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COMMISSION OF THE EUROPEAN COMMUNITIES

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[Institutional Reference]

Draft

**COMMISSION REGULATION**

**implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive**

Draft

## COMMISSION REGULATION

**implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive**

(Text with EEA Relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2003/39/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<sup>1</sup>, and in particular Articles 4(1)(2), 4(1)(7) and 4(2), Article 13(10), Article 25(7), Article 27(7), Article 28(3), Article 29(3), Article 30(3), Article 40(6), Article 44(3), Article 45(3), Article 56(5), and Article 58(4) thereof,

Whereas:

*[General]*

- (1) Directive 2004/39/EC establishes a comprehensive regulatory regime for financial markets in the Community, setting out, among other matters: operating conditions relating to the performance by investment firms of investment and ancillary services, and investment activities; organisational requirements (including record-keeping obligations) for investment firms performing such services and activities on a professional basis, and for regulated markets; transaction reporting requirements in respect of transactions in financial instruments; transparency requirements in respect of transactions in shares; and record-keeping requirements for investment firms and market operators.
- (2) It is appropriate that the provisions of this Regulation take that legislative form in order to ensure a harmonised regime in all Member States, to promote market integration and the cross-border provision of investment and ancillary services, and to facilitate the further consolidation of the single market. Provisions relating to certain aspects of record-keeping, and to transaction reporting, transparency and commodity derivatives have few interfaces with national law and with detailed laws governing client relationships.

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<sup>1</sup> OJ L 145, 30.4.2004, p. 1.

- (3) Detailed and fully harmonised transparency requirements and rules regulating transaction reporting are appropriate so as to ensure equivalent market conditions and the smooth operation of securities markets throughout the Community, and to facilitate the effective integration of those markets. Certain aspects of record-keeping are closely allied as they make use of the same concepts as are defined for transaction reporting and transparency purposes.
- (4) The regime established by Directive 2004/39/EC governing transaction reporting requirements in respect of transactions in financial instruments aims to ensure that relevant competent authorities are properly informed about transactions in which they have a supervisory interest. For those purposes it is necessary to ensure that a single data set is collected from all investment firms with a minimum of variation between Member States, so as to minimise the extent to which businesses operating across borders are subject to different reporting obligations, and so as to maximise the proportion of data held by a competent authority that can be shared with other competent authorities. The measures are also designed to ensure that competent authorities are in a position to carry out their obligations under that Directive as expeditiously and efficiently as possible.
- (5) The regime established by Directive 2004/39/EC governing transparency requirements in respect of transactions in shares admitted to trading on a regulated market aims to ensure that investors are fully informed as to the true level of actual and potential transactions in such shares, whether those transactions take place on regulated markets, multilateral trading facilities, hereinafter 'MTFs', systematic internalisers, or outside those trading venues. Those requirements are part of a broader framework of rules designed to promote competition between trading venues for execution services so as to increase investor choice, encourage innovation, lower transaction costs, and increase the efficiency of the price formation process on a pan-Community basis. A high degree of transparency is an essential part of this framework, so as to ensure a level playing field between trading venues so that the price discovery mechanism in respect of particular shares is not impaired by the fragmentation of liquidity, and investors are not thereby penalised. On the other hand, that Directive recognises that there may be circumstances where exemptions from pre-trade transparency obligations, or deferral of post-trade transparency obligations, may be necessary. This Regulation sets out details of those circumstances, bearing in mind the need both to ensure a high level of transparency, and to ensure that liquidity on trading venues and elsewhere is not impaired as an unintended consequence of obligations to disclose transactions and thereby to make public risk positions.

*[Transaction reporting]*

- (6) It is not necessary at this stage to specify or prescribe in detail the type, nature and sophistication of the arrangements for the exchange of information between competent authorities.
- (7) Where a notification made by a competent authority relating to the alternative determination of the most relevant market in terms of liquidity is not acted upon within a reasonable time or where a competent authority does not agree with the calculation made by the other authority the competent authorities concerned should seek to find a solution. It is open to the competent authorities, where appropriate, to discuss the matter in the Committee of European Securities Regulators.

- (8) The competent authorities should coordinate the design and establishment of arrangements for the exchange of transaction information between themselves. Again it is open to the competent authorities to discuss those matters in the Committee of European Securities Regulators. Competent authorities should report to the Commission which should inform the European Securities Committee of those arrangements. In carrying out the coordination, competent authorities should consider the need to monitor the activities of investment firms effectively, so as to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market in the Community, the need for decisions to be based on a thorough cost-benefit analysis, the need to ensure that transaction information is used only for the proper discharge of the functions of competent authorities and finally the need to have effective and accountable governance arrangements for any common system that might be considered necessary.
- (9) It is appropriate to set the criteria for determining when the operations of a regulated market are of substantial importance in a host Member State, and the consequences of that status in such a way as to avoid creating an obligation on a regulated market to deal with or be made subject to more than one competent authority where otherwise there would be no such obligation.

*[Market transparency]*

- (10) If granting waivers in relation to pre-trade transparency requirements, competent authorities should treat all regulated markets and MTFs equally and in a non-discriminatory manner, so that a waiver is granted either to all regulated markets and MTFs that they authorise under Directive 2004/39/EC, or to none. Competent authorities which grant the waivers should not impose additional requirements.
- (11) It is appropriate to consider that a trading algorithm operated by a regulated market or MTF usually should seek to maximise the volume traded, but other trading algorithms should be possible.
- (12) A waiver from pre-trade transparency obligations arising under Articles 29 or 44 of Directive 2004/39/EC conferred by a competent authority should not enable investment firms to avoid such obligations in respect of those transactions in liquid shares which they conclude on a bilateral basis under the rules of a regulated market or an MTF where, if carried out outside the rules of the regulated market or MTF, those transactions would be subject to the requirements to publish quotes set out in Article 27 of that Directive.
- (13) An activity should be considered as having a material commercial role for an investment firm if the activity is a significant source of revenue, or a significant source of cost. An assessment of significance for these purposes should, in every case, take into account the extent to which the activity is conducted or organised separately, the monetary value of the activity, and its comparative significance by reference both to the overall business of the firm and to its overall activity in the market in which the firm operates. It should be possible to consider an activity to be a significant source of revenue for a firm even if only one or two of the factors mentioned is relevant in a particular case.

- (14) The requirement to make certain quotes, orders or transactions public pursuant to Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC and this Regulation should not prevent regulated markets and MTFs from requiring their members or participants to make public other such information.
- (15) Information which is required to be made available as close to real time as possible should be made available as close to instantaneously as technically possible, assuming a reasonable level of efficiency and of expenditure on systems on the part of the person concerned.

*[Admission to trading]*

- (16) The admission to trading on a regulated market of units issued by undertakings for collective investment in transferable securities should not allow the avoidance of the relevant provisions of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>2</sup>, and in particular Articles 44 to 48 of that Directive.

*[Commodity derivatives]*

- (17) A derivative contract should only be considered to be a financial instrument under Section C(7) of Annex I to Directive 2004/39/EC if it relates to a commodity and meets the criteria in this Regulation for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and as not being for commercial purposes. A derivative contract should only be considered to be a financial instrument under Section C(10) of that Annex if it relates to an underlying specified in Section C(10) or in this Regulation and meets the criteria in this Regulation for determining whether it should be considered as having the characteristics of other derivative financial instruments.
- (18) The exemptions in Directive 2004/39/EC that relate to dealing on own account or to dealing or providing other investment services in relation to commodity derivatives covered by Sections C(5), C(6) and C(7) of Annex I to that Directive or derivatives covered by Section C(10) of that Annex I could be expected to exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries from the scope of that Directive and therefore such participants will not be required to apply the tests in this Regulation to determine if the contracts they deal in are financial instruments.
- (19) In accordance with Section B(7) of Annex I to Directive 2004/39/EC, investment firms may exercise the freedom to provide ancillary services in a Member State other than their home Member State, by performing investment services and activities and ancillary services of the type included under Section A or B of Annex I to that Directive related to the underlying of the derivatives included under Section C(5), (6), (7) and (10), where these are connected to the provision of investment or ancillary services. On this basis, a firm performing investment services or activities, and

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2 OJ L 375, 31.12.1985, p.3. Directive as last amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).

connected trading in spot contracts, should be capable to take advantage of the freedom to provide ancillary services in respect of that connected trading.

