information transmission

2.5.5

G

In assessing a *UK recognised body's* systems and controls for the transmission of information, the *FSA* may also have regard to the extent to which these systems and controls ensure that information is transmitted promptly and accurately:

- (1) within the *UK recognised body* itself;
- (2) to *members*; and
- (3) (where appropriate) to other market participants or other relevant persons.

Risk management

2.5.6

G

In assessing a *UK recognised body's* systems and controls for assessing and managing risk, the *FSA* may also have regard to the extent to which these systems and controls enable the *UK recognised body* to:

- (1) identify all the general, operational, legal and market risks wherever they arise in its activities;
- (2) measure and control the different types of risk;
- (3) allocate responsibility for risk management to *persons* with appropriate knowledge and expertise; and
- (4) provide sufficient, reliable information to *key individuals* and, where relevant, the *governing body* of the *UK recognised body*.

2.5.7

G

Where the *UK recognised body* assumes significant counterparty risk (for example, by acting as a central counterparty), the *FSA* may also have regard to:

- (1) the position of the risk management department within the *UK recognised body*, including its access to the *governing body* and its relationship with the commercial or marketing departments of the *UK recognised body*;
- (2) the frequency with which all exposures and risks incurred by the *UK recognised body* are monitored against risk or exposure limits or other appropriate control parameters;
- (3) the frequency with which risk or exposure limits (or other control parameters) are reviewed;
- (4) the reliability of the arrangements for monitoring and assessing intra-day movements in exposures and risks;
- (5) the robustness of the arrangements for calculating, collecting and holding margin payments and the allocation of losses; and
- (6) the arrangements for stress testing of the adequacy of the *UK recognised body's* financial resources to cover its exposures which may arise, for example, with substantial movements in market values or counterparty defaults.

Effecting and monitoring of transactions and operation of settlement arrangements

2.5.8

G

In assessing a *UK RIE's* systems and controls for the effecting and monitoring of transactions, and the systems and controls used by a *UK recognised body* for the operation of settlement arrangements, the *FSA* may have regard to the totality of the arrangements and processes through which a transaction is effected, cleared and settled, including:

- (1) a *UK RIE's* arrangements under which orders are received and matched, and its arrangements for trade and transaction reporting, and (if relevant) for transmission to a settlement system or *clearing house*;
- (2) a *UK recognised body's* arrangements under which clearing and settlement instructions arising from a transaction are entered into its systems to the point at which any rights or liabilities arising from that transaction are discharged; and
- (3) the arrangements made by the *UK recognised body* for monitoring and reviewing the operation of these systems and controls.

Safeguarding and administration of assets

2.5.9

G

In assessing a *UK recognised body's* systems and controls for the safeguarding and administration of assets belonging to users of its *facilities*, the *FSA* may have regard to the totality of the arrangements and processes by which the *UK recognised body*:

- (1) records the assets held and the identity of the owners of (and other *persons* with relevant rights over) those assets;
- (2) records any instructions given in relation to those assets;
- (3) records the carrying out of those instructions;
- (4) records any movements in those assets (or any corporate actions or other events in relation to those assets); and
- (5) reconciles its records of assets held with the records of any *custodian* or *sub-custodian* used to hold these assets, and with the records of beneficial or legal ownership of those assets.

Management of conflicts of interest

2.5.10

G

A conflict of interest arises in a situation where a *person* with responsibility to act in the interests of one *person* may be influenced in his action by an interest or association of his own, whether personal or business or employment related. Conflicts of interest can arise both for the *employees* of *UK recognised bodies* and for the *members* (or other *persons*) who may be involved in the decision-making process, for example where they belong to committees or to the *governing body*. Conflicts of interest may also arise for the *UK recognised body* itself as a result of its connection with another *person*.

2.5.11

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The *FSA* recognises that a *UK RCH* has legitimate interests of its own and that its general business policy may properly be influenced by other *persons* (such as its owners). Such a connection does not necessarily imply the existence of a conflict of interest nor is it necessary to exclude individuals closely connected with other *persons* (for example, those responsible for the stewardship of the owner's interests) from all decision-making processes

in a *UK recognised body*. However, there may be decisions, primarily regulatory decisions, from which it may be appropriate to exclude an individual in certain circumstances where an interest, position or connection of his conflicts with the interest of the *recognised body*.

