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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

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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;³
2. “*compound product*” means a financial instrument which combines:
 - a) two or more different financial instruments, or
 - b) one or more financial instruments with an investment service or services;

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.”

3. “*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;
4. “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
5. “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;
6. “durable medium” has the meaning given by Article 2(f) of the Distance Marketing Directive (that is: “any instrument which enables the consumer to store information addressed personally to him 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”);
7. “*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, 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;
8. “transaction for own account” means a transaction concluded as a result of dealing on own account by an investment firm as defined by Art. 4 (1) (6) of the Directive.

Title II

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.”

⁵ OJ L 145. 30/4/2004, p.1

⁶ OJ L 271, 9/10/2002, p.16

Information to Clients and Potential clients⁷

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:

- a) be accurate and give a balanced description of the potential benefits and the risks involved;
- b) include a prominent notification of risks associated with the investment services or financial instruments in question;
- c) be presented in a way that:
 - i) is likely to be understood by the persons to whom it is directed, or by whom it is likely to be received; and
 - ii) does not omit, diminish or obscure essential items or warnings;
- d) not include or refer to simulated historic returns;
- e) ensure that, where comparing investment services, financial instruments, or persons providing investment services:
 - i) the comparison is relevant and is presented in a fair and balanced way;
 - ii) the sources of the information used for the comparison are specified; and
 - iii) the facts that could affect the result of the comparison are included;
- f) if it contains indication of past performance of a financial instrument or an investment service:
 - i) be based on a reference period of at least one year;
 - ii) clearly state the reference period and the source of information;
 - iii) contain a prominent warning that the past performance does not guarantee future results
 - iv) 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 may be diminished or lost in the process of currency conversion;
- g) if it contains information on forecasted future performance:

⁷ 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.

- i) not be based on or refer to simulated historic returns;
 - ii) be based on objective and realistic assumptions;
 - iii) contain a prominent warning that such forecasts do not guarantee future performance;
- h) if it refers to a particular tax treatment, prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change;
- i) 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 responsible for the information.

Article 4

General requirements for information to retail clients

1. An investment firm shall provide the information required by Article 19(3) of the Directive, and the terms and conditions of any agreement which the firm has entered into with a retail client or proposes to enter into with a potential retail client, to the client or potential client in a durable medium and sufficiently in advance of the commencement of the investment or ancillary service to which the information or the agreement relates to enable the client or potential client to review and understand the information.⁸
2. 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 about any 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.

Article 5

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

⁸ 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.”

1. In order to comply with its obligations under Article 19(3) of the Directive, an investment firm shall ensure that the appropriate information received by retail clients and potential retail clients includes the following general information:
 - a) the name 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;
 - c) the methods of communication to be used between the investment firm and the client for the sending and reception of orders;
 - d) a statement of the fact that the investment firm is authorised and the name of the competent authority that has authorised it;
 - e) where the firm is acting through a tied agent, a statement of the fact that the tied agent is registered in accordance with Article 23(3) of the Directive and the Member State in which he is registered;
 - 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 business address of the representative;
 - 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 general description of the effect of the rules relating to the holding and protection of client assets, including 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 description of the conflicts of interest policy maintained by the firm in accordance with Article 21 of [instrument on organisational requirements and conflicts of interest];
 - j) a statement as to whether there is an out of court complaint and redress mechanism available to retail clients and, if so, the way of accessing it;
 - k) any limitations of 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 order to comply with Article 19(3) of the Directive the firm shall, in addition to the information required by paragraph (1), ensure that the client receives the following information:
 - 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;⁹
 - b) the method and frequency of valuation of the financial instruments in the client portfolio;

⁹ 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.

- c) details of any delegation of the discretionary management of all or part of the assets in the client's portfolio, where relevant;
- d) the way in which management objectives are established, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion;
- e) a specification of any benchmark against which the performance of the portfolio will be compared. Any such benchmark shall be based on widely used financial indicators which are produced by a third party and are consistent with the management objectives.

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 financial instrument to a client or potential client and that financial instrument is the subject matter of an offer to the public in connection with which a prospectus has been published in accordance with Article 3 of directive 2003/71/EC, the investment firm shall provide the client or potential client with a copy of that prospectus or inform him where it is made available to the public in accordance with Article 14 of that directive.
2. Where , in accordance with the obligation under the second tiret of Article 19(3) of the Directive, an investment firm provides information about a 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:
 - a) the risks associated with instruments of that type, including the risk of losing the entire investment;
 - b) the volatility of the markets where such instruments are traded and any limitations on the available market for such instruments;
 - c) the fact that an investor might assume financial commitments and other 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.
3. In the case of compound products, the description required by paragraph (1) shall specify the financial instruments comprising the compound product and describe the way in which those instruments interact.

