

EN

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**DRAFT COMMISSION WORKING DOCUMENT ON CONDUCT OF BUSINESS
RULES, BEST EXECUTION, CLIENT ORDER HANDLING RULES, ELIGIBLE
COUNTERPARTIES, CLARIFICATION OF THE DEFINITION OF INVESTMENT
ADVICE AND FINANCIAL INSTRUMENTS**

*Important note: This document is a working document of the Commission services for
discussion and consultation purposes.*

It does not purport to represent or pre-judge the formal proposals of the Commission.

Title I

General provisions

Article 1 *Subject Matter and Scope*

This Regulation lays down

Article 2 *Definitions*

For the purposes of this [Regulation], the following definitions will apply in addition to those contained in Directive 2004/39/EC:

1. “*commodity*”¹ means any goods² of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy ~~supplies~~ **such as electricity**;³:

~~2. “*delivery*” in relation to a commodity, or to an asset or right other than a commodity, means which ever of the following processes is most relevant to the case in question:~~

~~a) physical supply of the agreed quantity of the commodity to the buyer either directly or indirectly by means of a supply network⁴;~~

~~b) provision of a document (including a bill of lading, a warehouse warrant or an electronic document) giving ownership or rights in the nature of ownership to the agreed quantity of the commodity, asset or right;~~

~~c) the transfer by other means of ownership of the commodity, or of rights in the nature of ownership in relation to the commodity, including by notifying the operator of a supply network or other registrar of the recipient’s entitlement to receive or be recorded as the owner of the agreed quantity of the commodity, or of the asset or right;~~

¹ The following recitals will be added:

“The definition of a commodity should not affect other definitions of that term in national legislation and other community legislation. The tests for determining whether a contract shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes is only intended to be used for the purposes of determining whether contracts fall within section C(7) or C(10) of Annex I to the Directive.”

“A derivative contract relates to a commodity or to another factor where there is a direct link between that contract and the relevant underlying commodity or factor. For example, a derivative contract on the price of crude oil is a derivative contract relating to oil, while a derivative contract on the transportation costs for oil is a derivative contract relating to oil transportation costs not to oil. In the same way, a derivative that relates to a commodity derivative, such as an option on a commodity future, is a derivative relating to a derivative, although it still constitutes an indirect investment in commodities and should therefore still be regarded as a commodity derivative for the purposes of Articles 2(1)(i) and (k) of the Directive.”

~~² The following Recital will be added: “The concept of goods includes electricity”~~

³ The following Recital will be added: “The concept of commodity does not include services or other items that are not goods (such as currencies or rights in real estate) or that are entirely intangible.”

⁴ The following Recital will be added: “The concept of a supply network includes an energy supply network such as an electricity grid or gas pipeline system. It also includes a pool or similar arrangement whereby commodities, rights or assets may be supplied by one participant to another indirectly.”

3. "the Directive" means directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;⁵

4. "the Distance Marketing Directive" means directive 2002/65/EC of the European Parliament and of the Council 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC⁶;

5. "durable medium" ~~means on paper or has the meaning given by Article 2(f) of the Distance Marketing Directive (that is: "any other instrument means of recording text which enables which is easily accessible to the client consumer to store information addressed personally to him in a way accessible access to information for future reference for a period of time adequate for the purposes of the information and which and allows the unchanged reproduction of that text the information stored")~~;

In particular, an investment firm may comply with a requirement to provide information in a durable medium by making it available on a website provided that the following conditions are satisfied:

- a) the person to whom the information must be provided is notified of the address of that website, and the place on the website where the information may be accessed; and**
- b) the information is published continuously on that web site throughout a period sufficient to ensure that the person to whom the information must be provided has a reasonable opportunity to inspect it.**

6. "spot contract" means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made at a time that is **the longer of**

i) two business days; or

ii) the period generally accepted in the market for a commodity, asset or right as the standard delivery period.⁷ ~~having regard to the characteristics of the commodity, asset or right and the practices prevalent in the market for a commodity, asset or right of that kind, as soon as reasonably practicable after the contract is made;~~

~~7. "marketing communication" means any form of information communicated by or on behalf of an investment firm to the public that advertises, makes a recommendation in relation to, or is capable of acting as a solicitation regarding, investment services, financial instruments and/or where appropriate ancillary services.~~

~~For these purposes, information is issued to the public if it is designed for, directed at and/or addressed to, a number of people.~~

~~Information is not issued to the public if:~~

~~— it is directed at one specific person or group of persons acting jointly, unless it forms part of an organised marketing campaign; or~~

⁵ OJ L 145. 30/4/2004, p.1

⁶ OJ L 271, 9/10/2002, p.16

⁷ Insert a recital: **A contract should not be considered a spot contract whenever, irrespective of its explicit terms, there is an understanding between the parties thereto that delivery of the underlying is to be postponed and not to be performed within the longer of 2 business days or the shortest practical period.**

~~—it is only communicated by the investment firm to other members of its group, provided that the investment firm takes all reasonable steps to ensure that none of the recipients pass the communication to a person who is not a member of its group.~~

“carrying out”, in relation to an order, means the execution or the transmission for execution of that order by the investment firm, and includes an instruction by a portfolio manager to another person to execute or transmit the order;

Title II
Information to Clients and Potential clients⁸
Chapter 1
Information requirements

Article 3

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

In order to comply with the requirements imposed by Article 19(2) of the Directive to be fair, clear and not misleading, any information addressed to, or disseminated in such a way that it is likely to be received by, retail clients or potential retail clients, including a marketing communication shall **comply with the following conditions**.^{9 10}

- a) **it 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;
- b) **it shall** be presented in a way that:
 - i) 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; and
 - ii) ~~be presented in a way that~~ does not disguise, diminish or obscure important items, statements or warnings;
- [c] ~~not include or refer to simulated historic returns;~~ **it shall not include or refer to simulated historic returns [unless:**

⁸ Appropriate and proportionate information requirements should be established which take account of the status of a client as either retail or professional. The objective of the Directive 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 no specific information requirements be included in this [Regulation] with respect to professional clients. Those clients should 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.