- (20) The definition of a commodity should not affect any other definition of that term in national legislation and other community legislation. The tests for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes are only intended to be used for the purposes of determining whether contracts fall within Section C(7) or C(10) of Annex I to Directive 2004/39/EC.
- (21) A derivative contract should be understood as relating to a commodity or to another factor where there is a direct link between that contract and the relevant underlying commodity or factor. A derivative contract on the price of a commodity should therefore be regarded as a derivative contract relating to the commodity, while a derivative contract on the transportation costs for the commodity should not be regarded as a derivative contract relating to the commodity. A derivative that relates to a commodity derivative, such as an option on a commodity future (a derivative relating to a derivative) would constitute an indirect investment in commodities and should therefore still be regarded as a commodity derivative for the purposes of Directive 2004/39/EC.
- (22) The concept of commodity should not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible.
- (23) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

## **Chapter I**

### **General**

#### *Article 1*

##### *Subject-matter and scope*

1. This Regulation lays down the detailed rules for the implementation of Articles 4(1)(2), 4(1)(7), 13(6), 25, 27, 28, 29, 30, 40, 44, 45, 56 and 58 of Directive 2004/39/EC.
2. Articles 6 and 7 of this Regulation shall apply to management companies in accordance with Article 5(4) of Directive 85/611/EEC.

## Article 2

### Definitions

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

- (1) ‘commodity’ means any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity;
- (2) ‘issuer’ means an entity which issues transferable securities and, where appropriate, other financial instruments;
- (3) ‘Community issuer’ means an issuer which has its registered office in the Community;
- (4) ‘third country issuer’ means an issuer which is not a Community issuer;
- (5) ‘normal trading hours’ for a trading venue means those hours which the trading venue establishes in advance and makes public as its trading hours;
- (6) ‘portfolio trade’ means a transaction in more than one security where those securities are grouped and traded as a single lot against a specific reference price;
- (7) ‘relevant competent authority’ for a financial instrument means the competent authority of the most relevant market in terms of liquidity for that financial instrument;
- (8) ‘trading venue’ means a regulated market, MTF or systematic internaliser, in the case of a systematic internaliser, acting in its capacity as such, and, where appropriate, a system with similar functions outside the Community;
- (9) ‘turnover’, in relation to a financial instrument, means the sum of the results of multiplying the number of units of that instrument exchanged between buyers and sellers in a defined period of time, pursuant to transactions taking place on a trading venue or otherwise, by the unit price applicable to each such transaction;
- (10) ‘securities financing transaction’ means an instance of stock lending or the lending of other financial instruments, a repurchase or reverse repurchase transaction, or a buy-sell back or sell-buy back transaction.

## Article 3

### *Transactions related to an individual share in a portfolio trade and volume weighted average price transactions*

1. A transaction related to an individual share in a portfolio trade shall be considered, for the purposes of Article 17(1)(b)(ii), as a transaction subject to conditions other than the current market price.

It shall also be considered, for the purposes of Article 26(1)(b), as a transaction where the exchange of shares is determined by factors other than the current market valuation of the share.

2. A volume weighted average price transaction shall be considered, for the purposes of Article 17(1)(b)(ii), as a transaction subject to conditions other than the current market price. However, it shall not, for the purposes of Article 24, be considered to be an order subject to conditions other than the current market price.

It shall also be considered, for the purposes of Article 26(1)(b), as a transaction where the exchange of shares is determined by factors other than the current market valuation of the share.

#### *Article 4*

##### *References to trading day*

1. A reference to a trading day in relation to a trading venue, or in relation to post-trade information to be made public under Article 30 or 45 of Directive 2004/39/EC in relation to a share, shall be a reference to any day during which the trading venue concerned is open for trading.

A reference to the opening of the trading day shall be a reference to the commencement of the normal trading hours of the trading venue.

A reference to noon on the trading day shall be a reference to noon in the time zone where the trading venue is established.

A reference to the end of the trading day shall be a reference to the end of its normal trading hours.

2. A reference to a trading day in relation to the most relevant market in terms of liquidity for a share, or in relation to post-trade information to be made public under Article 28 of Directive 2004/39/EC in relation to a share, shall be a reference to any day of normal trading on trading venues in that market.

A reference to the opening of the trading day shall be a reference to the earliest commencement of normal trading in that share on trading venues in that market.

A reference to noon on the trading day shall be a reference to noon in the time zone of that market.

A reference to the end of the trading day shall be a reference to the latest cessation of normal trading in that share on trading venues in that market.

3. A reference to a trading day in relation to a spot contract, within the meaning of Article 38(2), shall be a reference to any day of normal trading of that contract on trading venues.

## Article 5

### *References to transaction*

For the purposes of this Regulation, a reference to a transaction is a reference only to the purchase and sale of a financial instrument, and does not include any of the following:

- (a) securities financing transactions;
- (b) the exercise of options or of covered warrants;
- (c) primary market transactions (such as issuance, allotment or subscription) in financial instruments falling within Article 4(1)(18)(a) and (b) of Directive 2004/39/EC.

## Chapter II

### **Record-keeping: client orders and transactions**

## Article 6

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

### *Record-keeping of client orders and decisions to deal*

An investment firm shall, in relation to every order received from a client, and in relation to every decision to deal taken in providing the service of portfolio management, promptly make a record of the following details, to the extent they are applicable to the order or decision to deal in question:

- (a) the name or other designation of the client;
- (b) the name or other designation of any relevant person acting on behalf of the client;
- (c) the details specified in points 6, 16, 18 and 19 of Table 1 of Annex I;
- (d) the nature of the order;
- (e) any other details, conditions and particular instructions from the client that specify how the order must be carried out;
- (f) the date and exact time of the receipt of the order, or of the decision to deal, by the investment firm.

## Article 7

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

### *Record-keeping of transactions*

1. Immediately after executing a client order, investment firms shall record the following details of the transaction in question:
  - (a) the name or other designation of the client;
  - (b) the details specified in points 2, 3, 4, 6, 16, and in points 18 to 21, of Table 1 of Annex I;
  - (c) the total consideration;
  - (d) the natural person who executed the transaction or who is responsible for the execution.
  
2. If an investment firm transmits an order 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;
  - (d) the date and exact time of transmission.

## Chapter III

### Transaction reporting

## Article 8

*(Second subparagraph of Article 25(3) of Directive 2004/39/EC)*

### *Determination of the most relevant market in terms of liquidity*

1. The most relevant market for a financial instrument in terms of liquidity, hereinafter 'the most relevant market', shall be determined in accordance with paragraphs 2 to 9.
  
2. In the case of a share or other transferable security covered by Article 4(1)(18)(a) of Directive 2004/39/EC or of a unit in a collective investment undertaking, the most

relevant market shall be the Member State where the share or the unit was first admitted to trading on a regulated market.