2.5.12 **G** *REC 2.5.13G to REC 2.5.16G set out the factors to which the FSA may have regard in assessing a UK recognised body's systems and controls for managing conflicts of interest.*

2.5.13 **G** *The FSA may have regard to the arrangements a UK recognised body makes to structure itself and to allocate responsibility for decisions so that it can continue to take proper regulatory decisions notwithstanding any conflicts of interest, including:*

- (1) the size and composition of the governing body and relevant committees;*
- (2) the roles and responsibilities of key individuals, especially where they also have responsibilities in other organisations;*
- (3) the arrangements for transferring decisions or responsibilities to alternates in individual cases; and*
- (4) the arrangements made to ensure that individuals who may have a permanent conflict of interest in certain circumstances are excluded from the process of taking decisions (or receiving information) about matters in which that conflict of interest would be relevant.*

2.5.14 **G** *The FSA may also have regard to the systems and controls intended to ensure that confidential information is only used for proper purposes. Where relevant, recognised bodies will have to comply with section 348 (Restrictions on disclosure of confidential information by the FSA etc.) and regulations made under section 349 (Exemptions from section 348) of the Act.*

2.5.15 **G** *The FSA may also have regard to the contracts of employment, staff rules, letters of appointment for members of the governing body, members of relevant committees and other key individuals and other guidance given to individuals on handling conflicts of interest. Guidance to individuals may need to cover:*

- (1) the need for prompt disclosure of a conflict of interest to enable others, who are not affected by the conflict, to assist in deciding how it should be managed;*
- (2) the circumstances in which a general disclosure of conflicts of interest in advance of any particular instance in which a conflict of interest arises may be sufficient;*
- (3) the circumstances in which a general advance disclosure may not be adequate;*
- (4) the circumstances in which it would be appropriate for a conflicted individual to withdraw from involvement in the matter concerned, without disclosing the interest; and*

2.5.16

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The FSA may also have regard to the arrangements made:

- (1) for enforcing rules or other provisions applicable to staff and other *persons* involved in regulatory decisions; and
- (2) to keep records of disclosures of conflicts of interest and the steps taken to handle them.

Internal and external audit

2.5.17

G

A *UK recognised body's* arrangements for internal and external audit will be an important part of its systems and controls. In assessing the adequacy of these arrangements, the FSA may have regard to:

- (1) the size, composition and terms of reference of any audit committee of the *UK recognised body's governing body*;
- (2) the frequency and scope of external audit;
- (3) the provision and scope of internal audit;
- (4) the staffing and resources of the *UK recognised body's* internal audit department;
- (5) the internal audit department's access to the *UK recognised body's* records and other relevant information; and
- (6) the position, responsibilities and reporting lines of the internal audit department and its relationship with other departments of the *UK recognised body*.

Information technology systems

2.5.18

G

Information technology is likely to be a major component of the systems and controls used by any *UK recognised body*. In assessing the adequacy of the information technology used by a *UK recognised body* to perform or support its *relevant functions*, the FSA may have regard to:

- (1) the organisation, management and resources of the information technology department within the *UK recognised body*;
- (2) the arrangements for controlling and documenting the design, development, implementation and use of information technology systems; and
- (3) the performance, capacity and reliability of information technology systems.

2.5.19

G

The *FSA* may also have regard to the arrangements for maintaining, recording and enforcing technical and operational standards and specifications for information technology systems, including:

- (1) the procedures for the evaluation and selection of information technology systems;
- (2) the arrangements for testing information technology systems before live operations;
- (3) the procedures for problem management and system change;
- (4) the arrangements to monitor and report system performance, availability and integrity;
- (5) the arrangements (including spare capacity and access to back-up facilities) made to ensure information technology systems are resilient and not prone to failure;
- (6) the arrangements made to ensure business continuity in the event that an information technology system does fail;
- (7) the arrangements made to protect information technology systems from damage, tampering, misuse or unauthorised access; and
- (8) the arrangements made to ensure the integrity of data forming part of, or being processed through, information technology systems.

2.5.20

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The *FSA* may have regard to the arrangements made to keep clear and complete audit trails of all uses of information technology systems and to reconcile (where appropriate) the audit trails with equivalent information held by system users and other interested parties.



2.5A Guidance on Public Interest Disclosure Act: Whistleblowing

Application and Purpose: Application

2.5A.1 **G** This section is relevant to every *UK recognised body* to the extent that the Public Interest Disclosure Act 1998 ("PIDA") applies to it.

Purpose

2.5A.2 **G**

- (1) The purposes of this section are to:
 - (a) provide *UK recognised bodies* with *guidance* regarding the provisions of PIDA; and
 - (b) Encourage *UK recognised bodies* to consider adopting and communicating to workers appropriate internal procedures for handling workers' concerns as part of an effective risk management system.
- (2) In this section "worker" includes, but is not limited to, an individual who has entered into a contract of employment.