⁹ Insert new recital: **“The conditions specified in Article 3 should apply to marketing communications intended for retail clients only where appropriate and proportionate taking into account the means of communication, and the information that the marketing communication intends to convey to the clients or potential clients. In particular, it would not be appropriate to apply the obligations under this article to marketing communications which contain no specific recommendation or which contain one or more of the following: the name of the firm, a logo, a contact point, a brief factual description of the firm’s investment services, fees and commissions or financial instruments.”**

¹⁰ Insert new recital: **“Competent authorities should not be obliged to pre-approve the content and form of marketing communications.**

(i) those returns are based on the performance of one or more recognised equity or debt securities indices over a reference period of at least one year, and]

(ii) the information includes an express statement that the returns are simulated and that there is no guarantee of future performance;

d) **where the information** ~~only~~ compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services ~~if~~:

i) the comparison is ~~relevant~~ **shall be meaningful** and is presented in a fair and balanced way,

ii) the sources of the information used for the comparison ~~are~~ **shall be** specified, and

iii) the **key facts and assumptions** material to the result of the comparison ~~are~~ **shall be** included;

[e) where it contains indication of past performance of a financial instrument or an investment service **it shall**:

i) not include that indication as the most prominent feature of the communication,

ii) include performance information which covers the previous five years (or the whole period if the financial instrument has been offered for less) based on complete 12-month periods;

iii) clearly state the reference period and the source of information;

iv) contain a prominent warning that the figures refer to the past and that past performance does not provide a reliable indicator of future results

v) where that 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, clearly state the currency and contain a warning that ~~gains accruing to the investor~~ **the return** may be ~~diminished or lost~~ **increase or decrease** in the process of currency conversion;

vi) where the information is based on gross performance, disclose the effect of commissions, fees or other charges;]

f) if it contains information on ~~forecasted~~ future performance, **it shall**:

i) [not be based on or refer to simulated historic returns;]

ii) be based on objective and reasonable assumptions;

iii) be based on or at least include a clear indication of net performance

iv) contain a prominent warning that such forecasts do not provide a reliable indicator of future performance;

g) if it refers to a particular tax treatment, **it shall** prominently state that the tax treatment depends on the individual circumstances of each client ~~and may be subject to change~~;

h) **it 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 4

General requirements for information to retail clients

1. **Subject to paragraph (3) below**, when dealing with a retail client or a potential retail client an investment firm shall provide the information required by Article ~~19(3)~~ **5** of **this Directive / Regulation** ~~the Directive~~, and the terms and conditions of any client agreement, to ~~that retail client or potential retail client~~ **that retail client or potential retail client** in a durable medium and in good time before the ~~retail client~~ **retail client** is bound by any agreement¹¹ to which the information relates ~~or before the provision of investment services.~~¹².

2. **Subject to paragraph (3) below**, when dealing with a retail client or a potential retail client an investment firm shall provide the information required by Articles 6 to 8 of this Directive / Regulation to that client or retail client in a durable medium and in good time before the provision of the service.¹³. ~~2.~~ **The investment firm may provide the information required by Articles 5 of this Directive / Regulation to a retail client after that client is bound by any agreement, or the information required by Articles 6 to 8 after the provision of the service if:**

(a) **an agreement is concluded at client's request using a means of distance communication which prevents the firm from providing the information in accordance with paragraph (1); and**

(b) **(in any case where Article 3(3) of the Distance Marketing Directive does not otherwise apply) the investment firm complies with the requirements of that Article in relation to the retail client or prospective retail client, as if that client or retail client were a 'consumer' and the investment firm were a 'supplier' for the purposes of that Directive.**

~~By way of derogation from paragraph (1), an investment firm may provide a retail client with the information required by Articles 5 to 8 and the terms and conditions of the client agreement after the commencement of the investment or ancillary service if the conditions of Article 5(2) of directive 2002/65/EC are satisfied.~~

3. An investment firm shall notify a retail client in good time about any material change to the information provided under Articles 5 to 8 which is relevant to a service which the firm is providing to that client. That notification shall be given in a durable medium.

4. Information contained in marketing material shall be consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services.

¹¹ ~~Insert new Recital: When a firm provides investment advice to a client, the information about the type of financial instrument to which the order relates may instead be provided at the time the recommendation is made~~

¹² Include two recitals:

“In determining what constitutes the provision of information sufficiently in advance of the commencement of a service to enable a client or potential client to review and understand the information, an investment firm may have regard to the urgency of the situation and the time necessary for the client to absorb and react to the specific information provided. 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.

“Investment firms are not obliged to provide all the information under Articles 6 to 9 immediately and at the same time provided that they comply with the general obligation to provide the relevant information sufficiently in advance before starting the provision of investment services. They may provide the information either separately, as part of a marketing communication, or by incorporating the information in the client agreement.”

¹³ Insert new recital: **“Each transaction in respect of the same type of financial instrument is not to be considered as a different provision of services for the purposes of this article”.**

5. Where a marketing communication contains:

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

(ii) 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,

and specifies the manner of response or includes a form by which any response may be made, it shall include such of the information mentioned in Articles 5 to 8 of this Directive / Regulation as is relevant to that offer or invitation.