3. In the case of a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or of a money market instrument which, in either case, is issued by a subsidiary, within the meaning of Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts<sup>3</sup>, of an entity which has its registered office in a Member State, the most relevant market shall be the Member State where the registered office of the parent entity is situated.
4. In the case of a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or of a money market instrument which, in either case, is issued by a Community issuer and which is not covered by paragraph 3 of this Article, the most relevant market shall be the Member State where the registered office of the issuer is situated.
5. In the case of a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC or a money market instrument which, in either case, is issued by a third country issuer and which is not covered by paragraph 3 of this Article, the most relevant market shall be the Member State where that security was first admitted to trading on a regulated market.
6. In the case of a derivative or a financial contract for differences or a transferable security covered by Article 4(1)(18)(c) of Directive 2004/39/EC, the most relevant market shall be:
  - (a) where the underlying security is a share or other transferable security covered by Article 4(1)(18)(a) of Directive 2004/39/EC which is admitted to trading on a regulated market, the Member State deemed to be the most relevant market in terms of liquidity for the underlying security, in accordance with paragraph 2;
  - (b) where the underlying security is a bond or other transferable security covered by Article 4(1)(18)(b) of Directive 2004/39/EC which is admitted to trading on a regulated market, the Member State deemed to be the most relevant market in terms of liquidity for that underlying security, in accordance with paragraphs 3, 4 or 5;
  - (c) where the underlying is an index composed of shares all of which are traded on a particular regulated market, the Member State where that regulated market is situated.
7. In any case not covered by paragraphs 2 to 6, the most relevant market shall be the Member State where the regulated market that first admitted the transferable security or derivative or financial contract for differences to trading is located.
8. Where a financial instrument covered by paragraphs 2, 5 or 7, or the underlying financial instrument of a financial instrument covered by paragraph 6 to which one of paragraphs 2, 5 or 7 is relevant, was first admitted to trading on more than one

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<sup>3</sup> OJ L 193 , 18.07.1983, p. 1.

regulated market simultaneously, and all those regulated markets share the same home Member State, that Member State shall be the most relevant market.

9. Where the regulated markets concerned do not share the same home Member State, the most relevant market in terms of liquidity for that instrument shall be the market where the turnover of that instrument is highest.

For the purposes of determining the most relevant market where the turnover of the instrument is highest, each competent authority that has authorised one of the regulated markets concerned shall calculate the turnover for that instrument in its respective market for the previous calendar year, provided that the instrument was admitted to trading at the beginning of that year.

Where the turnover for the relevant financial instrument cannot be calculated by reason of insufficient or non-existent data and the issuer has its registered office in a Member State, the most relevant market shall be the market of the Member State where the registered office of the issuer is situated.

However, where issuer does not have its registered office in a Member State, the most relevant market for that instrument shall be the market where the turnover of the relevant instrument class is the highest. For the purposes of determining that market, each competent authority that has authorised one of the regulated markets concerned shall calculate the turnover for the instruments of the same class in its respective market for the preceding calendar year.

The relevant classes of financial instrument are the following:

- (a) shares;
- (b) bonds or other forms of securitised debt;
- (c) any other financial instruments.

#### *Article 9*

*(Second subparagraph of Article 25(3) and Article 58(3) of Directive 2004/39/EC)*

#### *Alternative determination of most relevant market in terms of liquidity*

1. A competent authority may, in January every year, notify the relevant competent authority for a particular financial instrument that it intends to contest the determination, made in accordance with Article 8, of the most relevant market for that instrument.
2. Within four weeks of the sending of the notification, both authorities shall calculate the turnover for that instrument in their respective markets over the period of the previous calendar year.

If the results of that calculation indicate that the turnover is higher in the market of the contesting competent authority, that market shall be the most relevant market for that financial instrument.

#### *Article 10*

*(Article 25(3) of Directive 2004/39/EC)*

#### *List of financial instruments*

The relevant competent authority for one or more financial instruments shall establish and maintain an updated list of those financial instruments. That list shall be made available to the single competent authority designated as a contact point by each Member State in accordance with Article 56 of Directive 2004/39/EC.

#### *Article 11*

*(Article 25(5) of Directive 2004/39/EC)*

#### *Reporting channels*

1. The reports of transactions in financial instruments shall be made in an electronic form except under exceptional circumstances, when they may be made in a durable medium within the meaning of Article 2(2) of [the Implementing Directive] other than an electronic form, and the methods by which those reports are made shall satisfy the following conditions:
  - (a) they must ensure the security and confidentiality of the data reported;
  - (b) they must incorporate mechanisms for identifying and correcting errors in a transaction report;
  - (c) they must incorporate mechanisms for authenticating the source of the transaction report;
  - (d) they must include appropriate precautionary measures to enable the timely resumption of reporting in the case of system failure;
  - (e) they must be capable of reporting the information required under Article 12 in the format required by the competent authority and in accordance with this paragraph, within the time-limits set out in Article 25(3) of Directive 2004/39/EC.
2. A trade-matching or reporting system shall be approved by the competent authority for the purposes of Article 25(5) of Directive 2004/39/EC if the arrangements for reporting transactions established by that system comply with paragraph 1 of this

Article and are subject to monitoring by a competent authority in respect of their continuing compliance.

## *Article 12*

*(Article 25(3) and (5) of Directive 2004/39/EC)*

### *Content of the transaction report*

1. The reports of transactions referred to in Article 25(3) and (5) of Directive 2004/39/EC shall contain the information specified in Table 1 of Annex I to this Regulation which is relevant to the type of financial instrument in question and which the competent authority declares is not already in its possession or is not available to it by other means.
2. For the purposes of the identification of a counterparty to the transaction which is a regulated market, an MTF or other central counterparty, as specified in Table 1 of Annex I, each competent authority shall make publicly available a list of identification codes of the regulated markets and MTFs for which, in each case, it is the competent authority of the home Member State, and of any entities which act as central counterparties for such regulated markets and MTFs.
3. Member States may require reports made in accordance with Articles 25(3) and (5) of Directive 2004/39/EC to contain information related to the transactions in question which is additional to that specified in Table 1 of Annex I where that information is necessary to enable the competent authority to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner that promotes the integrity of the market, and provided that one of the following criteria is met:
  - (a) the financial instrument which is the subject of the report has characteristics which are specific to an instrument of that kind and which are not covered by the information items specified in that table;
  - (b) trading methods which are specific to the trading venue where the transaction took place involve features which are not covered by the information items specified in that table.
4. Member States may also require a report of a transaction made in accordance with Article 25(3) and (5) of Directive 2004/39/EC to identify the clients on whose behalf the investment firm has executed that transaction.

## Article 13

*(Article 25(3) and (5) of Directive 2004/39/EC)*

### *Exchange of information on transactions*

1. The competent authorities shall establish arrangements designed to ensure that the information received in accordance with Article 25(3) and (5) of Directive 2004/39/EC is made available to the following:
  - (a) the relevant competent authority for the financial instrument in question;
  - (b) in the case of branches, the competent authority that has authorised the investment firm providing the information;
  - (c) any other competent authority that requests the information for the proper discharge of its supervisory duties under Article 25(1) of Directive 2004/39/EC.
2. The information to be made available in accordance with paragraph 1 shall contain the information items described in Tables 1 and 2 of Annex I.
3. The information referred to in paragraph 1 shall be made available as soon as possible.

With effect from 1 November 2008 that information shall be made available no later than the close of the next working day of the competent authority that received the request following the day on which the competent authority has received the information or the request.

4. The competent authorities shall coordinate the following:
  - (a) the design and establishment of arrangements for the exchange of transaction information between the competent authorities as required by Directive 2004/39/EC and this Regulation;
  - (b) any future upgrading of the arrangements.
5. Before 1 November 2006, the competent authorities shall report to the Commission, which shall inform the European Securities Committee, on the design of the arrangements to be established in accordance with paragraph 1.

They shall also report to the Commission and inform the European Securities Committee whenever significant changes to those arrangements are proposed.