2.5A.3 **G** The *guidance* in this section concerns the effect of PIDA in the context of the relationship between *UK recognised bodies* and the *FSA*. It is not comprehensive guidance on PIDA itself.

Practical Measures: Effect of PIDA

2.5A.4 **G** Under PIDA, any clause or term in an agreement between a worker and his employer is void in so far as it purports to preclude the worker from making a protected disclosure (that is, "blow the whistle").

2.5A.5 **G** In accordance with section 1 of PIDA:

- (1) a "protected disclosure" is a qualifying disclosure which meets the relevant requirements set out in that section;
- (2) a "qualifying disclosure" is a disclosure, made in good faith, of information which, in the reasonable belief of the worker making the disclosure, tends to show that one or more of the following (a "failure") has been, is being, or is likely to be, committed:
 - (a) a criminal offence; or

- (b) a failure to comply with any legal obligation; or
- (c) a miscarriage of justice; or
- (d) the putting of the health and safety of any individual in danger; or
- (e) damage to the environment; or
- (f) deliberate concealment relating to any of (a) to (e);

it is immaterial whether the relevant failure occurred, occurs or would occur in the *United Kingdom* or elsewhere, and whether the law applying to it is that of the *United Kingdom* or of any other country or territory.

Internal Procedures

2.5A.6

G

- (1) *UK recognised bodies* are encouraged to consider adopting appropriate internal procedures which will encourage their workers with concerns to blow the whistle internally about matters which are relevant to the functions of the *FSA*.
- (2) In considering appropriate internal procedures, *UK recognised bodies* may find the *guidance* provided to *firms* in ■ SYSC 18.2.2G (2) and ■ SYSC 18.2.2G (3) helpful.

Link to fitness and propriety


2.5A.7


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In determining whether a *UK recognised body* is a fit and proper *person*, the *FSA* may have regard to any relevant factor including, but not limited to, how the *UK recognised body* and *key individuals* have complied with any relevant law (see REC 2.4.3 G (9)).



2.6 General safeguards for investors, provision of pre and post-trade information about share trading and suspension and removal of financial instruments from trading

- 2.6.1  Schedule to the Recognition Requirements Regulations, Paragraph 4(1)
The [UK RIE] must ensure that business conducted by means of its facilities is conducted in an orderly manner and so as to afford proper protection to investors.

- 2.6.2  Schedule to the Recognition Requirements Regulations, Paragraph 4(2)(aa)
Without prejudice to the generality of sub-paragraph [4(1)], the [UK RIE] must ensure that -
it has transparent and non-discretionary rules and procedures -
 - (i) **to provide for fair and orderly trading, and**
 - (ii) **to establish objective criteria for the efficient execution of orders;**

- 2.6.3  Schedule to the Recognition Requirements Regulations, Paragraph 4A
 - (1) **The [UK RIE] must make arrangements for-**
 - (a) **current bid and offer prices for *shares*, and**
 - (b) **the depth of trading interest in *shares* at the prices which are advertised through its systems,**
to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours, subject to the requirements contained in Chapter IV of the [MiFID Regulation] [(see REC 2.6.7 EU and REC 2.6.21 EU to REC 2.6.24 EU)].
 - (2) **If [a UK RIE] decides to give *investment firms* and *credit institutions* required to publish their quotes in *shares*-**
 - (a) **in accordance with Article 27 of [MiFID], or**
 - (b) **by the [FSA],**
access to the arrangements referred to in sub-paragraph (1), it must do so on reasonable commercial terms and on a non-discriminatory basis.

- (3) The [FSA] may waive the requirements of sub-paragraph (1) in the circumstances specified-
- (a) in the case of *shares* to be traded on a multilateral trading facility operated by the [UK RIE], in Article 29.2 of [MiFID] and Chapter IV of the [MiFID Regulation] [(see REC 2.6.10 EU and REC 2.6.13 EU)]; or
 - (b) in the case of *shares* to be traded on a *regulated market* operated by the [UK RIE], in Article 44.2 of [MiFID] and Chapter IV of the [MiFID Regulation] [(see REC 2.6.10 EU and REC 2.6.13 EU)].