However, the requirements of this paragraph do not apply to a marketing communication if, in order to respond to an offer or invitation contained in the communication [the retail client or potential retail client] / [the recipient] must refer to another document.

Article 5

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

1 In complying with its obligations under Article 19(3) of the Directive, the information **that the investment firm shall provide** ~~provided~~ to the **retail** client or potential retail client shall include, where **relevant, applicable** the following general information:

a) the name and address of the investment firm, and the contact details necessary to enable those 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, 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 firm is acting through a tied agent, a statement of this fact **and the Member State in which that agent is registered or from which that agent operates;**

[f] where the firm is acting through any other representative established in the Member State in which the client or potential client is resident, **the identity and business address of that representative and the capacity in which that representative is acting in relation to the client;**

g) 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 the Directive;

h) if the firm holds client assets, a summary description of the steps an investment firm takes to ensure the protection of client assets, including **summary** details of the relevant investor compensation ~~scheme~~ and deposit guarantee scheme, which apply to the firm by virtue of its activities in a Member State;

[i] a general description [which can be provided in summary form] of the conflicts of interest policy maintained by the firm in accordance with Article 21 of []; **The investment firm shall make available on its website its full details of its conflicts of interest policy.**

j) 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 the Directive.

~~k) any time limitations on the period for which the information provided under this Article and Articles 5 to 8 is valid.~~

2. Where an investment firm provides or proposes to provide portfolio management services to a retail client or potential retail client, in complying with Article 19(3) of the Directive the firm shall, in addition to the information required by paragraph (1), provide the client with the following information, where applicable:

~~[a) the types of financial instruments that may be included in the client portfolio and types of transactions that may be carried out in such instruments, including any limits;¹⁴]~~

a) 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 assets in the client's portfolio, where relevant;

~~[d) the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion];~~

c) ~~where appropriate,~~ a specification of any benchmark against which the performance of the portfolio will be compared.

3. **Where an investment firm provides or proposes to provide portfolio management services to a retail client or potential retail client, in complying with Article 19(3) of the Directive the firm shall, in addition to the information required by paragraphs (1) and (2), provide the client with [a summary of] such of the following information as is included in any agreement between the firm and the client:**

a) the types of financial instruments that may be included in the client portfolio and types of transactions that may be carried out in such instruments, including any limits;¹⁵]

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

¹⁴ Recital: Such information shall state whether investment firm is mandated to invest in financial instruments not admitted to trading on a regulated market, derivatives, illiquid or highly volatile instruments; or to undertake short sales, purchases with borrowed funds, securities repurchase or lending agreements, or any transactions involving margin payments, deposit of collateral or foreign exchange risk.

¹⁵ Recital: Such information shall state whether investment firm is mandated to invest in financial instruments not admitted to trading on a regulated market, derivatives, illiquid or highly volatile instruments; or to undertake short sales, purchases with borrowed funds, securities repurchase or lending agreements, or any transactions involving margin payments, deposit of collateral or foreign exchange risk.

Article 6
Information about financial instruments

1. Where , in accordance with the obligation under the second tiret of Article 19(3) of the Directive, an investment firm provides information about a **type of financial instrument** ~~which falls within Article 4(1)(18)(c) or any of paragraphs (4) to (10) of Annex I, section C of the Directive to a retail client or potential retail client, the guidance and warnings required by that tiret shall include an explanation and risk warning concerning any of the following features that are relevant to that instrument:~~ **to a client or potential client, the investment firm shall provide to the client or potential client** a general description of the nature and risks of the type of financial instrument in question. That ~~the~~ description **shall be** is sufficiently detailed to enable the client or potential client to understand the nature and specific risks of the particular instruments which are the subject matter of the information,¹⁶ **taking into account, in particular, the client’s status as either a retail or a professional client.**

The description of risks shall include, where relevant [to the instrument in question and the status and level of knowledge of the client]¹⁷:

- a) the risks associated with instruments of that type, 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 financial commitments and other additional obligations, including any contingent liabilities, additional to the cost of acquiring the instruments, as a result of transactions in such instruments;
- d) any margin requirements or similar obligations, applicable to instruments of the type in question.

~~The requirements of this paragraph are met if the investment firm provides a general description of the nature and risks of the type of financial instrument in question, provided that the description is sufficiently detailed to enable the retail client or potential retail client to understand the nature and specific risks of the particular instruments which are the subject matter of the information addressed to him.~~

2. In the case of instruments that incorporate a guarantee by a third party, the information about the guarantee shall include ~~details about the guarantor and about the terms and conditions and scope of the guarantee~~ **sufficient detail about the guarantor and the**

¹⁶ ~~Insert new recital: “Relevant risks that the client should be informed about are the leverage and its effects, the risks of losing the entire investment, the volatility of the price of the instrument, its lack of liquidity, the fact that an investor might assume financial commitments and other additional obligations, including any contingent liabilities, additional to the cost of acquiring the instruments, as a result of transactions in such instruments and any margin requirements or similar obligations, applicable to instruments of the type in question.~~

¹⁷ Insert a recital: **Where a financial instrument is composed of two or more different financial instruments or services, and where the risks associated with such a compound product are likely to be greater than the risks associated with each component instrument, an investment firm should provide an adequate description of the component parts of the compound product as well as the way in which the component parts interact.**