## *Article 14*

*(Article 58(1) of Directive 2004/39/EC)*

### *Request for cooperation and exchange of information*

1. Where a competent authority wishes another competent authority to supply or exchange information in accordance with Article 58(1) of Directive 2004/39/EC, it shall submit a written request to that competent authority containing sufficient detail to enable it to provide the information requested.

However, in a case of urgency, the request may be transmitted orally provided that it is confirmed in writing.

The competent authority which receives a request shall acknowledge receipt as soon as practicable.

2. Where the information requested under paragraph 1 is internally available to the competent authority that receives the request, that authority shall transmit the requested information without delay to the competent authority which made the request.

However, if the competent authority that receives the request does not possess or control the information requested, it shall immediately take the necessary steps to obtain that information and to comply fully with the request. That competent authority shall also inform the competent authority that made the request of the reasons for not sending immediately the information requested.

## *Article 15*

*(Article 56(2) of Directive 2004/39/EC)*

### *Determination of the substantial importance of a regulated market's operations in a host Member State*

The operations of a regulated market in a host Member State shall be considered to be of substantial importance for the functioning of the securities markets and the protection of investors in that host State where one of the following criteria is met:

- (a) the host Member State has formerly been the home Member State of the regulated market in question;
- (b) the regulated market in question has acquired through merger, takeover, or any other form of transfer the business of a regulated market which has its registered office or head office in the host Member State.

# Chapter IV

## Market transparency

### SECTION 1

#### PRE-TRADE TRANSPARENCY FOR REGULATED MARKETS AND MTFs

##### *Article 16*

*(Articles 29 and 44 of Directive 2004/39/EC)*

##### *Pre-trade transparency obligations*

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

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

In exceptional market conditions, however, one-way prices may be allowed for a limited time.

4. Where one of the entities referred to in paragraph 1 operates a periodic auction trading system, it shall, for each share specified in paragraph 1, make public and continuously update throughout its normal trading hours the price at which the auction trading system would best satisfy the system's trading algorithm and the volume that would potentially be executable at that price by participants in that system.

5. Where one of the entities referred to in paragraph 1 operates a trading system which is not wholly covered by paragraph 2 or 3 or 4, either because it is a hybrid system falling under more than one of those paragraphs or because the price determination process is of a different nature, it shall maintain a standard of pre-trade transparency that ensures that adequate information is made public as to the level of orders or quotes for that share, as well as the level of trading interest in that share.

In particular, the five best bid and offer price levels and/or two-way quotes of each market maker in that share shall be made public, if the characteristics of the price discovery mechanism permit it.

6. A summary of the information to be made public in accordance with paragraphs 2 to 5 is specified in Table 1 of Annex II.

### *Article 17*

*(Articles 29(2) and 44(2) of Directive 2004/39/EC)*

#### *Waivers based on market model and type of order or transaction*

1. Waivers in accordance with Article 29(2) and 44(2) of Directive 2004/39/EC may be granted by the competent authorities for systems operated by an MTF or a regulated market, if those systems satisfy one of the following criteria:
  - (a) they must be based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is regarded generally by market participants as a reliable reference price;
  - (b) they formalise negotiated transactions, each of which meets one of the following criteria:
    - (i) it is made at or within the current volume weighted spread for the size of the trade reflected on the order book or the quotes of the market makers of the regulated market or MTF operating that system or, where the share is not traded continuously, within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator;
    - (ii) it is subject to conditions other than the current market price of the share.

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

In the case of systems having functionality other than as described in points (a) or (b), the waiver shall not apply to that other functionality.

2. Waivers in accordance with Article 29(2) and 44(2) of Directive 2004/39/EC based on the type of orders may be granted only in relation to orders held in an order

management facility maintained by the regulated market or the MTF pending their being disclosed to the market.

### *Article 18*

*(Articles 29(2) and 44(2) of Directive 2004/39/EC)*

#### *References to negotiated transaction*

For the purpose of Article 17(1)(b) a negotiated transaction shall mean a transaction involving members or participants of a regulated market or an MTF which is negotiated privately but executed within the regulated market or MTF and where that member or participant in doing so undertakes one of the following tasks:

- (a) dealing on own account with another member or participant who acts for the account of a client;
- (b) dealing with another member or participant, where both are executing orders on own account;
- (c) acting for the account of both the buyer and seller;
- (d) acting for the account of the buyer, where another member or participant acts for the account of the seller;
- (e) trading for own account against a client order.

### *Article 19*

*(Articles 29(2) and 44(2), and fifth subparagraph of Article 27(1) of Directive 2004/39/EC)*

#### *Waivers in relation to transactions which are large in scale*

An order shall be considered to be large in scale compared with normal market size if it is equal to or larger than the minimum size of order specified in Table 2 in Annex II. For the purposes of determining whether an order is large in scale compared to normal market size, all shares admitted to trading on a regulated market shall be classified in accordance with their average daily turnover, which shall be calculated in accordance with the procedure set out in Article 32.

## SECTION 2

### PRE-TRADE TRANSPARENCY FOR SYSTEMATIC INTERNALISERS

#### *Article 20*

*(Article 4(1)(7) of Directive 2004/39/EC)*

#### *Criteria for determining whether an investment firm is a systematic internaliser*

1. Where an investment firm deals on own account by executing client orders outside a regulated market or an MTF, it shall be treated as a systematic internaliser if it meets the following criteria indicating that it carries on that activity on an organised, frequent and systematic basis:
  - (a) the activity has a material commercial role for the firm, and is carried on in accordance with non-discretionary rules and procedures;
  - (b) the activity is carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose;
  - (c) the activity is available to clients on a regular or continuous basis.
2. An investment firm shall cease to be a systematic internaliser in one or more shares if it ceases to carry on the activity specified in paragraph 1 in respect of those shares, provided that it has announced in advance that it intends to cease that activity using the same publication channels for that announcement as it uses to publish its quotes or, where that is not possible, using a channel which is equally accessible to its clients and other market participants.
3. The activity of dealing on own account by executing client orders shall not be treated as carried on on an organised, frequent and systematic basis where the following conditions apply:
  - (a) the activity is carried on on an *ad hoc* and irregular bilateral basis with wholesale counterparties as part of business relationships which itself are themselves characterised by dealings above standard market size;
  - (b) the transactions are carried out otherwise than by the personnel or outside the systems habitually used by the firm concerned for any business that it carries out in the capacity of a systematic internaliser.
4. Each competent authority shall ensure the maintenance and publication of a list of all systematic internalisers, in respect of shares considered to have a liquid market, hereinafter, 'liquid shares', which it has authorised as investment firms.

It shall ensure that the list is current by reviewing it at least annually.

The list shall be considered as published when it is submitted for publication to the Committee of European Securities Regulators in accordance with Article 33(5).

## *Article 21*

*(Article 27 of Directive 2004/39/EC)*

### *Determination of liquid shares*

1. A share admitted to trading on a regulated market shall be considered to have a liquid market if the share is traded daily, with a free float not less than EUR 500 million, and one of the following conditions is satisfied:
  - (a) the average daily number of transactions in the share is not less than 500;
  - (b) the average daily turnover for the share is not less than EUR 2 million.

However, a Member State may, in respect of shares for which it is the most relevant market, specify by notice that both of those conditions are to apply. That notice shall be made public.

2. A Member State may specify the minimum number of liquid shares for that Member State. The minimum number shall be no greater than 5. The specification shall be made public.
3. Where, pursuant to paragraph 1, a Member State would be the most relevant market for fewer liquid shares than the minimum number specified in accordance with paragraph 2, the competent authority for that Member State may designate one or more additional liquid shares, provided that the total number of shares which are considered in consequence to be liquid shares for which that Member State is the most relevant market does not exceed the minimum number specified by that Member State.

The competent authority shall designate the additional liquid shares successively in decreasing order of average daily turnover from among the shares for which it is the relevant competent authority that are admitted to trading on a regulated market and are traded daily.

4. For the purposes of the first subparagraph of paragraph 1, the calculation of the free float of a share shall exclude holdings exceeding 5% of the total voting rights of the issuer, unless such a holding is held by a collective investment undertaking or a pension fund.

Voting rights shall be calculated on the basis of all the shares to which voting rights are attached, even if the exercise of such a right is suspended.

5. A share shall not be considered to have a liquid market for the purposes of Article 27 of Directive 2004/39/EC until six weeks after its first admission to trading on a regulated market, if the estimate of the total market capitalisation for that share at the

start of the first day's trading after that admission, provided in accordance with Article 32(3) of this Regulation, is EUR 500 million or less.

6. Each competent authority shall ensure the maintenance and publication of a list of all liquid shares for which it is the relevant competent authority.

It shall ensure that the list is current by reviewing it at least annually.

The list shall be considered as published when it is submitted for publication to the Committee of European Securities Regulators in accordance with Article 33(5).

#### *Article 22*

*(fourth subparagraph of Article 27(1) of Directive 2004/39/EC)*

#### *Standard market size*

In order to determine the standard market size for liquid shares, those shares shall be grouped into classes in terms of the average value of orders executed in accordance with Table 3 in Annex II.

#### *Article 23*

*(Article 27(1) of Directive 2004/39/EC)*

#### *Quotes reflecting prevailing market conditions*

A systematic internaliser shall, for each liquid share for which it is a systematic internaliser, maintain the following:

- (a) a quote or quotes which are close in price to comparable quotes for the same share in other trading venues;
- (b) a record of its quoted prices, which it shall retain for a period of 12 months or such longer period as it considers appropriate.

The obligation laid down in point (b) is without prejudice to the obligation of the investment firm under Article 25(2) of Directive 2004/39/EC to keep at the disposal of the competent authority for at least 5 years the relevant data relating to all transactions it has carried out.

## *Article 24*

*(fifth subparagraph of Article 27(3) and Article 27(6) of Directive 2004/39/EC)*

### *Execution of orders by systematic internalisers*

1. For the purposes of the fifth subparagraph of Article 27(3) of Directive 2004/39/EC, execution in several securities shall be regarded as part of one transaction if that one transaction is a portfolio trade that involves 10 or more securities.

For the same purposes, an order subject to conditions other than the current market price means any order which is neither an order for the execution of a transaction in shares at the prevailing market price, nor a limit order.

2. For the purposes of Article 27(6) of Directive 2004/39/EC, the number or volume of orders shall be regarded as considerably exceeding the norm if a systematic internaliser cannot execute those orders without exposing itself to undue risk.

In order to identify the number and volume of orders that it can execute without exposing itself to undue risk, a systematic internaliser shall maintain and implement as part of its risk management policy under Article [8] of [the Implementing Directive] a non-discriminatory policy which takes into account the volume of the transactions, the capital that the firm has available to cover the risk for that type of trade, and the prevailing conditions in the market in which the firm is operating.

3. Where, in accordance with Article 27(6) of Directive 2004/39/EC, an investment firm limits the number or volume of orders it undertakes to execute, it shall set out in writing, and make available to clients and potential clients, the arrangements designed to ensure that such a limitation does not result in the discriminatory treatment of clients.

## *Article 25*

*(fourth subparagraph Article 27(3) of Directive 2004/39/EC)*

### *Retail size*

For the purposes of the fourth subparagraph of Article 27(3) of Directive 2004/39/EC, an order shall be regarded as being of a size bigger than the size customarily undertaken by a retail investor if it exceeds EUR 7 500.

## SECTION 3

### POST-TRADE TRANSPARENCY FOR REGULATED MARKETS, MTFs AND INVESTMENT FIRMS

#### *Article 26*

*(Articles 28, 30 and 45 of Directive 2004/39/EC)*

#### *Post-trade transparency obligation*

1. Investment firms, regulated markets, and investment firms and market operators operating an MTF shall, with regard to transactions in respect of shares admitted to trading on regulated markets concluded by them or, in the case of regulated markets or MTFs, within their systems, make public the following details:
  - (a) the details specified in points 2, 3, 6, 16, 18, 19 and 21 of Table 1 of Annex I;
  - (b) an indication that the exchange of shares is determined by factors other than the current market valuation of the share, where applicable;
  - (c) an indication that the trade was a negotiated trade, where applicable;
  - (d) any amendments to previously disclosed information, where applicable.

Those details shall be made public either by reference to each transaction or in a form aggregating the volume and price of all transactions in the same share taking place at the same time.

2. By way of exception, a systematic internaliser shall be entitled to use the acronym 'SI' instead of the venue identification referred to in paragraph 1(a) in respect of a transaction in a share that is executed in its capacity as a systematic internaliser in respect of that share.

It may exercise that right during the four months following the date specified in Article 41(2), or following the date on which the firm commences to be a systematic internaliser in relation to that share, whichever is the later.

Thereafter, the systematic internaliser may exercise that right only if it has made available to the public, in the three months immediately preceding the transaction, aggregate three-monthly data as to the transactions executed in its capacity as a systematic internaliser in respect of that share.

3. The aggregate three-monthly data referred to in the third subparagraph of paragraph 2 shall contain the following information for the share in respect of the three months concerned:
  - (a) the highest price;

- (b) the lowest price;
  - (c) the average price;
  - (d) the total number of shares traded;
  - (e) the total number of transactions;
  - (f) such other information as the systematic internaliser decides to make available.
4. Where the transaction is executed outside the rules of a regulated market or an MTF, one of the following investment firms shall, by agreement between the parties, arrange to make the information public:
- (a) the investment firm that sells the share concerned;
  - (b) the investment firm that acts on behalf of or arranges the transaction for the seller;
  - (c) the investment firm that acts on behalf of or arranges the transaction for the buyer;
  - (d) the investment firm that buys the share concerned.

In the absence of such an agreement, the information shall be made public by the investment firm determined by proceeding sequentially from point (a) to point (d) until the first point that applies to the case in question.

The parties shall take all reasonable steps to ensure that the transaction is made public as a single transaction. For those purposes two matching trades entered at the same time with a single party interposed shall be considered to be a single transaction.

#### *Article 27*

*(Articles 28, 30 and 45 of Directive 2004/39/EC)*

#### *Deferred publication of large transactions*

The deferred publication of information in respect of transactions may be authorised, for a period no longer than the period specified in Table 4 in Annex II for the class of share and transaction concerned, provided that the following criteria are satisfied:

- (a) the transaction is between an investment firm dealing on own account and a client of that firm;
- (b) the size of the transaction is equal to or exceeds the relevant minimum qualifying size, as specified in Table 4 in Annex II.

In order to determine the relevant minimum qualifying size for the purposes of point (b), all shares admitted to trading on a regulated market shall be classified in accordance with their average daily turnover to be calculated in accordance with Article 32.

## SECTION 4

### PROVISIONS COMMON TO PRE- AND POST-TRADE TRANSPARENCY

#### *Article 28*

*(Articles 27(3), 29(1) and 44(1) of Directive 2004/39/EC)*

#### *Publication and availability of pre- and post-trade transparency data*

1. A regulated market, MTF or systematic internaliser shall be considered to publish pre-trade information on a continuous basis during normal trading hours if that information is published as soon as it becomes available during the normal trading hours of the regulated market, MTF or systematic internaliser concerned, and remains available until it is updated.
2. Pre-trade information, and post-trade information relating to transactions taking place within normal trading hours, shall be made available as close to real time as possible. Post-trade information relating to such transactions shall be made available in any case within three minutes of the relevant transaction.
3. Information relating to a portfolio trade shall be made available with respect to each constituent transaction as close to real time as possible, having regard to the need to allocate prices to particular shares.
4. Post-trade information relating to transactions taking place on a trading venue but outside its normal trading hours shall be made public before the opening of the next trading day of the trading venue on which the transaction took place.
5. For transactions that take place outside a trading venue, post-trade information shall be made public before the opening of the next trading day in the most relevant market in terms of liquidity for that share.

#### *Article 29*

*(Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)*

#### *Public availability of pre- and post-trade information*

For the purposes of Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC and of this Regulation, pre- and post-trade information shall be considered to be made public or available

to the public if it is made available generally through one of the following to investors located in the Community:

- (a) the facilities of a regulated market which has admitted the share to trading or an MTF where the share is traded;
- (b) the facilities of a person not mentioned in point (a);
- (c) proprietary arrangements.

#### *Article 30*

*(Article 22(2) of Directive 2004/39/EC)*

#### *Disclosure of client limit orders*

An investment firm shall be considered to disclose client limit orders that are not immediately executable if it transmits the order to a regulated market or MTF that operates an order book trading system, or ensures that the order is made public and can be easily executed as soon as market conditions allow.

#### *Article 31*

*(Article 22(2), 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)*

#### *Arrangements for making information public*

Any arrangement to make information public, adopted for the purposes of Articles 29 and 30, shall satisfy the following conditions:

- (a) it must include all reasonable steps necessary to ensure that the information to be published is reliable, monitored continuously for errors, and corrected as soon as errors are detected;
- (b) it must facilitate the consolidation of the data with similar data from other sources;
- (c) it must make the information available to the public on a non-discriminatory commercial basis at a reasonable cost.

## Article 32

(Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)

### *Calculations and estimates for shares admitted to trading on a regulated market*

1. In respect of each share that is admitted to trading on a regulated market, the relevant competent authority for that share shall ensure that the following calculations are made in respect of that share promptly after the end of each calendar year:
  - (a) the average daily turnover;
  - (b) the average daily number of transactions;
  - (c) for those shares which satisfy the conditions laid down in Article 21(1)(a) or (b) (as applicable), the free float as at 31 December;
  - (d) if the share is a liquid share, the average value of the orders executed.
2. The calculation of the average daily turnover, average value of the orders executed and average daily number of transactions shall take into account all the orders executed in the Community in respect of the share in question between 1 January and 31 December of the preceding year, or, where applicable, that part of the year during which the share was admitted to trading on a regulated market and was not suspended from trading on a regulated market.

In the calculations of the average daily turnover, average value of the orders executed and average daily number of transactions of a share, non-trading days in the Member State of the relevant competent authority for that share shall be excluded.
3. Before the first admission of a share to trading on a regulated market, the relevant competent authority for that share shall ensure that estimates are provided, in respect of that share, of the average daily turnover, the average value of the orders executed, the free float and the average number of transactions for the six-week period following admission to trading, as well as the market capitalisation as it will stand at the start of the first day of trading. Those estimates shall take account of any previous trading history of the share, as well as that of shares that are considered to have similar characteristics.
4. After the first admission of a share to trading on a regulated market, the relevant competent authority for that share shall ensure that, in respect of that share, the average daily turnover, the average value of the orders executed, the free float and the average number of transactions are calculated, using data relating to the first month's trading, as soon as practicable after those data are available, and in any case before the end of the six-week period referred to in Article 21(5).
5. During the course of a calendar year, the relevant competent authorities shall ensure the review and where necessary the recalculation of the average daily turnover, average value of the orders executed, average number of transactions executed and

the free float whenever there is a change in relation to the share or the issuer which significantly affects the previous calculations on an ongoing basis.

6. The calculations referred to in paragraphs 1 to 5 which are to be published on or before the first trading day in March 2009 shall be made on the basis of the data relating to the regulated market or markets of the Member State which is the most relevant market in terms of liquidity for the share in question. For those purposes, negotiated transactions within the meaning of Article 18 shall be excluded from the calculations.

### *Article 33*

*(Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC)*

#### *Publication and effect of results of required calculations and estimates*

1. On the first trading day of March of each year, each competent authority shall, in relation to each share for which it is the relevant competent authority, ensure the publication of the following information:
  - (a) the average daily turnover and average daily number of transactions executed, as calculated in accordance with Article 32;
  - (b) the free float and average value of the orders executed, where calculated in accordance with Article 32.
2. The results of the estimates and calculations required under Article 32(3), (4) or (5) shall be published as soon as practicable after the calculation or estimate is completed.
3. The information referred to in paragraphs 1 or 2 shall be considered as published when it is submitted for publication to the Committee of European Securities Regulators in accordance with paragraph 5.
4. For the purposes of this Regulation, the following shall apply:
  - (a) the classification based on the publication referred to in paragraph 1 shall apply for the 12-month period starting on 1 April following publication and ending on the following 31 March;
  - (b) the classification based on the estimates provided for in Article 32(3) shall apply from the relevant first admission to trading until the end of the six-week period referred to in Article 21(5);
  - (c) the classification based on the calculations specified in Article 32(4) shall apply from the end of the six-week period referred to in Article 21(5), until the following 31 March.

However, the classification based on the recalculations specified in Article 32(5) shall apply from the date of publication and, unless further recalculated under Article 32(5), until the following 31 March.

5. The Committee of European Securities Regulators may, on the basis of data supplied to it by or on behalf of competent authorities that choose to do so, publish on its website consolidated and regularly updated lists of:
  - (a) every systematic internaliser;
  - (b) every share admitted to trading on a regulated market, specifying:
    - (i) the average daily turnover, free float and average daily number of transactions;
    - (ii) in the case of a liquid share, the average value of the orders executed; and
    - (iii) in the case of a liquid share which has been designated as an additional liquid share in accordance with Article 21(3), the name of the competent authority that so designated it.
6. Each competent authority shall ensure the first publication of the details referred to in points (a) and (b) of paragraph 1 on the first trading day in July 2007, based on the reference period 1 April 2006 to 31 March 2007. By way of derogation from paragraph 3, the classification based on that publication shall apply for the 5-month period starting on 1 November 2007 and ending on 31 March 2008.

#### *Article 34*

##### *First admission to trading of a share on a regulated market*

For the purposes of this Section, the first admission to trading of a share on a regulated market referred to in Article 40 of Directive 2004/39/EC shall be considered to take place at a time when one of the following conditions applies:

- (a) the share has not previously been admitted to trading on a regulated market;
- (b) the share has previously been admitted to trading on a regulated market but the share is removed from trading on every regulated market which has so admitted it.

## Chapter V

### Admission of financial instruments to trading

#### *Article 35*

*(Article 40(1) of Directive 2004/39/EC)*

#### *Transferable securities*

1. Transferable securities shall be considered freely negotiable for the purposes of Article 40(1) of Directive 2004/39/EC if they can be traded between the parties to a transaction, and subsequently transferred without restriction, and if all securities within the same class as the security in question are fungible.
2. Transferable securities which are subject to a restriction on transfer shall not be considered as freely negotiable unless that restriction is not likely to disturb the market.
3. Transferable securities that are not fully paid may be considered as freely negotiable if arrangements have been made to ensure that the negotiability of such securities is not restricted and that adequate information concerning the fact that the securities are not fully paid, and the implications of that fact for shareholders, is publicly available.
4. When exercising its discretion whether to admit a share to trading, a regulated market shall, in assessing whether the share is capable of being traded in a fair, orderly and efficient manner, take into account the following:
  - (a) the distribution of those shares to the public;
  - (b) such historical financial information, information about the issuer, and information providing a business overview as is required to be prepared under Directive 2003/71/EC, or is or will be otherwise publicly available.
5. A transferable security that is officially listed in accordance with Directive 2001/34/EC, and the listing of which is not suspended, shall be deemed to be freely negotiable and capable of being traded in a fair, orderly and efficient manner.
6. For the purposes of Article 40(1) of Directive 2004/39/EC, when assessing whether a derivative security referred to in Article 4(1)(18)(c) of that Directive is capable of being traded in a fair, orderly and efficient manner, the regulated market shall take into account, depending on the nature of the security being admitted, whether the following criteria are satisfied:
  - (a) the terms of the derivative security are clear and unambiguous and allow for a correlation between the price of the security and the price or other value measure of the underlying;

- (b) the price or other value measure of the underlying is reliable and publicly available;
- (c) there is sufficient information publicly available of a kind needed to value the security;
- (d) the arrangements for determining the settlement price of the security ensure that this price properly reflects the price or other value measure of the underlying;
- (e) where the settlement of the security requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there are adequate settlement and delivery procedures for that underlying as well as adequate arrangements to obtain relevant information about that underlying.

*Article 36*

*(Article 40(1) of Directive 2004/39/EC)*

*Units in collective investment undertakings*

1. A regulated market shall, when admitting to trading units in a collective investment undertaking, whether or not that undertaking is constituted in accordance with Directive 85/611/EEC, satisfy itself that the collective investment undertaking complies or has complied with the registration, notification or other procedures which are a necessary precondition for the marketing of the collective investment undertaking in the jurisdiction of the regulated market.
2. Without prejudice to Directive 85/611/EEC or any other Community legislation or national law relating to collective investment undertakings, Member States may provide that compliance with the requirements referred to in paragraph 1 is not a necessary precondition for the admission of units in a collective investment undertaking to trading on a regulated market.
3. When assessing whether units in an open-ended collective investment undertaking are capable of being traded in a fair, orderly and efficient manner in accordance with Article 40(1) of Directive 2004/39/EC, the regulated market shall take the following aspects into account:
  - (a) the distribution of those units to the public;
  - (b) whether there are appropriate market-making arrangements, or whether the management company of the scheme provides appropriate alternative arrangements for investors to redeem the units;
  - (c) whether the value of the units is made sufficiently transparent to investors by means of the periodic publication of the net asset value.
4. When assessing whether units in a closed-end collective investment undertaking are capable of being traded in a fair, orderly and efficient manner in accordance with

Article 40(1) of Directive 2004/39/EC, the regulated market shall take the following aspects into account:

- (a) the distribution of those units to the public;
- (b) whether the value of the units is made sufficiently transparent to investors, either by publication of information on the fund's investment strategy or by the periodic publication of net asset value.

#### *Article 37*

*(Article 40(1) and (2) of Directive 2004/39/EC)*

#### *Derivatives*

1. When admitting to trading a financial instrument of a kind listed in points 4 to 10 of Section C of Annex I to Directive 2004/39/EC, regulated markets shall verify that the following conditions are satisfied:
  - (a) the terms of the contract establishing the financial instrument must be clear and unambiguous, and enable a correlation between the price of the financial instrument and the price or other value measure of the underlying;
  - (b) the price or other value measure of the underlying must be reliable and publicly available;
  - (c) sufficient information of a kind needed to value the derivative must be publicly available;
  - (d) the arrangements for determining the settlement price of the contract must be such that the price properly reflects the price or other value measure of the underlying;
  - (e) where the settlement of the derivative requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there must be adequate arrangements to enable market participants to obtain relevant information about that underlying as well as adequate settlement and delivery procedures for the underlying.
2. Where the financial instruments concerned are of a kind listed in points 5, 6, 7 or 10 of Section C of Annex I to Directive 2004/39/EC, point (b) of paragraph 1 shall not apply if the following conditions are satisfied:
  - (a) the contract establishing that instrument must be likely to provide a means of disclosing to the market, or enabling the market to assess, the price or other value measure of the underlying, where the price or value measure is not otherwise publicly available;
  - (b) the regulated market must ensure that appropriate supervisory arrangements are in place to monitor trading and settlement in such financial instruments;

- (c) the regulated market must ensure that settlement and delivery, whether physical delivery or by cash settlement, can be effected in accordance with the contract terms and conditions of those financial instruments.

## **Chapter VI**

### **Derivative financial instruments**

#### *Article 38*

*(Article 4(1)(2) of Directive 2004/39/EC)*

#### *Characteristics of other derivative financial instruments*

1. For the purposes of Section C(7) of Annex I to Directive 2004/39/EC, a contract which is not a spot contract within the meaning of paragraph 2 of this Article and which is not covered by paragraph 3 shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if it satisfies the following conditions:
  - (a) it meets one of the following sets of criteria:
    - (i) it is traded on a third country trading facility that performs an analogous function to a regulated market or an MTF;
    - (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF or such a third country trading facility;
    - (iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or such a third country trading facility;
  - (b) it is cleared by a clearing house or other entity carrying out the same functions as a clearing house, or there are arrangements for the payment or provision of margin in relation to the contract;
  - (c) it is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.
2. A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:
  - (a) two trading days;
  - (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph.

3. For the purposes of Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to an underlying referred to in that Section or in Article 39 of this Regulation shall be considered to have the characteristics of other derivative financial instruments if one of the following conditions is satisfied:
  - (a) that contract 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) that contract is traded on a regulated market or an MTF;
  - (c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.
4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2004/39/EC, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.

#### *Article 39*

*(Article 4(1)(2) of Directive 2004/39/EC)*

#### *Derivatives within Section C(10) of Annex I to Directive 2004/39/EC*

In addition to derivative contracts of a kind referred to in Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to any of the following shall fall within that Section if it meets the criteria set out in that Section and in Article 38(3) of this Regulation:

- (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;
- (g) an index or measure related to the price or volume of transactions in any asset, right, service or obligation.

## **Chapter VII**

### **Final provisions**

#### *Article 40*

##### *Re-examinations*

1. At least once every two years, and after consulting the Committee of European Securities Regulators, the Commission shall re-examine the tables included in Annex II as well as the criteria for determination of liquid shares contained in Article 41.
2. The Commission shall, after consulting the Committee of European Securities Regulators, re-examine the provisions of Articles 38 and 39 relating to criteria for determining which instruments are to be treated as having the characteristics of other derivative financial instruments, or as being for commercial purposes, or which fall within Section C(10) of Annex I to Directive 2004/39/EC if the other criteria set out in that section are satisfied in relation to it.

The Commission shall report to the European Parliament and to the Council at the same time that it makes its reports under Article 65(1)(a) and (d) of Directive 2004/39/EC.

#### *Article 41*

##### *Entry into force*

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. This Regulation shall apply from 1 November 2007.
3. 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 I

**Table 1: List of fields for reporting purposes**

<b>Field Identifier</b>	<b>Description</b>
1. Reporting Firm Identification	A unique code to identify the firm which executed the transaction.
2. Trading Day	The trading day on which the transaction was executed.
3. Trading Time	The time at which the transaction was executed, reported in the local time of the competent authority to which the transaction will be reported, and the basis in which the transaction is reported expressed as GMT +/- hours.
4. Buy/Sell Indicator	Identifies whether the transaction was a buy or sell from the perspective of the reporting investment firm or, in the case of a report to a client, of the client.
5. Trading Capacity	Identifies whether the firm executed the transaction on its own account (either on its own behalf or on behalf of a client) or for the account and on behalf of a client.
6. Instrument Identification	This shall consist in: <ul style="list-style-type: none"> <li>– a unique code, to be decided by the competent authority (if any) to which the report is made identifying the financial instrument which is the subject of the transaction;</li> <li>– if the financial instrument in question does not have a unique identification code, the report must include the name of the instrument or, in the case of a derivative contract, the characteristics of the contract.</li> </ul>
7. Instrument Security Code Type	The code type used to report the security code of the instrument
8. Underlying Instrument Identification	The instrument identification applicable to the security that is the underlying asset in a derivative contract as well as the transferable security falling within Article 4(1)(18)(c) of Directive 2004/39/EC.
9. Underlying Instrument Identification Code type	The code type used to report the underlying security code of the instrument
10. Instrument Type	The classification of the financial instrument that is the subject of the transaction. The description must at least indicate whether the instrument belongs to one of the following categories:

<b>Field Identifier</b>	<b>Description</b>
	<ul style="list-style-type: none"> <li>– Shares</li> <li>– Bonds or other forms of securitised debt</li> <li>– Money market instruments</li> <li>– Units in collective investment undertakings</li> <li>– Derivatives of which the underlying is a share</li> <li>– Derivatives of which the underlying is a bond or other forms of securitised debt</li> <li>– Derivatives of which the underlying is a commodity</li> <li>– Derivatives of which the underlying is an index</li> <li>– Derivatives of which the underlying is an interest rate</li> <li>– Other financial instruments</li> </ul>
11. Maturity Date	The maturity date of a bond or other form of securitised debt, or the exercise date / maturity date of a derivative contract.
12. Derivative Type	Specification whether a derivative is an option, future, swap, forward rate agreement or any other derivative contract.
13. Put/Call	Specification whether an option or any other financial instrument is a put or a call.
14. Strike Price	The strike price of an option or other financial instrument.
15. Price Multiplier	The number of units of the financial instrument in question which are contained in a trading lot; for example, the number of derivatives or securities represented by one contract.
16. Unit Price	The price per security or derivative contract excluding commission and accrued interest. In the case of a debt instrument, the price may be expressed either in terms of currency or as a percentage.
17. Price Notation	The currency in which the price is expressed. If, in the case of a bond or other form of securitised debt, the price is expressed as a percentage, that percentage shall be included.
18. Quantity	The number of units of the financial instruments, the nominal value of bonds, or the number of derivative contracts included in the transaction.
19. Quantity Notation	An indication as to whether the quantity is the number of units of

<b>Field Identifier</b>	<b>Description</b>
	financial instruments, the nominal value of bonds or the number of derivative contracts.
20. Counterparty	<p>Identification of the counterparty to the transaction. That identification shall consist in:</p> <ul style="list-style-type: none"> <li>– where the counterparty is an investment firm, a unique code for that firm, to be determined by the competent authority (if any) to which the report is made;</li> <li>– where the counterparty is a regulated market or MTF or an entity acting as its central counterparty, the unique harmonised identification code for that market, MTF or entity acting as central counterparty, as specified in the list published by the competent authority of the home Member State of that entity in accordance with Article 12(2);</li> <li>– where the counterparty is not an investment firm, a regulated market, an MTF or an entity acting as central counterparty, it should be identified as ‘customer/client’ of the investment firm which executed the transaction.</li> </ul>
21. Venue Identification	<p>Identification of the venue where the transaction was executed. That identification shall consist in:</p> <ul style="list-style-type: none"> <li>– where the venue is a trading venue: its unique harmonised identification code;</li> <li>– otherwise: the code ‘OTC’.</li> </ul>
22. Transaction Reference Number	A unique identification number for the transaction provided by the investment firm or a third party reporting on its behalf.
23. Cancellation Flag	An indication as to whether the transaction was cancelled.

**Table 2: Further details for use of competent authorities**

<b>Field Identifier</b>	<b>Description</b>
1. Reporting Firm Identification	In addition to the information specified in Table 1, the full name of the reporting firm.
6. Instrument Identification	The unique code, agreed between all the competent authorities, applicable to the financial instrument in question shall be used.
20. Counterparty	Where the counterparty is an investment firm, instead of the information specified in Table 1, the full name of the investment firm.

## ANNEX II

**Table 1: Information to be made public in accordance with Article 16**

<b>Type of system</b>	<b>Description of system</b>	<b>Summary of information to be made public, in accordance with Article 16</b>
continuous auction order book trading system	a system that by means of an order book and a trading algorithm operated without human intervention matches sell orders with matching buy orders on the basis of the best available price on a continuous basis	the aggregate number of orders and the shares they represent at each price level, for at least the five best bid and offer price levels
quote-driven trading system	a system where transactions are concluded on the basis of firm quotes that are continuously made available to participants, which requires the market makers to maintain quotes in a size that balances the needs of members and participants to deal in a commercial size and the risk to which the market maker exposes itself	the best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices
periodic auction trading system	a system that matches orders on the basis of a periodic auction and a trading algorithm operated without human intervention	the price at which the auction trading system would best satisfy its trading algorithm and the volume that would potentially be executable at that price
trading system not covered by first three rows	a hybrid system falling into two or more of the first three rows or a system where the price determination process is of a different nature than that applicable to the types of system covered by first three rows	adequate information as to the level of orders or quotes and of trading interest; in particular, the five best bid and offer price levels and/or two-way quotes of each market maker in the share, if the characteristics of the price discovery mechanism so permit

**Table 2: Orders large in scale compared with normal market size**

<b>Class in terms of average daily turnover (ADT)</b>	<b>ADT &lt; €500,000</b>	<b>€500,000 ≤ ADT &lt; €1,000,000</b>	<b>€1,000,000 ≤ ADT &lt; €25,000,000</b>	<b>€25,000,000 ≤ ADT &lt; €50,000,000</b>	<b>ADT ≥ €50,000,000</b>
Minimum size of order qualifying as large in scale compared with normal market size	€0 000	€100 000	€250 000	€400 000	€500 000

**Table 3: Standard market sizes**

<b>Class in terms of average value of transactions executed (AVT)</b>	<b>AVT &lt; €10,000</b>	<b>€10,000 ≤ AVT &lt; €20,000</b>	<b>€20,000 ≤ AVT &lt; €30,000</b>	<b>€30,000 ≤ AVT &lt; €40,000</b>	<b>€40,000 ≤ AVT &lt; €50,000</b>	<b>€50,000 ≤ AVT &lt; €70,000</b>	<b>€70,000 ≤ AVT &lt; €90,000</b>	<b>Etc.</b>
Standard market size	€7 500	€15 000	€25 000	€35 000	€45 000	€60 000	€80 000	Etc.

**Table 4: Deferred publication thresholds and delays**

The table below shows, for each permitted delay for publication and each class of shares in terms of average daily turnover, the minimum qualifying size of transaction (ADT) that will qualify for that delay in respect of a share of that type.

		<b>Class of shares in terms of average daily turnover (ADT)</b>			
		<b>ADT &lt; €100 000</b>	<b>€100 000 ≤ ADT &lt; €1 000 000</b>	<b>€1 000 000 ≤ ADT &lt; €50 000 000</b>	<b>ADT ≥ €50 000 000</b>
		<b>Minimum qualifying size of transaction for permitted delay</b>			
<b>Permitted delay for publication</b>	<b>60 minutes</b>	€10 000	Greater of 5% of ADT and €25 000	Lower of 10% of ADT and € 500 000	Lower of 10% of ADT and €7 500 000
	<b>180 minutes</b>	€25 000	Greater of 15% of ADT and €75 000	Lower of 15% of ADT and € 000 000	Lower of 20% of ADT and €15 000 000
	<b>Until end of trading day (or roll-over to noon of next trading day if trade undertaken in final 2 hours of trading day)</b>	€45 000	Greater of 25% of ADT and €100 000	Lower of 25% of ADT and €10 000 000	Lower of 30% of ADT and €30 000 000
	<b>Until end of trading day next after trade</b>	€60 000	Greater of 50% of ADT and €100 000	100% of ADT	100% of ADT
	<b>Until end of second trading day next after trade</b>	€80 000	Greater of 100% of ADT and €100 000	250% of ADT	