

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and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (repealed)

## TITLE II

### **AUTHORISATION AND OPERATING CONDITIONS FOR INVESTMENT FIRMS**

#### CHAPTER I

#### **CONDITIONS AND PROCEDURES FOR AUTHORISATION**

##### *Article 5*

##### **Requirement for authorisation**

1 Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis be subject to prior authorisation in accordance with the provisions of this Chapter. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 48.

2 By way of derogation from paragraph 1, Member States shall allow any market operator to operate an MTF, subject to the prior verification of their compliance with the provisions of this Chapter, excluding Articles 11 and 15.

3 Member States shall establish a register of all investment firms. This register shall be publicly accessible and shall contain information on the services and/or activities for which the investment firm is authorised. It shall be updated on a regular basis.

4 Each Member State shall require that:

- any investment firm which is a legal person have its head office in the same Member State as its registered office,
- any investment firm which is not a legal person or any investment firm which is a legal person but under its national law has no registered office have its head office in the Member State in which it actually carries on its business.

5 In the case of investment firms which provide only investment advice or the service of reception and transmission of orders under the conditions established in Article 3, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the granting of an authorisation, in accordance with the conditions laid down in Article 48(2).

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## Article 6

### Scope of authorisation

1 The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex I. Authorisation shall in no case be granted solely for the provision of ancillary services.

2 An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension of its authorisation.

3 The authorisation shall be valid for the entire Community and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Community, either through the establishment of a branch or the free provision of services.

## Article 7

### Procedures for granting and refusing requests for authorisation

1 The competent authority shall not grant authorisation unless and until such time as it is fully satisfied that the applicant complies with all requirements under the provisions adopted pursuant to this Directive.

2 The investment firm shall provide all information, including a programme of operations setting out inter alia the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the investment firm has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Chapter.

3 An applicant shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted.

## Article 8

### Withdrawal of authorisations

The competent authority may withdraw the authorisation issued to an investment firm where such an investment firm:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted, such as compliance with the conditions set out in Directive 93/6/EEC;

- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive governing the operating conditions for investment firms;
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

### *Article 9*

#### **Persons who effectively direct the business**

1 Member States shall require the persons who effectively direct the business of an investment firm to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the investment firm.

Where the market operator that seeks authorisation to operate an MTF and the persons that effectively direct the business of the MTF are the same as those that effectively direct the business of the regulated market, those persons are deemed to comply with the requirements laid down in the first subparagraph.

2 Member States shall require the investment firm to notify the competent authority of any changes to its management, along with all information needed to assess whether the new staff appointed to manage the firm are of sufficiently good repute and sufficiently experienced.

3 The competent authority shall refuse authorisation if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the firm pose a threat to its sound and prudent management.

4 Member States shall require that the management of investment firms is undertaken by at least two persons meeting the requirements laid down in paragraph 1.

By way of derogation from the first subparagraph, Member States may grant authorisation to investment firms that are natural persons or to investment firms that are legal persons managed by a single natural person in accordance with their constitutive rules and national laws. Member States shall nevertheless require that alternative arrangements be in place which ensure the sound and prudent management of such investment firms.

### *Article 10*

#### **Shareholders and members with qualifying holdings**

1 The competent authorities shall not authorise the performance of investment services or activities by an investment firm until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an investment firm, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings.

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Where close links exist between the investment firm and other natural or legal persons, the competent authority shall grant authorisation only if those links do not prevent the effective exercise of the supervisory functions of the competent authority.

2 The competent authority shall refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

[<sup>F13</sup> Member States shall require any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (hereinafter referred to as the proposed acquisition), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 10b(4).

Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an investment firm first to notify in writing the competent authorities, indicating the size of the intended holding. Such a person shall likewise notify the competent authorities if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the investment firm would cease to be his subsidiary.

Member States need not apply the 30 % threshold where, in accordance with Article 9(3) (a) of Directive 2004/109/EC, they apply a threshold of one-third.

In determining whether the criteria for a qualifying holding referred to in this Article are fulfilled, Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

4 The relevant competent authorities shall work in full consultation with each other when carrying out the assessment provided for in Article 10b(1) (hereinafter referred to as the assessment) if the proposed acquirer is one of the following:

- a a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed;
- b the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed; or
- c a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.

The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the

competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the investment firm in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.]

5 Member States shall require that, if an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in the first subparagraph of paragraph 3, that investment firm is to inform the competent authority without delay.

At least once a year, investment firms shall also inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders and members or as a result of compliance with the regulations applicable to companies whose transferable securities are admitted to trading on a regulated market.

6 Member States shall require that, where the influence exercised by the persons referred to in the first subparagraph of paragraph 1 is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation.

Such measures may consist in applications for judicial orders and/or the imposition of sanctions against directors and those responsible for management, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall be taken in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.

#### Textual Amendments

- F1** Substituted by [Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector \(Text with EEA relevance\).](#)

### *f<sup>2</sup>* Article 10a

#### Assessment period

1 The competent authorities shall, promptly and in any event within two working days following receipt of the notification required under the first subparagraph of Article 10(3), as well as following the possible subsequent receipt of the information referred to in paragraph 2 of this Article, acknowledge receipt thereof in writing to the proposed acquirer.