2.6.4



Schedule to the Recognition Requirements Regulations, Paragraph 4B

- (1) The [UK RIE] must make arrangements for the price, volume and time of transactions executed in *shares* to be made available to the public as soon as possible after the time of the transaction on reasonable commercial terms, subject to the requirements contained in Chapter IV of the [MiFID Regulation] [(see REC 2.6.15 EU and REC 2.6.21 EU to REC 2.6.24 EU)].
- (2) If [a UK RIE] decides to give *investment firms* and *credit institutions* required to make public details of their transactions in *shares*-
- (a) in accordance with Article 28 of [MiFID], or
 - (b) by the [FSA],
- access to the arrangements referred to in sub-paragraph (1), it must do so on reasonable commercial terms and on a non discriminatory basis.
- (3) The [FSA] may permit [UK RIEs] to defer the publication required by sub-paragraph (1) in the circumstances specified, and subject to the requirements contained-
- (a) in the case of *shares* traded on a *multilateral trading facility* operated by [a UK RIE], in Article 30.2 of [MiFID] and Chapter IV of the [MiFID Regulation] [(see REC 2.6.18 EU)]; or
 - (b) in the case of *shares* traded on *regulated market* operated by [a UK RIE], in Article 45.2 of [MiFID] and Chapter IV of the [MiFID Regulation] [(see REC 2.6.18 EU)].
- (4) If the [FSA] permits [UK RIEs] to defer the publication required by sub-paragraph (1), those [UK RIEs] must ensure that the existence of and the terms of the permission are disclosed to users and members of their *facilities* and to investors.

2.6.5



Articles 29.2 and 44.2 of *MiFID* provide that the pre-trade transparency requirement can be waived based on market model or the size and type of orders. In particular this obligation can be waived in respect of transactions that are large in scale compared with normal market size for the share or type of share in question. Articles 30.2 and 45.2 of *MiFID* provide that publication of the details of transactions can be deferred based on their type or size. In particular this obligation can be deferred in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares.

2.6.6



Schedule to the Recognition Requirements Regulations, Paragraph 7E

The rules of the [UK RIE] must provide that the [UK RIE] must not exercise its power to suspend or remove from trading on a regulated market operated by it any financial instrument which no longer complies with its rules, where such step would be likely to cause significant damage to the interests of investors or the orderly functioning of the financial markets.

2.6.7



Article 17 of the MiFID Regulation

Pre-trade transparency obligations

- (1) **A ... market operator operating an MTF or a regulated market shall, in respect of each share admitted to trading on a regulated market that is traded within a system operated by it and specified in Table 1 of Annex II [(see REC 2.6.8 EU)], make public the information set out in paragraphs 2 to 6.**
- (2) **Where one of the entities referred to in paragraph 1 operates a continuous auction order book trading system, it shall, for each share as specified in paragraph 1, make public continuously throughout its normal trading hours the aggregate number of orders and of the shares those orders represent at each price level, for the five best bid and offer price levels.**
- (3) **Where one of the entities referred to in paragraph 1 operates a quote-driven trading system, it shall, for each share as specified in paragraph 1, make public continuously throughout its normal trading hours the best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices.**

The quotes made public shall be those that represent binding commitments to buy and sell the shares and which indicate the price and volume of shares in which the registered market makers are prepared to buy or sell.

In exceptional market conditions, however, indicative or one-way prices may be allowed for a limited time.
- (4) **Where one of the entities referred to in paragraph 1 operates a periodic auction trading system, it shall, for each share specified in paragraph 1, make public continuously throughout its normal trading hours the price that would best satisfy the system's trading algorithm and the volume that**

Pre-trade transparency obligations	
	would potentially be executable at that price by participants in that system.
(5)	<p>Where one of the entities referred to in paragraph 1 operates a trading system which is not wholly covered by paragraphs 2 or 3 or 4, either because it is a hybrid system falling under more than one of those paragraphs or because the price determination process is of a different nature, it shall maintain a standard of pre-trade transparency that ensures that adequate information is made public as to the price level of orders or quotes for each share specified in paragraph 1, as well as the level of trading interest in that share.</p> <p>In particular, the five best bid and offer price levels and/or two-way quotes of each market maker in that share shall be made public, if the characteristics of the price discovery mechanism permit it.</p>
(6)	A summary of the information to be made public in accordance with paragraphs 2 to 5 is specified in Table 1 of Annex II. [(see REC 2.6.8 EU)]

2.6.8



Table 1 of Annex II to the MiFID Regulation: Information to be made public in accordance with Article 17 (see REC 2.6.9EU)

Type of system	Description of system	Summary of information to be made public, in accordance with Article 17
continuous auction or order book trading system	a system that by means of an order book and a trading algorithm operated without human intervention matches sell orders with matching buy orders on the basis of the best available price on a continuous basis	the aggregate number of orders and the shares they represent at each price level, for at least the five best bid and offer price levels.
quote-driven trading system	a system where <i>transactions</i> are concluded on the basis of firm quotes that are continuously made available to participants, which requires the market makers to maintain	the best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices