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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, DRAFT 6.02.06
[Institutional Reference]

Draft

COMMISSION DIRECTIVE

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

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(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/EEC¹, and in particular Article 4(2), Article 13(10), Article 18(3), Article 19(10), Article Article 21(6), Article 22(3) and Article 24(5) thereof,

Whereas:

[General]

- (1) Directive 2004/39/EC establishes the general principles for a comprehensive 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 taking place on regulated markets, multilateral trading facilities (MTFs), or systematic internalisers, or outside those trading venues.
- (2) The rules for the implementation of the regime governing organisational requirements for investment firms performing investment 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

¹ OJ L 145, 30.4.2004, p. 1.

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 comprehensive 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 uniform level of investor protection 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 for investment firms as regards their authorisation and operation. Consequently, Member States and competent authorities should not add supplementary binding rules in those areas 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 have not been fully addressed by the Community legislation, and it should be strictly proportionate.
- (9) 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.
- (10) 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 the Directive, 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 the Directive by competent authorities.

[Definitions]

- (11) For the purposes of Articles 25(3), 28, 30 and 45 of Directive 2004/39/EC and of this Directive, the following should not be considered to be purchases and sales: securities financing transactions, the exercise of options or of covered warrants, and primary market transactions (such as issuance, allotment or subscription) in financial instruments falling within Article 4(1)(18)(a) and (b) of Directive 2004/39/EC.

[Organisational requirements]

- (12) For the purposes of the provisions of this Directive requiring an investment firm to establish, implement and maintain an adequate risk management policy, the risks relating to the firm's activities, processes and systems should include the risks associated with the outsourcing of critical or important functions or of investment services or activities. Such risks should include those associated with the firm's relationship with the service provider, and the potential risks posed where the outsourced activities of multiple investment firms or other regulated entities are concentrated within a limited number of service providers.
- (13) 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 is not likely to compromise their objectivity, would not be proportionate in the case of very small investment firms. However, they would only be disproportionate for larger firms in exceptional circumstances.
- (14) 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 Directive 95/46/EC on the protection of individual with regard to the processing of personal data and on the free movement of such data, and with national measures implementing that Directive.
- (15) 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.

- (16) 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.
- (17) For the purposes of the provisions of this Directive setting out conditions for outsourcing critical or important operational functions or investment services or activities, an outsourcing that would involve the delegation of functions to the extent that the firm becomes a letter box entity should be considered to undermine the conditions with which the investment firm must comply in order to be and remain authorised in accordance with Article 5 of the Directive.
- (18) The outsourcing of investment services and activities 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 outsourcing arrangements are 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.
- (19) 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.

[Conflicts of interest]

- (20) 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 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 stands to gain a benefit if there is not also a disadvantage to a client, or that one client to whom the firm owes a duty stands to make a gain or avoid a loss without there being a concomitant loss to another such client.
- (21) 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.
- (22) 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.

- (23) Investment firms should aim to identify and manage the conflicts of interest arising in relation to their various business lines under a comprehensive conflicts of interest policy. 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 undesirable. The purpose of such disclosure should be to give the client an opportunity to decide whether to continue his commercial relationship with the investment firm, in respect of the relevant investment services or wholly.

[Investment research]

- (24) Investment research should be a sub-category of recommendations as defined in Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.² Recommendations, as so defined, which do not constitute investment research as defined in this Directive are nevertheless subject to the provisions of Directive 2003/125/EC as to the fair presentation of investment recommendations and the disclosure of conflicts of interest.
- (25) A recommendation as defined in Article 1(3) of Directive 2003/125/EC which constitutes investment research should not be treated as a marketing communication for the purposes of the provisions of and under Directive 2004/39/EC regulating the provision by investment firms of information to clients.
- (26) 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.
- (27) 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.
- (28) 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

² OJ L 339, 24.12.2003, p. 73.

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.

- (29) Small gifts or minor hospitality below a level specified in the firm's conflicts of interest policy should not be considered as inducements for the purposes of the provisions relating to investment research.
- (30) 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.
- (31) Current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed.
- (32) The same requirements should apply to the substantial alteration of investment research produced by a third party as apply to the production of research.
- (33) Financial analysts and other persons involved in the production of investment research should not become involved in activities other than the preparation of investment research, including 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.
- (34) Without prejudice to the provisions of this Directive relating to the production or dissemination of 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.
- (35) 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 and their respective implementing measures.