The competent authorities shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents

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required by the Member State to be attached to the notification on the basis of the list referred to in Article 10b(4) (hereinafter referred to as the assessment period), to carry out the assessment.

The competent authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

2 The competent authorities may, during the assessment period, if necessary, and no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but may not result in an interruption of the assessment period.

3 The competent authorities may extend the interruption referred to in the second subparagraph of paragraph 2 up to 30 working days if the proposed acquirer is:

- a situated or regulated outside the Community; or
- b a natural or legal person not subject to supervision under this Directive or Directives 85/611/EEC, 92/49/EEC<sup>(1)</sup>, 2002/83/EC, 2005/68/EC<sup>(2)</sup> or 2006/48/EC<sup>(3)</sup>.

4 If the competent authorities, upon completion of the assessment, decide to oppose the proposed acquisition, they shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to make such disclosure in the absence of a request by the proposed acquirer.

5 If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

6 The competent authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

7 Member States may not impose requirements for the notification to and approval by the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

#### Textual Amendments

- F2** Inserted by [Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector \(Text with EEA relevance\).](#)

## Article 10b

### Assessment

1 In assessing the notification provided for in Article 10(3) and the information referred to in Article 10a(2), the competent authorities shall, in order to ensure the sound and prudent management of the investment firm in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment firm, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

- a the reputation of the proposed acquirer;
- b the reputation and experience of any person who will direct the business of the investment firm as a result of the proposed acquisition;
- c the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the investment firm in which the acquisition is proposed;
- d whether the investment firm will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directives 2002/87/EC<sup>(4)</sup> and 2006/49/EC<sup>(5)</sup>, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;
- e whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC<sup>(6)</sup> is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

In order to take account of future developments and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may adopt implementing measures which adjust the criteria set out in the first subparagraph of this paragraph.

2 The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

3 Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their competent authorities to examine the proposed acquisition in terms of the economic needs of the market.

4 Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 10(3). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5 Notwithstanding Article 10a(1), (2) and (3), where two or more proposals to acquire or increase qualifying holdings in the same investment firm have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.]

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### Textual Amendments

- F2** Inserted by [Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector \(Text with EEA relevance\).](#)

## Article 11

### Membership of an authorised Investor Compensation Scheme

The competent authority shall verify that any entity seeking authorisation as an investment firm meets its obligations under Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes<sup>(7)</sup> at the time of authorisation.

## Article 12

### Initial capital endowment

Member States shall ensure that the competent authorities do not grant authorisation unless the investment firm has sufficient initial capital in accordance with the requirements of Directive 93/6/EEC having regard to the nature of the investment service or activity in question.

Pending the revision of Directive 93/6/EEC, the investment firms provided for in Article 67 shall be subject to the capital requirements laid down in that Article.

## Article 13

### Organisational requirements

1 The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8.

2 An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons.

3 An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 18 from adversely affecting the interests of its clients.

4 An investment firm shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end the investment firm shall employ appropriate and proportionate systems, resources and procedures.

5 An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of

important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations.

An investment firm shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

6 An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

7 An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent.

8 An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the clients' rights and, except in the case of credit institutions, prevent the use of client funds for its own account.

9 In the case of branches of investment firms, the competent authority of the Member State in which the branch is located shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in paragraph 6 with regard to transactions undertaken by the branch.

10 In order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 2 to 9, the Commission shall adopt<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2),<sup>]</sup> implementing measures which specify the concrete organisational requirements to be imposed on investment firms performing different investment services and/or activities and ancillary services or combinations thereof. <sup>[F4]</sup>Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).<sup>]</sup>

#### Textual Amendments

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
- F4** Inserted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

### Article 14

#### Trading process and finalisation of transactions in an MTF

1 Member States shall require that investment firms or market operators operating an MTF, in addition to meeting the requirements laid down in Article 13, establish transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders.

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2 Member States shall require that investment firms or market operators operating an MTF establish transparent rules regarding the criteria for determining the financial instruments that can be traded under its systems.

Member States shall require that, where applicable, investment firms or market operators operating an MTF provide, or are satisfied that there is access to, sufficient publicly available information to enable its users to form an investment judgement, taking into account both the nature of the users and the types of instruments traded.

3 Member States shall ensure that Articles 19, 21 and 22 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. However, the members of or participants in the MTF shall comply with the obligations provided for in Articles 19, 21 and 22 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.

4 Member States shall require that investment firms or market operators operating an MTF establish and maintain transparent rules, based on objective criteria, governing access to its facility. These rules shall comply with the conditions established in Article 42(3).

5 Member States shall require that investment firms or market operators operating an MTF clearly inform its users of their respective responsibilities for the settlement of the transactions executed in that facility. Member States shall require that investment firms or market operators operating an MTF have put in place the necessary arrangements to facilitate the efficient settlement of the transactions concluded under the systems of the MTF.

6 Where a transferable security, which has been admitted to trading on a regulated market, is also traded on an MTF without the consent of the issuer, the issuer shall not be subject to any obligation relating to initial, ongoing or ad hoc financial disclosure with regard to that MTF.

7 Member States shall require that any investment firm or market operator operating an MTF comply immediately with any instruction from its competent authority pursuant to Article 50(1) to suspend or remove a financial instrument from trading.

### *Article 15*

#### **Relations with third countries**

1 Member States shall inform the Commission of any general difficulties which their investment firms encounter in establishing themselves or providing investment services and/or performing investment activities in any third country.

2 Whenever it appears to the Commission, on the basis of information submitted to it under paragraph 1, that a third country does not grant Community investment firms effective market access comparable to that granted by the Community to investment firms from that third country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community investment firms. The Council shall act by a qualified majority.

3 Whenever it appears to the Commission, on the basis of information submitted to it under paragraph 1, that Community investment firms in a third country are not granted national treatment affording the same competitive opportunities as are available to domestic investment firms and that the conditions of effective market access are not fulfilled, the Commission may initiate negotiations in order to remedy the situation.

In the circumstances referred to in the first subparagraph, the Commission may decide, [<sup>F5</sup>in accordance with the regulatory procedure referred to in Article 64(3),] at any time and in addition to the initiation of negotiations, that the competent authorities of the Member States must limit or suspend their decisions regarding requests pending or future requests for authorisation and the acquisition of holdings by direct or indirect parent undertakings governed by the law of the third country in question. Such limitations or suspensions may not be applied to the setting-up of subsidiaries by investment firms duly authorised in the Community or by their subsidiaries, or to the acquisition of holdings in Community investment firms by such firms or subsidiaries. The duration of such measures may not exceed three months.

Before the end of the three-month period referred to in the second subparagraph and in the light of the results of the negotiations, the Commission may decide, [<sup>F5</sup>in accordance with the regulatory procedure referred to in Article 64(3),] to extend these measures.

4 Whenever it appears to the Commission that one of the situations referred to in paragraphs 2 and 3 obtains, the Member States shall inform it at its request:

- a of any application for the authorisation of any firm which is the direct or indirect subsidiary of a parent undertaking governed by the law of the third country in question;
- b whenever they are informed in accordance with Article 10(3) that such a parent undertaking proposes to acquire a holding in a Community investment firm, in consequence of which the latter would become its subsidiary.

That obligation to provide information shall lapse whenever agreement is reached with the third country concerned or when the measures referred to in the second and third subparagraphs of paragraph 3 cease to apply.

5 Measures taken under this Article shall comply with the Community's obligations under any international agreements, bilateral or multilateral, governing the taking-up or pursuit of the business of investment firms.

#### **Textual Amendments**

- F5** Substituted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

## CHAPTER II

### OPERATING CONDITIONS FOR INVESTMENT FIRMS

#### Section 1

#### **General provisions**

##### *Article 16*

#### **Regular review of conditions for initial authorisation**

1 Member States shall require that an investment firm authorised in their territory comply at all times with the conditions for initial authorisation established in Chapter I of this Title.

2 Member States shall require competent authorities to establish the appropriate methods to monitor that investment firms comply with their obligation under paragraph 1. They shall require investment firms to notify the competent authorities of any material changes to the conditions for initial authorisation.

3 In the case of investment firms which provide only investment advice, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the review of the conditions for initial authorisation, in accordance with the conditions laid down in Article 48(2).

##### *Article 17*

#### **General obligation in respect of on-going supervision**

1 Member States shall ensure that the competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this Directive. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of investment firms with those obligations.

2 In the case of investment firms which provide only investment advice, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the regular monitoring of operational requirements, in accordance with the conditions laid down in Article 48(2).

##### *Article 18*

#### **Conflicts of interest**

1 Member States shall require investment firms to take all reasonable steps to identify conflicts of interest between themselves, including their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any investment and ancillary services, or combinations thereof.

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2 Where organisational or administrative arrangements made by the investment firm in accordance with Article 13(3) to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the investment firm shall clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business on its behalf.

3 In order to take account of technical developments on financial markets and to ensure uniform application of paragraphs 1 and 2, the Commission shall adopt<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2),] implementing measures to:

- a define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest when providing various investment and ancillary services and combinations thereof;
- b establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the clients or potential clients of the investment firm.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### **Textual Amendments**

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
- F4** Inserted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

## Section 2

### **Provisions to ensure investor protection**

#### *Article 19*

#### **Conduct of business obligations when providing investment services to clients**

1 Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8.

2 All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

3 Appropriate information shall be provided in a comprehensible form to clients or potential clients about:

- the investment firm and its services,

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- financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,
- execution venues, and
- costs and associated charges

so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.

4 When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

5 Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In case the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

In cases where the client or potential client elects not to provide the information referred to under the first subparagraph, or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format.

6 Member States shall allow investment firms when providing investment services that only consist of execution and/or the reception and transmission of client orders with or without ancillary services to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 5 where all the following conditions are met:

- the above services relate to shares admitted to trading on a regulated market or in an equivalent third country market, money market instruments, bonds or other forms of securitised debt (excluding those bonds or securitised debt that embed a derivative), UCITS and other non-complex financial instruments. A third country market shall be considered as equivalent to a regulated market if it complies with equivalent requirements to those established under Title III. The Commission shall publish a list of those markets that are to be considered as equivalent. This list shall be updated periodically,
- the service is provided at the initiative of the client or potential client,
- the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules; this warning may be provided in a standardised format,

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— the investment firm complies with its obligations under Article 18.

7 The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

8 The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

9 In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article.

10 In order to ensure the necessary protection of investors and the uniform application of paragraphs 1 to 8, the Commission shall adopt<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2),] implementing measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those implementing measures shall take into account:

- a the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;
- b the nature of the financial instruments being offered or considered;
- c the retail or professional nature of the client or potential clients.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### **Textual Amendments**

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
- F4** Inserted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

### *Article 20*

#### **Provision of services through the medium of another investment firm**

Member States shall allow an investment firm receiving an instruction to perform investment or ancillary services on behalf of a client through the medium of another investment firm to rely on client information transmitted by the latter firm. The investment firm which mediates the instructions will remain responsible for the completeness and accuracy of the information transmitted.

The investment firm which receives an instruction to undertake services on behalf of a client in this way shall also be able to rely on any recommendations in respect of the service or transaction that have been provided to the client by another investment firm.

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The investment firm which mediates the instructions will remain responsible for the appropriateness for the client of the recommendations or advice provided.

The investment firm which receives client instructions or orders through the medium of another investment firm shall remain responsible for concluding the service or transaction, based on any such information or recommendations, in accordance with the relevant provisions of this Title.

### *Article 21*

#### **Obligation to execute orders on terms most favourable to the client**

1 Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction.

2 Member States shall require investment firms to establish and implement effective arrangements for complying with paragraph 1. In particular Member States shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result in accordance with paragraph 1.

3 The order execution policy shall include, in respect of each class of instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue. It shall at least include those venues that enable the investment firm to obtain on a consistent basis the best possible result for the execution of client orders.

Member States shall require that investment firms provide appropriate information to their clients on their order execution policy. Member States shall require that investment firms obtain the prior consent of their clients to the execution policy.

Member States shall require that, where the order execution policy provides for the possibility that client orders may be executed outside a regulated market or an MTF, the investment firm shall, in particular, inform its clients about this possibility. Member States shall require that investment firms obtain the prior express consent of their clients before proceeding to execute their orders outside a regulated market or an MTF. Investment firms may obtain this consent either in the form of a general agreement or in respect of individual transactions.

4 Member States shall require investment firms to monitor the effectiveness of their order execution arrangements and execution policy in order to identify and, where appropriate, correct any deficiencies. In particular, they shall assess, on a regular basis, whether the execution venues included in the order execution policy provide for the best possible result for the client or whether they need to make changes to their execution arrangements. Member States shall require investment firms to notify clients of any material changes to their order execution arrangements or execution policy.

5 Member States shall require investment firms to be able to demonstrate to their clients, at their request, that they have executed their orders in accordance with the firm's execution policy.

6 In order to ensure the protection necessary for investors, the fair and orderly functioning of markets, and to ensure the uniform application of paragraphs 1, 3 and 4, the

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Commission shall<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2),] adopt implementing measures concerning:

- a the criteria for determining the relative importance of the different factors that, pursuant to paragraph 1, may be taken into account for determining the best possible result taking into account the size and type of order and the retail or professional nature of the client;
- b factors that may be taken into account by an investment firm when reviewing its execution arrangements and the circumstances under which changes to such arrangements may be appropriate. In particular, the factors for determining which venues enable investment firms to obtain on a consistent basis the best possible result for executing the client orders;
- c the nature and extent of the information to be provided to clients on their execution policies, pursuant to paragraph 3.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### Textual Amendments

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments](#), as regards the implementing powers conferred on the Commission.
- F4** Inserted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments](#), as regards the implementing powers conferred on the Commission.

## Article 22

### Client order handling rules

1 Member States shall require that investment firms authorised to execute orders on behalf of clients implement procedures and arrangements which provide for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm.

These procedures or arrangements shall allow for the execution of otherwise comparable client orders in accordance with the time of their reception by the investment firm.

2 Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. Member States may decide that investment firms comply with this obligation by transmitting the client limit order to a regulated market and/or MTF. Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article 44(2).

3 In order to ensure that measures for the protection of investors and fair and orderly functioning of markets take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall adopt<sup>[F3]</sup>, in

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accordance with the procedure referred to in Article 64(2),] implementing measures which define:

- a the conditions and nature of the procedures and arrangements which result in the prompt, fair and expeditious execution of client orders and the situations in which or types of transaction for which investment firms may reasonably deviate from prompt execution so as to obtain more favourable terms for clients;
- b the different methods through which an investment firm can be deemed to have met its obligation to disclose not immediately executable client limit orders to the market.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### **Textual Amendments**

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
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### *Article 23*

#### **Obligations of investment firms when appointing tied agents**

1 Member States may decide to allow an investment firm to appoint tied agents for the purposes of promoting the services of the investment firm, soliciting business or receiving orders from clients or potential clients and transmitting them, placing financial instruments and providing advice in respect of such financial instruments and services offered by that investment firm.

2 Member States shall require that where an investment firm decides to appoint a tied agent it remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the firm. Member States shall require the investment firm to ensure that a tied agent discloses the capacity in which he is acting and the firm which he is representing when contacting or before dealing with any client or potential client.

Member States may allow, in accordance with Article 13(6), (7) and (8), tied agents registered in their territory to handle clients' money and/or financial instruments on behalf and under the full responsibility of the investment firm for which they are acting within their territory or, in the case of a cross-border operation, in the territory of a Member State which allows a tied agent to handle clients' money.

Member States shall require the investment firms to monitor the activities of their tied agents so as to ensure that they continue to comply with this Directive when acting through tied agents.

3 Member States that decide to allow investment firms to appoint tied agents shall establish a public register. Tied agents shall be registered in the public register in the Member State where they are established.

Where the Member State in which the tied agent is established has decided, in accordance with paragraph 1, not to allow the investment firms authorised by their competent authorities to appoint tied agents, those tied agents shall be registered with the competent authority of the home Member State of the investment firm on whose behalf it acts.

Member States shall ensure that tied agents are only admitted to the public register if it has been established that they are of sufficiently good repute and that they possess appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant information regarding the proposed service to the client or potential client.

Member States may decide that investment firms can verify whether the tied agents which they have appointed are of sufficiently good repute and possess the knowledge as referred to in the third subparagraph.

The register shall be updated on a regular basis. It shall be publicly available for consultation.

4 Member States shall require that investment firms appointing tied agents take adequate measures in order to avoid any negative impact that the activities of the tied agent not covered by the scope of this Directive could have on the activities carried out by the tied agent on behalf of the investment firm.

Member States may allow competent authorities to collaborate with investment firms and credit institutions, their associations and other entities in registering tied agents and in monitoring compliance of tied agents with the requirements of paragraph 3. In particular, tied agents may be registered by an investment firm, credit institution or their associations and other entities under the supervision of the competent authority.

5 Member States shall require that investment firms appoint only tied agents entered in the public registers referred to in paragraph 3.

6 Member States may reinforce the requirements set out in this Article or add other requirements for tied agents registered within their jurisdiction.

#### *Article 24*

### **Transactions executed with eligible counterparties**

1 Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Articles 19, 21 and 22(1) in respect of those transactions or in respect of any ancillary service directly related to those transactions.

2 Member States shall recognise as eligible counterparties for the purposes of this Article investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions authorised or regulated under Community legislation or the national law of a Member State, undertakings exempted from the application of this Directive under Article 2(1) (k) and (l), national governments and their corresponding offices including public bodies that deal with public debt, central banks and supranational organisations.

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Classification as an eligible counterparty under the first subparagraph shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to Articles 19, 21 and 22.

3 Member States may also recognise as eligible counterparties other undertakings meeting pre-determined proportionate requirements, including quantitative thresholds. In the event of a transaction where the prospective counterparties are located in different jurisdictions, the investment firm shall defer to the status of the other undertaking as determined by the law or measures of the Member State in which that undertaking is established.

Member States shall ensure that the investment firm, when it enters into transactions in accordance with paragraph 1 with such undertakings, obtains the express confirmation from the prospective counterparty that it agrees to be treated as an eligible counterparty. Member States shall allow the investment firm to obtain this confirmation either in the form of a general agreement or in respect of each individual transaction.

4 Member States may recognise as eligible counterparties third country entities equivalent to those categories of entities mentioned in paragraph 2.

Member States may also recognise as eligible counterparties third country undertakings such as those mentioned in paragraph 3 on the same conditions and subject to the same requirements as those laid down at paragraph 3.

5 In order to ensure the uniform application of paragraphs 2, 3 and 4 in the light of changing market practice and to facilitate the effective operation of the single market, the Commission may adopt<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2), implementing measures which define:

- a the procedures for requesting treatment as clients under paragraph 2;
- b the procedures for obtaining the express confirmation from prospective counterparties under paragraph 3;
- c the predetermined proportionate requirements, including quantitative thresholds that would allow an undertaking to be considered as an eligible counterparty under paragraph 3.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### Textual Amendments

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
- F4** Inserted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

## Section 3

### Market transparency and integrity

#### Article 25

#### **Obligation to uphold integrity of markets, report transactions and maintain records**

1 Without prejudice to the allocation of responsibilities for enforcing the provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>(8)</sup>, Member States shall ensure that appropriate measures are in place 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 which promotes the integrity of the market.

2 Member States shall require investment firms to keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering<sup>(9)</sup>.

3 Member States shall require investment firms which execute transactions in any financial instruments admitted to trading on a regulated market to report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. This obligation shall apply whether or not such transactions were carried out on a regulated market.

The competent authorities shall, in accordance with Article 58, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives this information.

4 The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned.

5 Member States shall provide for the reports to be made to the competent authority either by the investment firm itself, a third party acting on its behalf or by a trade-matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed. In cases where transactions are reported directly to the competent authority by a regulated market, an MTF, or a trade-matching or reporting system approved by the competent authority, the obligation on the investment firm laid down in paragraph 3 may be waived.

6 When, in accordance with Article 32(7), reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information.

7 In order to ensure that measures for the protection of market integrity are modified to take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 to 5, the Commission may adopt<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2), implementing measures which define the methods and arrangements for reporting financial transactions, the form and content of these reports and

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the criteria for defining a relevant market in accordance with paragraph 3. [<sup>F4</sup>Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### **Textual Amendments**

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
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### *Article 26*

#### **Monitoring of compliance with the rules of the MTF and with other legal obligations**

1 Member States shall require that investment firms and market operators operating an MTF establish and maintain effective arrangements and procedures, relevant to the MTF, for the regular monitoring of the compliance by its users with its rules. Investment firms and market operators operating an MTF shall monitor the transactions undertaken by their users under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

2 Member States shall require investment firms and market operators operating an MTF to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. Member States shall also require investment firms and market operators operating an MTF to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

### *Article 27*

#### **Obligation for investment firms to make public firm quotes**

1 Member States shall require systematic internalisers in shares to publish a firm quote in those shares admitted to trading on a regulated market for which they are systematic internalisers and for which there is a liquid market. In the case of shares for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request.

The provisions of this Article shall be applicable to systematic internalisers when dealing for sizes up to standard market size. Systematic internalisers that only deal in sizes above standard market size shall not be subject to the provisions of this Article.

Systematic internalisers may decide the size or sizes at which they will quote. For a particular share each quote shall include a firm bid and/or offer price or prices for a size or sizes which could be up to standard market size for the class of shares to which the share belongs. The price or prices shall also reflect the prevailing market conditions for that share.

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Shares shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that share. The standard market size for each class of shares shall be a size representative of the arithmetic average value of the orders executed in the market for the shares included in each class of shares.

The market for each share shall be comprised of all orders executed in the European Union in respect of that share excluding those large in scale compared to normal market size for that share.

2 The competent authority of the most relevant market in terms of liquidity as defined in Article 25 for each share shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that share, the class of shares to which it belongs. This information shall be made public to all market participants.

3 Systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. They shall be entitled to update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes.

The quote shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

Systematic internalisers shall, while complying with the provisions set down in Article 21, execute the orders they receive from their retail clients in relation to the shares for which they are systematic internalisers at the quoted prices at the time of reception of the order.

Systematic internalisers shall execute the orders they receive from their professional clients in relation to the shares for which they are systematic internalisers at the quoted price at the time of reception of the order. However, they may execute those orders at a better price in justified cases provided that this price falls within a public range close to market conditions and provided that the orders are of a size bigger than the size customarily undertaken by a retail investor.

Furthermore, systematic internalisers may execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the conditions established in the fourth subparagraph, in respect of transactions where execution in several securities is part of one transaction or in respect of orders that are subject to conditions other than the current market price.

Where a systematic internaliser who quotes only one quote or whose highest quote is lower than the standard market size receives an order from a client of a size bigger than its quotation size, but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions of the previous two subparagraphs. Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with the provisions of Article 22, except where otherwise permitted under the conditions of the previous two subparagraphs.

- 4 The competent authorities shall check:
- a that investment firms regularly update bid and/or offer prices published in accordance with paragraph 1 and maintain prices which reflect the prevailing market conditions;
  - b that investment firms comply with the conditions for price improvement laid down in the fourth subparagraph of paragraph 3.

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5 Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the investors to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and the final settlement of the transaction.

6 In order to limit the risk of being exposed to multiple transactions from the same client systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They shall also be allowed, in a non-discriminatory way and in accordance with the provisions of Article 22, to limit the total number of transactions from different clients at the same time provided that this is allowable only where the number and/or volume of orders sought by clients considerably exceeds the norm.

7 In order to ensure the uniform application of paragraphs 1 to 6, in a manner which supports the efficient valuation of shares and maximises the possibility of investment firms of obtaining the best deal for their clients, the Commission shall<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2),] adopt implementing measures which:

- a specify the criteria for application of paragraphs 1 and 2;
- b specify the criteria determining when a quote is published on a regular and continuous basis and is easily accessible as well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:
  - (i) through the facilities of any regulated market which has admitted the instrument in question to trading;
  - (ii) through the offices of a third party;
  - (iii) through proprietary arrangements;
- c specify the general criteria for determining those transactions where execution in several securities is part of one transaction or orders that are subject to conditions other than current market price;
- d specify the general criteria for determining what can be considered as exceptional market circumstances that allow for the withdrawal of quotes as well as conditions for updating quotes;
- e specify the criteria for determining what is a size customarily undertaken by a retail investor.
- f specify the criteria for determining what constitutes considerably exceeding the norm as set down in paragraph 6;
- g specify the criteria for determining when prices fall within a public range close to market conditions.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### Textual Amendments

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

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**F4** Inserted by Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.

## Article 28

### Post-trade disclosure by investment firms

1 Member States shall, at least, require investment firms which, either on own account or on behalf of clients, conclude transactions in shares admitted to trading on a regulated market outside a regulated market or MTF, to make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public as close to real-time as possible, on a reasonable commercial basis, and in a manner which is easily accessible to other market participants.

2 Member States shall require that the information which is made public in accordance with paragraph 1 and the time-limits within which it is published comply with the requirements adopted pursuant to Article 45. Where the measures adopted pursuant to Article 45 provide for deferred reporting for certain categories of transaction in shares, this possibility shall apply mutatis mutandis to those transactions when undertaken outside regulated markets or MTFs.

3 In order to ensure the transparent and orderly functioning of markets and the uniform application of paragraph 1, the Commission shall adopt<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2),] implementing measures which:

- a specify the means by which investment firms may comply with their obligations under paragraph 1 including the following possibilities:
  - (i) through the facilities of any regulated market which has admitted the instrument in question to trading or through the facilities of an MTF in which the share in question is traded;
  - (ii) through the offices of a third party;
  - (iii) through proprietary arrangements;
- b clarify the application of the obligation under paragraph 1 to transactions involving the use of shares for collateral, lending or other purposes where the exchange of shares is determined by factors other than the current market valuation of the share.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

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#### Textual Amendments

**F3** Deleted by Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.

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## Article 29

### Pre-trade transparency requirements for MTFs

1 Member States shall, at least, require that investment firms and market operators operating an MTF make public current bid and offer prices and the depth of trading interests at these prices which are advertised through their systems in respect of shares admitted to trading on a regulated market. Member States shall provide for this information to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours.

2 Member States shall provide for the competent authorities to be able to waive the obligation for investment firms or market operators operating an MTF to make public the information referred to in paragraph 1 based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. In particular, the competent authorities shall be able to waive the obligation in respect of transactions that are large in scale compared with normal market size for the share or type of share in question.

3 In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2)] adopt implementing measures as regards:

- a the range of bid and offers or designated market-maker quotes, and the depth of trading interest at those prices, to be made public;
- b the size or type of orders for which pre-trade disclosure may be waived under paragraph 2;
- c the market model for which pre-trade disclosure may be waived under paragraph 2 and in particular, the applicability of the obligation to trading methods operated by an MTF which conclude transactions under their rules by reference to prices established outside the systems of the MTF or by periodic auction.

Except where justified by the specific nature of the MTF, the content of these implementing measures shall be equal to that of the implementing measures provided for in Article 44 for regulated markets.

<sup>[F4]</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### Textual Amendments

- F3** Deleted by Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.
- F4** Inserted by Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.

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### Article 30

#### Post-trade transparency requirements for MTFs

1 Member States shall, at least, require that investment firms and market operators operating an MTF make public the price, volume and time of the transactions executed under its systems in respect of shares which are admitted to trading on a regulated market. Member States shall require that details of all such transactions be made public, on a reasonable commercial basis, as close to real-time as possible. This requirement shall not apply to details of trades executed on an MTF that are made public under the systems of a regulated market.

2 Member States shall provide that the competent authority may authorise investment firms or market operators operating an MTF to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares. Member States shall require MTFs to obtain the competent authority's prior approval to proposed arrangements for deferred trade-publication, and shall require that these arrangements be clearly disclosed to market participants and the investing public.

3 In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall<sup>[F3]</sup>, in accordance with the procedure referred to in Article 64(2)] adopt implementing measures in respect of:

- a the scope and content of the information to be made available to the public;
- b the conditions under which investment firms or market operators operating an MTF may provide for deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed.

Except where justified by the specific nature of the MTF, the content of these implementing measures shall be equal to that of the implementing measures provided for in Article 45 for regulated markets.

[<sup>F4</sup>The measures referred to in the first subparagraph, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).]

#### Textual Amendments

- F3** Deleted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)
- F4** Inserted by [Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.](#)

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## CHAPTER III

### RIGHTS OF INVESTMENT FIRMS

#### *Article 31*

#### **Freedom to provide investment services and activities**

1 Member States shall ensure that any investment firm authorised and supervised by the competent authorities of another Member State in accordance with this Directive, and in respect of credit institutions in accordance with Directive 2000/12/EC, may freely perform investment services and/or activities as well as ancillary services within their territories, provided that such services and activities are covered by its authorisation. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements on such an investment firm or credit institution in respect of the matters covered by this Directive.

2 Any investment firm wishing to provide services or activities within the territory of another Member State for the first time, or which wishes to change the range of services or activities so provided, shall communicate the following information to the competent authorities of its home Member State:

- a the Member State in which it intends to operate;
- b a programme of operations stating in particular the investment services and/or activities as well as ancillary services which it intends to perform and whether it intends to use tied agents in the territory of the Member States in which it intends to provide services.

In cases where the investment firm intends to use tied agents, the competent authority of the home Member State of the investment firm shall, at the request of the competent authority of the host Member State and within a reasonable time, communicate the identity of the tied agents that the investment firm intends to use in that Member State. The host Member State may make public such information.

3 The competent authority of the home Member State shall, within one month of receiving the information, forward it to the competent authority of the host Member State designated as contact point in accordance with Article 56(1). The investment firm may then start to provide the investment service or services concerned in the host Member State.

4 In the event of a change in any of the particulars communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the home Member State shall inform the competent authority of the host Member State of those changes.

5 Member States shall, without further legal or administrative requirement, allow investment firms and market operators operating MTFs from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory.

6 The investment firm or the market operator that operates an MTF shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State of the MTF shall communicate, within one month, this information to the Member State in which the MTF intends to provide such arrangements.

The competent authority of the home Member State of the MTF shall, on the request of the competent authority of the host Member State of the MTF and within a reasonable delay, communicate the identity of the members or participants of the MTF established in that Member State.

### *Article 32*

#### **Establishment of a branch**

1 Member States shall ensure that investment services and/or activities as well as ancillary services may be provided within their territories in accordance with this Directive and Directive 2000/12/EC through the establishment of a branch provided that those services and activities are covered by the authorisation granted to the investment firm or the credit institution in the home Member State. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements save those allowed under paragraph 7, on the organisation and operation of the branch in respect of the matters covered by this Directive.

2 Member States shall require any investment firm wishing to establish a branch within the territory of another Member State first to notify the competent authority of its home Member State and to provide it with the following information:

- a the Member States within the territory of which it plans to establish a branch;
- b a programme of operations setting out inter alia the investment services and/or activities as well as the ancillary services to be offered and the organisational structure of the branch and indicating whether the branch intends to use tied agents;
- c the address in the host Member State from which documents may be obtained;
- d the names of those responsible for the management of the branch.

In cases where an investment firm uses a tied agent established in a Member State outside its home Member State, such tied agent shall be assimilated to the branch and shall be subject to the provisions of this Directive relating to branches.

3 Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of an investment firm, taking into account the activities envisaged, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article 56(1) and inform the investment firm concerned accordingly.

4 In addition to the information referred to in paragraph 2, the competent authority of the home Member State shall communicate details of the accredited compensation scheme of which the investment firm is a member in accordance with Directive 97/9/EC to the competent authority of the host Member State. In the event of a change in the particulars, the competent authority of the home Member State shall inform the competent authority of the host Member State accordingly.

5 Where the competent authority of the home Member State refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the investment firm concerned within three months of receiving all the information.

6 On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of

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transmission of the communication by the competent authority of the home Member State, the branch may be established and commence business.

7 The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 and in measures adopted pursuant thereto.

The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 19, 21, 22, 25, 27 and 28 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory.

8 Each Member State shall provide that, where an investment firm authorised in another Member State has established a branch within its territory, the competent authority of the home Member State of the investment firm, in the exercise of its responsibilities and after informing the competent authority of the host Member State, may carry out on-site inspections in that branch.

9 In the event of a change in any of the information communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the host Member State shall also be informed of that change by the competent authority of the home Member State.

### *Article 33*

#### **Access to regulated markets**

1 Member States shall require that investment firms from other Member States which are authorised to execute client orders or to deal on own account have the right of membership or have access to regulated markets established in their territory by means of any of the following arrangements:

- a directly, by setting up branches in the host Member States;
- b by becoming remote members of or having remote access to the regulated market without having to be established in the home Member State of the regulated market, where the trading procedures and systems of the market in question do not require a physical presence for conclusion of transactions on the market.

2 Member States shall not impose any additional regulatory or administrative requirements, in respect of matters covered by this Directive, on investment firms exercising the right conferred by paragraph 1.

### *Article 34*

#### **Access to central counterparty, clearing and settlement facilities and right to designate settlement system**

1 Member States shall require that investment firms from other Member States have the right of access to central counterparty, clearing and settlement systems in their territory for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

Member States shall require that access of those investment firms to such facilities be subject to the same non-discriminatory, transparent and objective criteria as apply to local participants. Member States shall not restrict the use of those facilities to the clearing and settlement of transactions in financial instruments undertaken on a regulated market or MTF in their territory.

2 Member States shall require that regulated markets in their territory offer all their members or participants the right to designate the system for the settlement of transactions in financial instruments undertaken on that regulated market, subject to:

- a such links and arrangements between the designated settlement system and any other system or facility as are necessary to ensure the efficient and economic settlement of the transaction in question; and
- b agreement by the competent authority responsible for the supervision of the regulated market that technical conditions for settlement of transactions concluded on the regulated market through a settlement system other than that designated by the regulated market are such as to allow the smooth and orderly functioning of financial markets.

This assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national central banks as overseers of settlement systems or other supervisory authorities on such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.

3 The rights of investment firms under paragraphs 1 and 2 shall be without prejudice to the right of operators of central counterparty, clearing or securities settlement systems to refuse on legitimate commercial grounds to make the requested services available.

#### *Article 35*

#### **Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs**

1 Member States shall not prevent investment firms and market operators operating an MTF from entering into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2 The competent authority of investment firms and market operators operating an MTF may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in Article 34(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the national central banks as overseers of clearing and settlement systems or by other supervisory authorities with a competence in such systems.

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- (1) [<sup>F2</sup>Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive) (OJ L 228, 11.8.1992, p. 1). Directive as last amended by Directive 2007/44/EC of the European Parliament and of the Council (OJ L 247, 21.9.2007, p. 1).
- (2) Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (OJ L 323, 9.12.2005, p. 1). Directive as amended by Directive 2007/44/EC.
- (3) Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1). Directive as last amended by Directive 2007/44/EC.
- (4) Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (OJ L 35, 11.2.2003, p. 1). Directive as amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).
- (5) Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201).
- (6) Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).]
- (7) OJ L 84, 26.3.1997, p. 22.
- (8) OJ L 96, 12.4.2003, p. 16.
- (9) OJ L 166, 28.6.1991, p. 77. Directive as last amended by Directive 2001/97/EC of the European Parliament and of the Council (OJ L 344, 28.12.2001, p. 76).

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#### **Textual Amendments**

- F2** Inserted by Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (Text with EEA relevance).