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

Article 7

Information about costs and associated charges

1. In complying with its obligations under Article 19(3) of the Directive, an investment firm shall ensure that the information it provides to its retail clients and potential retail clients includes, where **relevant applicable**, the following information:

a) **the total price to be paid by the client to the supplier in connection with the financial instrument or the investment service** ~~the basis for the calculation of the price to be paid, including all related fees, commissions, charges and expenses, and all taxes payable via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it.~~ ~~via the investment firm in connection with the financial instrument or the investment service that is being offered. This information shall include, in particular:~~

i) ~~notice of the possibility that, in addition to the fees charged by it, the investment firm may recover from the retail client expenses, charges or other costs incurred by the investment firm or another person and, where this is the case, notice that the investment firm will provide the retail client with the relevant details of such expenses, charges or other costs on request;;~~

ii) ~~the rates applicable, , and the frequency with which they are applied;~~

iii) ~~where the commissions and fees are to be paid in foreign currency, the currency involved;~~

[b) notice of the possibility that other taxes, related to transactions in connection with the financial instrument or the investment service, and / or costs may exist that are not paid via the supplier or imposed by him;]

[c) where the retail client or potential retail client has agreed to participate in any securities financing transactions , the basis on which he will benefit from such participation;]

d) the arrangements for payment.

Article 8

Information requirements concerning safeguarding of client assets

1. In complying with Article 19(3) of the Directive, an investment firm **which holds financial instruments or funds belonging to retail clients** shall, where **relevant applicable**, ~~additionally~~ provide the following information to retail clients and potential retail clients.

2. Where a client's assets may be held by a third party on behalf of the investment firm, the investment firm shall inform the client of this fact and of the responsibility **of** the investment firm ~~accepts~~, in accordance with the applicable national law, for any acts or omissions of the third party or the consequences for the client of the insolvency of the third party.

3. Where the client's financial instruments may, in accordance with national law, be held on an omnibus basis by a third party, the investment firm shall inform the client of this fact ~~and provide him with a description of any resulting risks.~~

4. Where, by reason of ~~local market practices~~ **national law**, it will not be legally possible or practicable 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, an investment firm shall inform the client of this fact and include a prominent warning of the resulting risks.

5. If assets belonging to a client or potential client are or will be subject to the law of a jurisdiction other than ~~that of a the Member State in which the client is resident~~, information provided under this Article shall state that fact, **indicate that the rights of the client or potential client relating to those assets may differ accordingly, and give an undertaking that a description of those rights, including any applicable investor compensation or similar schemes, will be provided on request.**

6. An investment firm shall inform the client about the terms of any security interest or lien it has taken over, or any right of set off it holds in relation to, the client's assets.

7. Where applicable, the investment firm shall notify the client of the fact that a third party may have a security interest or lien over, or right of set-off in relation to, the client's assets,

Article 9

Content of marketing communications

~~1. An investment firm shall take all reasonable steps to ensure that the information contained in its current marketing communications is in conformity with any information the firm provides to clients in the course of carrying on investment and ancillary services.~~

~~2. Where a marketing communication which is addressed to, or disseminated in such a way that it is likely to be received by, retail clients or potential retail clients~~

~~a) refers to a particular financial instrument or type of financial instrument, or to an investment or ancillary service, it shall also include a precise and balanced description of the main characteristics and the risks of the instrument or service in question; or~~

~~b) contains a direct offer in relation to provide a particular service or a direct offer in respect of a particular financial instrument it shall include, at least, such of the information mentioned in Articles 5 to 8 that is relevant to that offer.~~

~~[Article]~~

~~1. In complying with the obligation in Article 19(2) of the Directive, an investment firm must ensure that:~~

~~i) the content, presentation and method of distribution of a marketing communication that is addressed to or directed at persons who include (or are likely to include) retail clients or potential retail clients is appropriate for the needs of the target audience, taking account of:~~

~~— (a) the target audience's likely understanding and knowledge of any financial instrument or investment service that is being promoted;~~

~~—— (b) — the amount of information given in the marketing communication and its role in the sales process;~~

~~—— (c) — the nature and risk of the financial instrument or investment service being promoted and the nature of the financial commitment involved; and~~

~~ii) — a direct offer marketing communication contains any information required under Article 19(3) of the Directive in relation to the investment services and/or financial instruments to which it relates.~~

~~2. — An investment firm (“A”) may distribute a marketing communication in writing or in a pre-recorded format through television, radio or another such medium without having to comply with the requirements under Article 19(2) of the Directive where that marketing communication was issued or approved by another investment firm or person regulated by a competent authority in a Member State (“B”) if:~~

~~(a) A takes reasonable care to ensure that B has confirmed that the marketing communication complies with the requirements that would have applied had A confirmed compliance itself and was subject to the same requirements in doing so;~~

~~(b) so far as A is or reasonably should be aware, B has not since withdrawn the marketing communication and it has not ceased to comply with those requirements; and~~

~~(c) A takes reasonable care only to communicate the marketing communication to recipients of the type envisaged by B when confirming compliance.]~~

Title III Provision of investment services

Article 10 *Assessment of client suitability and appropriateness*

1. In discharging its duty under Article 19(4) of the Directive, an investment firm shall **obtain from** ~~ask the client to provide~~ such information as is necessary for it 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 recommended, or entered into in the course of providing a portfolio management service:

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

b) is such that the client is able financially to bear ~~the risk of any loss that the investment may cause, in particular if the transaction is financed with loans or involves leveraged transactions requiring margin calls~~ **investment risks within the margins of the investment objectives**; and

c) 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 the portfolio.