[Inducements]

- (36) 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 client does not pay the investment firm for the advice or recommendations, and where the advice or recommendations are not biased as a result of the receipt of commission, is capable of enhancing the quality of the investment advice to the client.

[Information to clients]

- (37) This Directive does not cover requirements as to the form, content and performance of contracts for the provision of investment services.

- (38) This Directive sets out requirements for marketing communications which relate 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. This Directive is without prejudice to Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council³ and national legislation implementing it.
- (39) Nothing in this Directive requires competent authorities to approve the content and form of marketing communications. However, neither does it prevent them from doing so, insofar as any such pre-approval is based only on compliance with the obligation in Directive 2004/39/EC that information to clients, including marketing communications, should be fair, clear and not misleading.
- (40) 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.
- (41) 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, and a reference to the types of investment services provided by the firm, or to its fees or commissions.
- (42) 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 considered, whether or not the person who provides the information considers or intends it to be misleading.
- (43) 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.

³ OJ L 149, 11.6.2005, p. 22.

- (44) Investment firms should not be obliged 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, firms should be permitted to provide it either separately, as part of a marketing communication, or by incorporating the information in a client agreement.
- (45) In cases where an investment firm is required to provide information to a retail 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.
- (46) 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.
- (47) 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 trading⁴ 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.
- (48) 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.

[Suitability and appropriateness]

- (49) 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.

⁴ OJ L 345, 31.12.2003, p. 64.

- (50) 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.
- (51) 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 2004/39/EC 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).
- (52) 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 specific type of product or 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 suitability or appropriateness before beginning that service.
- (53) 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.

[Reporting requirements]

- (54) 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.
- (55) For the purposes of the provisions on reporting to clients and best execution, a reference to the nature of the order should be understood as referring to its status as a limit order, market order, or other specific type of order.

[Best execution]

- (56) 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 that policy with a view to obtaining the best possible result on an order-by-order basis. For retail clients this means obtaining the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution.

- (57) 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.
- (58) 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.
- (59) 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.
- (60) 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 to the retail client.
- (61) 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.

- (62) 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.
- (63) 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. Accordingly, without derogating from the obligation of the first firm to its client to deliver best execution, it is intended that the first firm should, when transmitting orders to other entities for execution, take all reasonable steps to select entities that are most likely to deliver the best possible result in the execution of those orders. An investment firm which transmits orders to another firm for execution should also monitor the execution quality delivered by the other firm and take the necessary steps to correct any deficiencies when they arise. Subject to the proper fulfilment of these duties, the first firm should be entitled to rely on the ability of the second firm to deliver best execution.
- (64) 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.

[Client order handling]

- (65) 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.
- (66) 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 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.

[Investment advice]

- (67) Advice about financial instruments given in a newspaper, journal, magazine or any other publication (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, provided that the giving of investment advice is not the principal purpose of the publication or broadcast.
- (68) 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.
- (69) 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 Directive 2004/39/EC, and consequently Directive 2004/39/EC and its protections apply to the provision of that recommendation.
- (70) The Committee of European Security Regulators, established by Commission Decision 2001/527/EC has been consulted for technical advice.
- (71) 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 and 8 of Chapter III and, to the extent they relate to those provisions, Chapter I and Section 9 of Chapter III and Chapter IV of this Directive shall apply to management companies in accordance with Article 5(4) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)⁵.

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;⁶
- (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 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) '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;
- (6) 'person with whom a relevant person has a family relationship' means any of the following:

⁵ OJ L 375, 31.12.1985, p. 3.

⁶ OJ L 339, 24.12.2003, p. 73.

- (a) the spouse of the relevant person or any partner of that person considered by national law as equivalent to a spouse;
 - (b) a 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 by the date of the personal transaction concerned;
- (7) ‘securities financing transaction’ has the meaning given in [the Implementing Regulation];
- (8) ‘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

Provision of information in a durable medium

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 by means of a website, provided that the following conditions are satisfied:

- (a) the person to whom the information is to be provided, when offered the choice between information on paper or in another durable medium and information by means of a website, must specifically choose the provision of the information in that form;
- (b) that person must be notified of the address of the website, and the place on the website where the information may be accessed;
- (c) the information must be provided accessible continuously by means of that website throughout a period sufficient to ensure that the person to whom the information is to be provided has a reasonable opportunity to inspect and reproduce it.

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 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 fully 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 to 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 entry into force 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.

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 the provisions of national law transposing 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 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 arrangements and procedures, including failures by the relevant persons to comply with such arrangements or follow such procedures.
2. Member States shall require investment firms, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of the investment services and activities undertaken in the course of that business, to establish and maintain a risk management function that operates independently and carries out the following tasks:
 - (a) implementation of the policy and procedures referred to in paragraph 1;
 - (b) provision of reports and advice to senior management in accordance with Article 9(2).

Where an investment firm is not required under the first sub-paragraph to 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 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 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 by virtue of an activity carried out by him on behalf of the firm:

- (a) entering into a personal transaction which meets either 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 24(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;
 - (c) a record is made 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 [UCITS] 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

(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.
3. Member States shall ensure that, when investment firms outsource critical or important operational functions or any other 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.

Article 14

(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 require investment firms to exercise due skill and 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;
- (f) the service provider must disclose to the investment firm any development that may have an 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 belonging to the investment firm or relating to its clients;
 - (k) where applicable, the investment firm and the service provider must establish, implement and maintain a contingency plan for disaster recovery and periodic testing of backup facilities.
2. 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.
 3. 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 they control the service provider or have the ability to influence its actions, and the extent to which the service provider is included in the consolidated supervision of the group.
 4. 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

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

Service providers located in third countries

In addition to the requirements set out in Article 14(1), 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.

Where those conditions 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.

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 the first paragraph.

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, 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 deposit 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 2000/12/EC 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)(d), a ‘qualifying money market fund’ means a collective investment undertaking authorised under Directive 85/611/EEC [UCITS], 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 either of the following, whether alone or in combination with the other:
 - (i) cash;
 - (ii) high quality money market instruments with a maturity or residual maturity that is no greater than one year, or with yield adjustments which are made regularly, and at least annually;

(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 or second highest available credit rating by each competent rating agency which has rated that instrument. An instrument that is not rated by any 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.

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 deposited 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.

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;
 - (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, or otherwise use financial instruments held in such an account for their own account or for the account of another client unless, in addition to the conditions set out in paragraph 1, at least one of the following conditions is met:

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

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

Article 20

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

Reports by external auditors

Member States shall require investment firms to ensure that their external auditors report at least annually to the competent authority of the home Member State of the firm on the adequacy of the firm's arrangements under this Chapter.

SECTION 4

CONFLICTS OF INTEREST

Article 21

(Articles 13(3) and 18(1) 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:

- (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 point (a) of that paragraph carry on those activities at a level of independence appropriate to the size and activities of the investment firm, and to the degree of risk entailed to clients.

For those purposes, they shall include such of the following as are necessary and appropriate for the firm to ensure the requisite level of independence:

- (a) effective procedures to prevent or control the exchange of information between relevant persons engaged in activities involving a risk of a conflict of interest

where the exchange of that information may harm the interests of one or more clients;

- (b) the separate supervision of relevant persons whose principal functions involve carrying out activities on behalf of, or providing services to, clients whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the firm;
- (c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
- (d) measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out investment or ancillary services or activities;
- (e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate investment or ancillary services or activities where such involvement may impair the proper management of conflicts of interest.

If the adoption or the practice of one or more of those measures and procedures does not ensure the requisite level 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. Where, in case of a specific conflict of interest, an investment firm is not reasonably confident that the measures adopted under its general conflicts policy could prevent the risk of damage to its clients it shall, in accordance with the Directive, disclose the general nature or source of the conflict of interest.
- 5. Member States shall ensure that disclosure to clients, pursuant to Article 18(2) of Directive 2004/39, is made in a durable medium and includes sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the investment or ancillary service in the context of which the conflict of interest arises.

Article 23

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

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

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

Article 24

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

Investment research

1. For the purposes of Article 25, ‘investment research’ means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:
 - (a) it is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;
 - (b) if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2004/39/EC.
2. A recommendation within the meaning of Article 1(3) of Directive 2003/125/EC that does not meet the conditions set out in paragraph 1 shall be treated as a marketing communication for the purposes of Directive 2004/39/EC and Member States shall require any investment firm that produces or disseminates the recommendation to ensure that it is clearly identified as such.

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

Article 25

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

Additional organisational requirements where a firm produces and disseminates investment research

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

interests may conflict with the interests of the persons to whom the investment research is disseminated.

2. Member States shall require investment firms covered by paragraph 1 to have in place arrangements designed to ensure that the following conditions are satisfied:
 - (a) financial analysts and other relevant persons must not undertake personal transactions or trade, other than as market makers 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, if that financial analyst or other relevant person has 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 be permitted to review a draft of investment research for the purpose of verifying the accuracy of factual statements made in that research 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 acting 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 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.

Member States shall permit an investment firm, for the purposes of point (b)(i), to disclose the essential terms of the commission arrangements 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 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 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 if less than 5 years, but not less than one year, or such longer period as the firm may decide, and which is based, in every case, 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 of a financial instrument, financial index or investment service, 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, financial indices or investment services 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 paragraph 4 must be complied with;
 - (c) the information must contain a prominent warning that the figures refer to simulated past 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) it must be based on or at least include a clear indication of net performance;
 - (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.
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 classification

1. Member States shall ensure that investment firms notify the client of its classification as a retail client, a professional client or an eligible counterparty in accordance with Directive 2004/39/EC.
2. Member States shall ensure that investment firms inform clients in a durable medium about any right that client has to request a different classification 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.

It shall be a matter for the investment firm whether to agree to a request from a client for a different classification resulting in treatment as a different class of client.

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 in a durable medium:
 - (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 in a durable medium

3. Member States shall require investment firms to provide professional clients with the information referred to in Article 32(5) and (6) in a durable medium and in good time before the provision of the service concerned.
4. 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 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.
5. 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.
6. 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.
7. 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.

8. If a professional client requests it, an investment firm shall provide that client with any type of information in a durable medium which the firm is required under Directive 2004/39/EC or this Directive to provide to a retail client.

Article 30

(the 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 the relevant investor compensation and deposit guarantee scheme which apply 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 and, where the client so requests, further details of that policy in a durable medium.
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 authorised 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 classification as either a retail client or a professional client. That description must explain, in sufficient detail, the nature of the specific type of instrument concerned, as well as the risks particular to that specific type of instrument.
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 those components interact.
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

(second 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, where possible, the terms of any security interest or lien which any person has or may have over the client's financial instruments or funds, or any right of set-off in relation to those instruments or funds.
7. An investment firm which proposes to enter into securities financing transactions in relation to financial instruments held by it on behalf of a retail client, or otherwise to use 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

(Article 19(2) and third and fourth indents 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 information is regarded as fair, clear and not misleading for the purposes of Article 19(2) of Directive 2004/39/EC if, in the case of information relating to units in a collective investment undertaking covered by Directive 85/611/EEC, that information is provided in a full prospectus, a simplified prospectus, or in an annual and half yearly report and that prospectus or report complies with Directive 85/611/EEC.
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 33 of that Directive is regarded as appropriate information for the purposes of the second indent of Article 19(3) of Directive 2004/39/EC.

However, Member States shall ensure that such a simplified prospectus is regarded as appropriate information for the purposes of the fourth indent of Article 19(3) of Directive 2004/39/EC only to the extent that it includes the information specified in Article 33 of this Directive.

Article 35

(Article 19(2) and (3) of Directive 2004/39/EC)

Information drawn up in accordance with Directive 2003/71/EC

Member States shall ensure that where a prospectus provided by an investment firm to a client has been approved by a competent authority in accordance with Article 13 of Directive 2003/71/EC, and the investment firm concerned is responsible under Article 6 of that Directive for the information included in that prospectus, that information is treated as satisfying the requirements laid down in Article 19(2) or (3) of Directive 2004/39/EC, as well as any related requirement under this Directive.