4. In the case of instruments that incorporate a guarantee, the description required by paragraph (1) shall include details about the guarantor and about the terms and conditions and scope of the guarantee.

Article 7

Information about costs and associated charges

In order to comply with its obligations under Article 19(3) of the Directive, an investment firm shall ensure that its retail clients and potential retail clients receive the following information:

- a) 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 investment firm in connection with the financial instrument or the investment service that is being offered. This information shall include, in particular:
 - i) the details of expenses, charges or other costs incurred or to be incurred by the firm in connection with the investment service or transaction in the financial instrument, which it is entitled to recover;
 - ii) the rates applicable, including any maximum or minimum fees, 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) a statement, where applicable, that other taxes or costs may arise in connection with the service or a transaction in the financial instrument that are not levied by or paid through the investment firm;
- c) where the retail client or potential retail client has agreed to participate in any securities financing transactions (including securities lending), 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 order to comply with Article 19(3) of the Directive, an investment firm shall, where applicable, additionally provide the following information to clients and potential 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 to the client, 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, the investment firm shall inform the client this fact and provide him with a description of any resulting risks.

4. Where, by reason of local market practices, 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 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, except where that interest, lien or right arises in the context of participation in any securities financing transaction.

Article 9

Investor aptitude test

1. Investment firms may choose not to provide information mentioned in Article 5(2) and Article 6 to a client or potential client if that client or potential client has voluntarily taken and successfully accomplished an investor aptitude test establishing that he is sufficiently knowledgeable and has an adequate understanding of financial markets.
2. The Committee of European Securities Regulators shall define the harmonised content and format of the investor aptitude test.

Article 10

Content of marketing communications

1. An investment firm shall take all reasonable steps to ensure that the information contained in its marketing communications is consistent 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 of a firm which is mentioned in the communication:
 - 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 nature 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.

Title III

Provision of investment services

Article 11

Assessment of client suitability and appropriateness

1. In order to discharge its duty under Article 19(4) of the Directive, an investment firm shall ask the client to provide such information as is necessary for it to understand the essential facts about the client and have a reasonable basis for believing that the specific transaction recommended, or entered into under portfolio management:
 - a) meets the needs and 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; and
 - c) is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction.

An investment firm shall be entitled to assume that professional clients are –

- a) able financially to bear the risk of any loss that the investment may cause, for the purposes of sub-paragraph (b); and
- b) have the level of experience and knowledge mentioned in sub-paragraph (c) above,

unless in all the circumstances such an assumption is manifestly unreasonable.

2. For the purposes of Article 19(4) of the Directive, information regarding the financial situation of a client or potential client includes (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.
3. For the purposes of Article 19(4) of the Directive, information regarding the investment objectives of a client or potential client includes (but is not restricted to) information on the length of time for which the client wishes to hold the investment, his risk profile, and the purposes of the investment that the firm may recommend.
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 includes 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.
5. An investment firm shall not [invite] [induce or persuade?] a client or potential client not to provide information required for the purposes of Article 19(4) and (5) of the Directive.
 6. 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 12

Provision of services in non-complex instruments

For the purposes of the first tiret of Article 19(6) of the Directive, a financial instrument which is not specified in that tiret will 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) it is not a compound product;
- c) there are frequent opportunities to dispose of, redeem, or otherwise realise it at prices that are publicly available to the market participants; and
- d) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument.

Title IV

Reporting to clients

Article 13

Reporting obligations in respect of execution of orders

1. An investment firm that executes orders on behalf of its clients shall, when carrying out an order for a client, provide him promptly with the essential information concerning the execution of the order in a durable medium and, in the case of a retail client, it shall send to him a notice confirming the execution of the order no later than the first business day following that execution.

This Article does not apply where orders are executed in the context of portfolio management.

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

3. A notice mentioned in paragraph (1) which is sent to a retail client shall include 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 the time of execution or, 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 venue¹⁰ 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 unit price will be the average price at which the tranches have been executed. In such a 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;
 - 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 have not previously been notified to the client.
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 14

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.
2. A statement required by paragraph (1) which is provided to a retail client shall include:
 - 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 value 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;

¹⁰ As defined by the Regulation on Cooperation and Enforcement.