2. For the purposes of Article 19(4) and, where relevant, Article 19(5) of the Directive, an investment firm shall be entitled to assume that professional clients:

a) accurately convey their ~~needs and~~ objectives to the investment firm for the purposes of subparagraph (1)(a);

b) are **[in the case of investment advice]** able financially to bear the risk of any loss that the investment may cause, for the purposes of sub-paragraph (1)(b); and

c) have the level of experience and knowledge mentioned in sub-paragraph (1)(c) above, in relation to those products, transactions and services for which they are classified as professional clients 18.

For the purposes of Article 19(4) of the Directive, information regarding the financial situation of a client or potential client may include (but is not restricted to) information on his financial situation, the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

3bis. For the purposes of Article 19(4) of the Directive, information regarding the investment objectives of a client or potential client may include (but is not restricted to) information on the length of time for which the client wishes to hold the investment, his preferences regarding risk taking (risk profile), and the purposes of the investment.

4. For the purposes of Articles 19(4) and (5) of the Directive, information regarding a client's or potential client's knowledge and experience in the investment field may include information on:

a) the types of services, transactions and financial instruments 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; and

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

4bis. The extent of the information to be requested under Article 19(4) or (5) of the Directive depends on 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 in them **and the nature of the client.**

~~[4. — In order to discharge the duty under article 19 (5) of the Directive, the Investment Firm shall assess the appropriateness of the investment service or product on the basis of the investment parameters which include the type of instruments, types of transactions and orders, of which the client has sufficient knowledge or experience]~~

5. Where a client or potential fails to provide all the information required under Article 19(4) of the Directive, the investment firm shall in no circumstances be considered as having the necessary information so as to enable it to recommend to that client or potential client the investment services and financial instruments that are suitable for him.

6. 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 the Directive¹⁹.

¹⁸ Insert this recital: An envisaged transaction, product or service shall be deemed to be appropriate for the purpose of Article 19 (5) of the Directive to the extent that the client is classified as a professional client in relation to the envisaged transaction, products or service.

¹⁹ Insert new recital: **“An envisaged transaction may be considered unsuitable for the client or potential client because of the risks of the financial instruments involved, the type of transaction, the characteristics**

7. An investment firm shall be entitled to rely on the information provided by the clients or potential clients unless it is manifestly inaccurate or incomplete.

Article 11
Provision of services in non-complex instruments

For the purposes of the first tiret of Article 19(6) of the Directive, a **type of financial instrument** ~~which is not specified in that tiret will~~ **shall** be considered as non-complex if:

a) it does not fall within Article 4(1)(18)(c) or any of paragraphs (4) to (10) of Annex I, section C of the Directive;

b) there are frequent opportunities to dispose of, redeem, or otherwise realise it at prices that are publicly available to the market participants; and

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

d) adequate information on its characteristics is publicly available and is likely to be understood by the average retail client.

Title IV
Reporting to clients

Article 12
Reporting obligations in respect of execution of orders

1. **When an investment firm that has carried out** ~~executes an~~ orders on behalf of its a clients ~~or transmits orders of the client~~ **it shall when carrying out an order for a client,** provide him promptly with the essential information in a durable medium concerning the execution of the order.

In the case of a retail client, ~~this will mean that it~~ **the firm** shall send to him a notice confirming the execution of the order no later than the first business day following that execution or if the confirmation is received **by the investment firm** from a third party no later than the first business day following receipt of the confirmation from the third party.

This paragraph does not require an investment firm to provide a confirmation which would contain the same information as a confirmation that is to be promptly dispatched to the client by another person.

This Article does not apply where orders are executed in the context of portfolio management, in which case Article 14 applies.

2. An investment firm shall supply a client with information about the status of his order on request.

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”.

3. A notice mentioned in paragraph (1) which is sent to a retail client shall include **where relevant** [*where it exists*] the following information:

a) the name of the investment firm, and the name or other designation of the retail client's account;

b) the date and exact time of execution, or, **where an order is executed on an open outcry market and it is not practicable to record the exact time of execution, the date and time period in which the execution took place provided that this is in accordance with the rules of the market** ~~where the time of execution is not available, a statement that it will be supplied on request;~~

c) the nature of the order and the execution venue[as defined in document 20] where the transaction was carried out;

d) the financial instrument and the quantities involved in the transaction;

e) the unit price applied and the total consideration. Where the order is executed in tranches, the investment firm can choose to supply the client with information about the price of each tranche or the average price. In the latter case the investment firm shall supply the client with information about the price of each tranche upon request;

f) a total sum ~~and itemised breakdown~~ of the commissions and expenses charged. **An itemised breakdown shall be provided on request;**

g) 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.

h) 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 an anonymous trading system.

4. If the order relates to units or shares in a collective investment undertaking and is executed periodically, an investment firms shall be exempt from the obligation to send confirmation notice after it has carried out each periodic order provided that it provides the client with the information required by paragraph (3) in respect of those transactions at least every 6 months.

Article 13

Reporting obligations in case of portfolio management

1. An investment firm that carries out the service of portfolio management shall provide the clients for whom it carries out that service with periodic statements in a durable medium of the activities carried out on behalf of the client, **unless the client is a professional client and the firm and the client have agreed otherwise in writing.**

2. A statement required by paragraph (1) which is provided to a retail client shall include **where relevant:**

a) the name of the investment firm and the name or other designation of the retail client's account;

- b) a statement of the contents and the valuation of the portfolio, including details of:
- i) each financial instrument held, its market **or fair value if market value is unavailable** and the cash balance at the beginning and at the end of the reporting period; and
 - ii) the performance of the portfolio during the reporting period;
- c) the total amount ~~and an itemised breakdown~~ of fees and charges incurred during the reporting period; including a comparison against the benchmark agreed in the contract (if any). **An itemised breakdown shall be provided on request**
- d) the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio
- e) information about other corporate actions giving rights in relation to financial instruments held in the portfolio.
- f) for each transaction executed during the period, the information referred to under Article 13(3)(b) (c) and (d).