SECTION 3

ASSESSMENT OF SUITABILITY AND APPROPRIATENESS

Article 36

(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 that the client is able financially to bear the risk of any loss that the investment may cause.
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 37

(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 specific type of product or 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 38

(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, frequency of the client's transactions in financial instruments and the period over which they have been carried out;
 - (c) the level of education, 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 the 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 39

(the 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) 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 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.

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 confirming execution of the order 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.

2. In addition to the requirements under paragraph 1, Member States shall require investment firms to supply the client, on request, with information about the status of his order.
3. Member States shall ensure that, in the case of orders for a retail clients relating to units or shares in a collective investment undertaking which are executed periodically, investment firms either take the action specified in point (b) of paragraph 1 or provide the retail client, at least once every six months, with the information listed in paragraph 4 in respect of those transactions.
4. The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with Table 1 of Annex I to [the Implementing Regulation]:
 - (a) the reporting firm identification;
 - (b) the name or other designation of the client;
 - (c) the trading day;
 - (d) the trading time;
 - (e) the nature of the order;
 - (f) the venue identification;
 - (g) the instrument identification;
 - (h) the buy/sell indicator;
 - (i) the quantity;
 - (j) the unit price;
 - (k) the total consideration;
 - (l) a total sum of the commissions and expenses charged and, where the retail client so requests, an itemised breakdown;
 - (m) 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;
 - (n) if the client's counterparty was the investment firm itself or any person in the investment firm's group, the fact that this was the case unless the order was executed through a trading system.

For the purposes of point (j), 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 that facilitates anonymous trading.

5. The investment firm may provide the client with the information referred to in paragraph 2 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.
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 (e) and (g) to (j) where relevant, unless the client elects to

receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

3. In the case of retail clients, the periodic statement referred to in paragraph 1 shall be provided once every 6 months, except in the following cases:
 - (a) where the client so requests, the periodic statement must be provided every 3 months;
 - (b) in cases where paragraph 4 applies, the periodic statement must be provided at least once every 12 months;
 - (c) where the agreement between an investment firm and a retail client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.

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

However, the exception provided for in point (b) shall not apply in the case of transactions in financial instruments covered by Article 4(1)(18)(c) 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 no later than the first business day following that execution and containing the information referred to in Article 40(4).

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 or operate client accounts that include an uncovered open position in a contingent liability transaction, they also report to the 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 start 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 19(1) and 21(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 status of the client as retail or professional;
 - (b) the nature 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, a MTF, a systematic internaliser acting in its capacity as such, or a market maker or other liquidity provider.

2. An investment firm satisfies its obligation under Article 21(1) of the Directive to obtain the best possible result for a client to the extent that it executes an order following specific instructions from the client.
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.
4. Member States shall ensure that investment firms do not structure or charge their commissions in such a way as to discriminate unfairly between execution venues.
5. Before 31 October 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

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

Best execution: application to portfolio management and reception and transmission of orders

1. Member States shall require investment firms, when providing the service of portfolio management, to comply with obligations analogous to those imposed under Articles 21 and 22(1) of Directive 2004/39/EC when carrying out transactions that result from decisions to deal, as if references in those Articles to executing orders were references to carrying out transactions 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 obligations analogous to those imposed under Articles 21 and 22(1) of Directive 2004/39/EC when receiving and transmitting client orders, as if references in those Articles to executing orders shall be treated as references to transmitting orders to another entity for execution.

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 a durable medium and 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) of this Directive, 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.

3. Investment firms shall include in the execution policy 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.

SECTION 6

CLIENT ORDER HANDLING

Article 47

(Article 22(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 in advance about any material difficulty relevant to the proper carrying out of orders.
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

(Article 22(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 in aggregation with another client order unless the following conditions are met:
 - (a) it must be unlikely that the aggregation of orders 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 for the fair allocation of aggregated orders and transactions in sufficiently precise terms, and in particular in terms of how the volume and price of orders relates to how they will be allocated in each case.
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

(Article 22(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 23(1)(c).

3. Member States shall require investment firms to put in place procedures 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 durable medium, and in such a form and manner that the following conditions are met:
 - (a) the competent authority must be able 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.

SECTION 9

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

Article 52

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

Investment advice

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

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

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

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

Chapter IV

Final provisions

Article 53

Transposition

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

3. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 54

Entry into force

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

Article 55

Addressees

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the Commission

[...]

Member of the Commission