- 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.
3. A statement required by paragraph (1) shall be provided to retail clients at least every 3 months.
 4. 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 execution of the order in a durable medium and, in the case of a retail client, send to him a notice confirming the execution of the order no later than the first business day following that execution;
 - b) by way of derogation from paragraph (3), the statements required by paragraph (1) shall be provided to retail clients at least every 6 months.

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 open position in contingent liability transaction, it shall immediately report to the client any losses exceeding a predetermined threshold agreed between the firm and the client.
7. At least once a year an investment firm shall provide to its retail clients for whom it carries out portfolio management services a management report on the strategy adopted during the period covered by the report.

Article 15

Statements of client assets

1. An investment firm that holds client assets shall, at least once a year, send to each client for whom it holds assets, a statement of those client assets. 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.
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 16

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
- net turnover:	EUR 40 000 000
- own funds:	EUR 2 000 000.

Title VII

Investment advice

Article 17

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:
 - a. it is presented as suitable for, or based on a consideration of the person circumstances of, that client; 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.
2. A recommendation shall be considered as personal where it is addressed directly to a particular client or where the circumstances in which the recommendation¹¹ is made imply that it is addressed to a particular client.
 3. A recommendation is not a personal recommendation if it is issued generally to the public or a sector of the public.¹²

Title VIII

Best execution

Article 18

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 status of the client as retail or professional;
 - b) the nature of the client order;
 - c) the type of financial instruments that are the subject of that order; and
 - d) the nature of the execution venues to which that order can be directed.
2. When an investment firm executes an order on behalf of a retail client, 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 execution¹³) payable by the client.
3. 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),

¹¹ Insert the following recital: “The relevant circumstances that may be taken into consideration when determining when investment advice is being provided include, amongst others: the communication in its entirety and any other communications between the parties and the relationship between the parties including the nature of the recipient”.

¹² Insert the following recital: “Advice about financial instruments given in a newspaper, journal, magazine or any other periodical publication, or in any television or radio broadcast, is not to be considered as a personal recommendation for the purposes of the definition of ‘investment advice’ in the Directive, provided that the giving of investment advice is not the principal purpose of the publication or broadcast.

¹³ 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”.

execution venues shall make available data relating to the quality of execution of transactions on that venue on at least an annual basis.

Article 19

Best Execution – scope

1. Member States shall require 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 20

Execution policy

In order to comply 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), an investment firm shall review those arrangements and that policy whenever it becomes aware, or the circumstances are such that it should be 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 21

Information on best execution policy

1. The information required to be provided by an investment firm to its 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 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.
2. 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 that such instructions 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 22

General principles

1. In order to comply 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 impossible, or the interests of the client require otherwise;
 - c) inform its 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 risks or impediments 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.

Article 23

Aggregation and allocation of orders

1. In order to comply 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) the firm reasonably believes that the aggregation of orders will not work overall to the disadvantage of any client whose order is to be aggregated;
 - b) the 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.
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 on a proportional basis, unless otherwise agreed with a client.

Article 24

Aggregation and allocation of transactions for own account

1. In order to comply 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 gives unfair preference to the investment firm or to any particular client.

Article 25

Record keeping of orders

1. In order to comply 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 member of the personnel of the investment firm who executed the transaction;
 - f) the identification of the financial instruments involved in the transaction;
 - g) the number or total value of financial instruments involved in the transaction; and

- h) the nature of the order.
2. If an investment firm transmits orders to another investment firm 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 investment firm to whom the order was transmitted;
 - c) the terms of the order transmitted; and
 - d) the date and exact time of transmission.

Article 26

Record keeping of aggregated orders

In order to comply with Article 22(1) of the Directive, when an investment firm combines a client order for execution with another client order or a transaction for own account, it shall make a record of the intended basis of allocation of such orders or transactions prior to carrying them out.

Article 27

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, 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 and amount of the fee, commission or benefit, or method of calculating that amount, is properly disclosed to the client and the client has given his fully informed 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 [facilitates] [demonstrably improves the quality of] the provision of the relevant service to 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 28**Characteristics of other derivative financial instruments*

3. 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:
 - 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 a market or trading facility in a third country that is equivalent to a regulated market or an MTF;
 - 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;
 - v) there are arrangements for the payment or provision of margin in relation to the contract; or
 - vi) the price, the lot, the delivery date or other terms are determined solely by reference to regularly published prices, to standard lots or standard delivery dates.
4. 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 29**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 30

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

ANNEX