3. A statement required by paragraph (1) shall be provided to retail clients at least every ~~6~~ **3** months, unless **a different period is agreed in writing with a retail client, in which case the minimum period shall be every 3 months and the maximum period shall be every 12 months** ~~the client requests receipt every six months.~~

4. **A statement required by paragraph (1) shall contain the information required under Article 13.3 in respect of each order carried out by the investment firm on behalf of its client during the reporting period, unless the client elects to receive that information on a transaction by transaction basis in which case:** ~~A client may opt to receive information on each transaction at the moment when it is executed by the portfolio manager. If a client chooses this option –~~

a) the investment firm shall, on the execution of a transaction by the portfolio manager, provide the client promptly with the essential information concerning the transaction in a durable medium and, in the case of a retail client, send to him a notice confirming the transaction no later than the first business day following that execution and containing the information referred to in Article 13.3 **in accordance with Article 13;**

b) by way of derogation from paragraph (3), the statements required by paragraph (1) shall be provided to retail clients at least every ~~6~~ **12** months. The statement need not include the information provided for under paragraph 2(f)

However, this derogation is not available in relation to transactions in financial instruments falling within Article 4(1)(18)(c) or any of paragraphs (4) to (10) of Annex I, section C of the Directive.

5. By way of derogation from paragraphs (3) and (4), where the retail client agreement for a portfolio management service authorises a leveraged portfolio, the statement required by paragraph (1) shall be provided at least once a month.

6. In addition to the requirement under paragraph (1), if an investment firm provides portfolio management transactions or operates client accounts that include an uncovered open position in a contingent liability transaction, it shall report to the client any losses exceeding a

predetermined threshold agreed between the firm and the client no later than the end of the business day (or at the start of the business day next following the non-business day) in which the threshold is exceeded.

Article 14 *Statements of client assets*

1. An investment firm that holds client assets shall, at least once a year, send ~~a statement of client assets~~ to each client for whom it holds assets, a statement of those client assets unless the same information has been provided in any other periodic statements. The statement shall be sent in a durable medium.

This obligation does 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 mentioned in paragraph (1) shall:

- a) include details of all the assets held by the investment firm for that client;
- b) specify any benefit that has accrued to the client by virtue of participation in any securities financing transactions.
- c) identify any such client assets that have been lent

3. The information included in the statement may be based either on trade or on settlement date provided that the same basis is applied to all information in the statement.

4. An investment firm which holds assets and carries out the service of portfolio management for a client may include the statement required by paragraph (1) in a statement it is required to provide to that client by Article 14(1).

Title VI **Eligible Counterparties**

Article 15 *Eligible counterparties*

For the purposes of Article 24(3) of the Directive, the pre-determined requirements, including quantitative thresholds, which will allow Member States to recognise an undertaking as an eligible counterparty are that the undertaking meets two of the following size requirements on a company basis:

- balance sheet total: EUR 20 000 000
- **annual** net turnover: EUR 40 000 000
- own funds: EUR 2 000 000.

Once it has verified that the criteria mentioned in paragraph (1) are met by the undertaking the investment firm shall promptly notify the undertaking ~~in writing~~ of the new classification, specifying any limitations that **may** apply ~~to the classification~~ **and inform the**

undertaking of any protection it will lose under such classification to as a result of the new classification.

For the purposes of Article 24(3) of the Directive, Member States may also recognize as eligible counterparties other undertakings which request that status, provided that ~~the relevant~~ **any such undertaking has been classified may be treated** as a professional client under Annex II Section II of the Directive **and it is recognised as an eligible counterparty only in respect of the services or transactions for which it could be treated as a professional client.**

Title VII Investment advice

Article 16 Investment advice

1. For the purposes of the definition of ‘investment advice’ in Article 4(1)(4) of the Directive, a recommendation is a personal recommendation if **it 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), and:**

a) it is presented as suitable for, or based on a consideration of the ~~person~~ circumstances of, that person; and

b) it constitutes a recommendation to:

i) buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument [~~or type of financial instrument~~]; or

ii) exercise or not exercise any right conferred by a particular financial instrument [~~or type of financial instrument~~] to buy, sell, subscribe for, exchange, or redeem a financial instrument.

However, a recommendation issued by a ‘promotore finanziario’ which refers to a particular financial instrument or a type of financial instrument shall be considered as investment advice for the purposes of this Regulation/Directive.

2. A recommendation is not a personal recommendation if it is **issued generally to the public or a sector of the public.** ~~intended for distribution channels or for the public~~

Title VIII Best execution

Article 17 Best Execution – relative importance of the factors

1. Subject to paragraph (2), when executing a client order, an investment firm shall take into account the following criteria for determining the relative importance of the factors listed in Article 21(1) of the Directive with a view to obtaining the best possible result for the client:

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; and
- d) the characteristics of the execution venues to which that order can be directed.

2. An investment firm satisfies its obligation under Article 21(1) of the Directive to obtain the best possible result for their clients when it executes an order following specific instructions from the client, in accordance with that paragraph.

3. ~~Without prejudice to Article 21(1)~~ In the absence of specific instructions from a client, when an investment firm executes an ~~market~~ order on behalf of a retail client, it shall take the necessary steps to ensure that it achieves the best possible result in terms of ²⁰ the most important factor for determining the best possible result as required by Article 21(1) ~~shall be~~ the total consideration, representing the price of the financial instrument and the costs related to execution~~24~~).

4. The costs related to execution mentioned in paragraph (3) shall include –

(a) all expenses incurred by the client which are directly related to the execution of the order, including exchange fees, settlement fees and any other fees paid to intermediaries involved in the execution of the order; and

(b) the commission charged to the client by the firm.

5. In order to comply with Article 21(2) investment firms shall not use their own commissions to discriminate between execution venues.

6. In order to enable investment firms to identify those execution venues that will [or are likely to] deliver the best possible result for their clients for the purposes of Article 21(1), execution venues shall make available to the public on a reasonable commercial basis data relating to the quality of execution of transactions on that venue on at least an annual basis. The Committee of European Securities Regulators shall establish the content and the format of the data to be made available in accordance with the previous sentence with the view of their comparability by [31 October 2006].

Article 18

Best Execution – scope

1. Investment firms that provide the service of reception and transmission of orders or portfolio management, but do not execute client orders shall exercise due skill, care and diligence when selecting the investment firms to execute their client orders.

²⁰ When executing retail client orders in the absence of specific client instructions, an investment 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 inasmuch as they are instrumental in delivering the best possible result to the retail client as specified in Article 17.

²¹ Insert the following recital: “Cost factors relevant to determining best execution shall include all expenses incurred by the client directly related to the execution of the order, including exchange fees and settlement fees. They shall exclude the commissions and fees charged by the investment firm to its clients”.

The preceding paragraph does not lessen or remove any obligation that applies to an investment firm by virtue of Article 19(1) of the Directive, or of Article 21(1) of the Directive where the firm retains any discretion in respect of the execution of client orders.

2. Member States shall require **as appropriate** investment firms providing the service of portfolio management to comply with the obligations under Articles 21 and 22(1) of the Directive when carrying out decisions to deal on the basis that:

a) references in those Articles to executing orders shall be treated as references to carrying out decisions by the investment firm to deal in financial instruments on behalf of its client;

b) cross references shall be read accordingly.

2. Member States shall require investment firms providing the service the reception and transmission of orders to comply with the obligations under Articles 21 and 22(1) of the Directive when receiving and transmitting client orders on the basis that:

a) references in those Articles to executing orders shall be treated as references to the instructing another investment firm to execute or transmit orders for execution; and

b) cross references shall be read accordingly.

Article 19 *Execution policy*

In complying with the requirement in Article 21(4) of the Directive (and without limiting the general obligation under that paragraph to monitor the effectiveness of its order execution arrangements and policy and assess the venues in its execution policy on a regular basis), an investment firm shall, at least annually, review its execution arrangements and policy. An investment firm must also review its execution arrangements and policy whenever it becomes aware, or reasonably should have become aware, that a material change has occurred that affects its 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.

Article 20 *Information on best execution policy*

1. The information required to be provided by an investment firm to its retail clients under the second paragraph of Article 21(3) of the Directive ~~shall include a description of how the investment firm proposes to fulfil its duty under Article 21(1) of the Directive to obtain the best possible result for clients. That description shall be provided to retail clients in good time and in a durable medium~~ **prior to the provision of the service** and shall include:

a) an account of the relative importance the investment firm assigns to the factors cited in Article 21(1) of the Directive or the process by which the firm determines the relative importance of these factors; and

b) a ~~complete~~ list of the execution venues ~~included in the execution policy~~ **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.**

[2. **The investment firm shall include in [any statement or description of] its execution policy [made available to a client]** ~~If the investment firm accepts specific instructions from its clients that conflict with the firm's execution policy or arrangements,~~ a clear and prominent warning ~~shall be given to the client~~ that **any specific** such 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.]

Title IX **Client order handling rules**

Article 21 *General principles.*

1. In complying with Article 22(1) of the Directive, an investment firm shall:
 - a) ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;
 - b) carry out client orders sequentially and promptly unless the nature of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise;
 - c) inform its **retail** client in advance:
 - i) where relevant, that it may act on own account in relation to the carrying out of an order; and
 - ii) about any **significant** 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 assets received in settlement of that executed order are promptly and correctly delivered to the account of each relevant client.
3. An investment firm shall take all reasonable steps ~~not to [improperly] effect a transaction for its own account or the account of any of its relevant persons before those of clients in identical or better conditions than the latter~~ **to prevent the misuse of information relating to pending client orders by the firm itself or any of its relevant persons, in particular where such misuse would be detrimental to the interests of the relevant clients.**

Article 22 *Aggregation and allocation of orders*

1. In complying with Article 22(1) of the Directive, an investment firm shall not carry out [a client order (as defined in previous instrument)] in aggregation with another [client] order or with a transaction for own account unless all of the following conditions are met:
 - a) it is likely that the aggregation of orders will not work overall to the disadvantage of any client whose order is to be aggregated;

b) the investment firm has disclosed to each such client that the effect of aggregation may work to its disadvantage in relation to a particular order; and

c) it has established and effectively implements an order allocation policy that provides for the fair allocation of such orders and transactions **in sufficiently precise terms**.

2. When an investment firm aggregates an order with one or more other orders and the aggregated order is partially executed, it shall allocate the related trades in accordance with its order allocation policy.

Article 23

Aggregation and allocation of transactions for own account

1. In complying with Article 22(1) of the Directive, an investment firm which has aggregated a transaction for own account with one or more client orders shall not allocate the related trades in a way that is detrimental to a client.

2. Where an investment firm aggregates a client order with a transaction for own account and the aggregated order is partially executed, the related trades shall be allocated to the client in priority to the firm, unless 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. In the latter case, the transaction for own account may be allocated proportionally, in accordance with the principle set out in Article 23(2).

3. For the purposes of paragraph (1), an investment firm shall put in place procedures to prevent the reallocation of transactions for own account which are executed in combination with client orders in a way which **is detrimental to the client**²². ~~gives unfair preference to the investment firm or to any particular client.~~

Article 24

Record keeping of ~~orders~~ transactions

1. In complying with Article 22(1), immediately after an investment firm has executed a client order, it shall record the following details of the transaction:

a) the name or other designation of the client;

b) the name of the counterparty, if known;

c) the execution venue or venue in a third country where the order was executed;

d) the date and exact time of execution, or, where an order is executed on an open outcry market and it is not practicable to record the exact time of execution, the date and time period in which the execution took place provided that this is in accordance with the rules of the market;

e) the natural person **if any** who executed the transaction **or who is responsible for the execution**;

²² Insert new recital: “**Reallocation of transactions would be detrimental to a client if unfair precedence is given to the investment firm or to any particular client.**”

- f) the identification of the financial instruments involved in the transaction;
- g) the number and total value of financial instruments involved in the transaction; and
- ~~h) the nature of the transaction~~
- i) price and other significant terms.

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

- a) the name or other designation of the client whose order has been transmitted;
- b) the name or other designation of the person to whom the order was transmitted;
- c) the terms of the order transmitted; and
- d) the date and exact time of transmission.

*Article 25
Inducements*

1. In order to comply with the requirements of Article 19(1) of the Directive to act honestly, fairly and professionally in accordance with the best interests of the client, **and without prejudice to its obligations under Articles 13(3), 18 and 21 of the Directive** an investment firm shall not, in relation to the provision of an investment or ancillary service to a client, receive or offer any fee, commission or non-monetary benefit except:

- a) a fee, commission or non-monetary benefit paid or provided by a client; or
- b) a fee, commission or non-monetary benefit paid or provided by a third party, provided that:
 - (i) the existence, **nature** and amount of the fee, commission or benefit, or method of calculating that amount, is **clearly properly** disclosed to the client ~~and the client has given his consent to that payment or provision~~ prior to the provision of the relevant investment or ancillary service; and
 - (ii) the payment of the fee or commission, or the provision of the non-monetary benefit enhances the quality of the relevant service to the client and **does not** ~~is not likely to~~ impair compliance with the firm's duty to act in the best interests of the client.

2. The obligation in paragraph (1)(b) to make proper disclosure shall require disclosure that is comprehensive, accurate, understandable to the client ~~and [easily comparable with disclosure made for the same purpose by other firms]~~. In order to comply with that obligation, the firm may make a disclosure of commission arrangements in general terms, provided that it undertakes to disclose further details at the request of the client.

*Article 26
Characteristics of other derivative financial instruments*

1. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I of the Directive if it is entered into with or by the operator of an energy transmission grid or pipeline network, and:

(a) it is for the purpose of ensuring security of energy supplies, or

(b) it is necessary to keep in balance the supplies and uses of energy at a given time.

2. For the purposes of Section C(7) of Annex I of the Directive, a contract shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if **the contract is not a spot contract and each of the following conditions apply:**

~~a) [the contract is not a spot contract and at the time the contract is entered into it is more probable than not (having regard to the respective businesses of the parties, the express or implied terms of the contract, and the course of dealings in similar contracts, if any, between the parties) that the buyer will not make, or the seller will not take, delivery of the commodity, asset or right in question under the contract]; or~~

~~b) the contract is not a spot contract and at least [one] of the following conditions is met:~~

~~i) the contract is traded on [or its performance is enforced by] a regulated market, an MTF or a trading facility in a third country that is equivalent to a regulated market or an MTF, or the contract is expressed to be equivalent to any such contract;~~

~~ii) the contract is expressed to be traded on a regulated market, an MTF or an equivalent third country marketplace or trading facility or is expressed to be equivalent to such a contract;~~

~~iii) performance of the contract is enforced by a regulated market, an MTF or an equivalent third country marketplace or trading facility;~~

~~iv) the contract is cleared by a clearing house or equivalent, or there are arrangements for the payment or provision of margin in relation to the contract; and~~

~~v) there are arrangements for the payment or provision of margin in relation to the contract; or~~

~~vi) the contract is standardised and, in particular, the price, the lot, the delivery date or other terms are determined solely principally by reference to regularly published prices, to standard lots or standard delivery dates.~~

2. For the purposes of Section C(10) of Annex I of the Directive, a derivative contract mentioned in that Section will have the characteristics of other derivative financial instruments if:

a) it is settled in cash or may be settled in cash at the option of one or more of the parties (otherwise than by reason of a default or other termination event);

b) it is traded on a regulated market or an MTF; or

c) the conditions mentioned in paragraph (1) of this Article are satisfied in relation to the contract.

Article 27
Derivatives within Section C(10) of Annex I to the Directive

In addition to derivative contracts of a kind mentioned in Section C(10) of Annex I to the Directive, a derivative contract relating to any of the following will fall within that section if the other criteria set out in that section are satisfied in relation to it:

- a) telecommunications bandwidth;
- b) commodity storage capacity;
- c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;
- d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources;
- e) a geological, environmental or other physical variable;
- f) any other asset or right of a fungible nature (other than a right to receive a service) that is capable of being transferred; or
- g) an index or measure related to the price or volume of transactions in any asset, right, service or obligation.

Article 28
Entry into force

This Regulation shall enter into force on the [...] day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the Commission
[...]
Member of the Commission