

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and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (repealed)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

COMPETENT AUTHORITIES

CHAPTER I

DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 48

Designation of competent authorities

1 Each Member State shall designate the competent authorities which are to carry out each of the duties provided for under the different provisions of this Directive. Member States shall inform the Commission and the competent authorities of other Member States of the identity of the competent authorities responsible for enforcement of each of those duties, and of any division of those duties.

2 The competent authorities referred to in paragraph 1 shall be public authorities, without prejudice to the possibility of delegating tasks to other entities where that is expressly provided for in Articles 5(5), 16(3), 17(2) and 23(4).

Any delegation of tasks to entities other than the authorities referred to in paragraph 1 may not involve either the exercise of public authority or the use of discretionary powers of judgement. Member States shall require that, prior to delegation, competent authorities take all reasonable steps to ensure that the entity to which tasks are to be delegated has the capacity and resources to effectively execute all tasks and that the delegation takes place only if a clearly defined and documented framework for the exercise of any delegated tasks has been established stating the tasks to be undertaken and the conditions under which they are to be carried out. These conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. In any case, the final responsibility for supervising compliance with this Directive and with its implementing measures shall lie with the competent authority or authorities designated in accordance with paragraph 1.

Member States shall inform the Commission and the competent authorities of other Member States of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

3 The Commission shall publish a list of the competent authorities referred to in paragraphs 1 and 2 in the *Official Journal of the European Union* at least once a year and update it continuously on its website.

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Article 49

Cooperation between authorities in the same Member State

If a Member State designates more than one competent authority to enforce a provision of this Directive, their respective roles shall be clearly defined and they shall cooperate closely.

Each Member State shall require that such cooperation also take place between the competent authorities for the purposes of this Directive and the competent authorities responsible in that Member State for the supervision of credit and other financial institutions, pension funds, UCITS, insurance and reinsurance intermediaries and insurance undertakings.

Member States shall require that competent authorities exchange any information which is essential or relevant to the exercise of their functions and duties.

Article 50

Powers to be made available to competent authorities

1 Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Within the limits provided for in their national legal frameworks they shall exercise such powers:

- a directly; or
- b in collaboration with other authorities; or
- c under their responsibility by delegation to entities to which tasks have been delegated according to Article 48(2); or
- d by application to the competent judicial authorities.

2 The powers referred to in paragraph 1 shall be exercised in conformity with national law and shall include, at least, the rights to:

- a have access to any document in any form whatsoever and to receive a copy of it;
- b demand information from any person and if necessary to summon and question a person with a view to obtaining information;
- c carry out on-site inspections;
- d require existing telephone and existing data traffic records;
- e require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- f request the freezing and/or the sequestration of assets;
- g request temporary prohibition of professional activity;
- h require authorised investment firms and regulated markets' auditors to provide information;
- i adopt any type of measure to ensure that investment firms and regulated markets continue to comply with legal requirements;
- j require the suspension of trading in a financial instrument;
- k require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;
- l refer matters for criminal prosecution;

- m allow auditors or experts to carry out verifications or investigations.

Article 51

Administrative sanctions

1 Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2 Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 50.

3 Member States shall provide that the competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Article 52

Right of appeal

1 Member States shall ensure that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right to apply to the courts. The right to apply to the courts shall also apply where, in respect of an application for authorisation which provides all the information required, no decision is taken within six months of its submission.

2 Member States shall provide that one or more of the following bodies, as determined by national law, may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

- a public bodies or their representatives;
- b consumer organisations having a legitimate interest in protecting consumers;
- c professional organisations having a legitimate interest in acting to protect their members.

Article 53

Extra-judicial mechanism for investors' complaints

1 Member States shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate.

2 Member States shall ensure that those bodies are not prevented by legal or regulatory provisions from cooperating effectively in the resolution of cross-border disputes.

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Article 54

Professional secrecy

1 Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 48(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Directive.

2 Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

3 Without prejudice to cases covered by criminal law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4 Any confidential information received, exchanged or transmitted pursuant to this Directive shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive and with other Directives applicable to investment firms, credit institutions, pension funds, UCITS, insurance and reinsurance intermediaries, insurance undertakings regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5 This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.

Article 55

Relations with auditors

1 Member States shall provide, at least, that any person authorised within the meaning of Eighth Council Directive 84/253/EEC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents⁽¹⁾, performing in an investment firm the task described in Article 51 of Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies⁽²⁾, Article 37 of Directive 83/349/EEC or Article 31 of Directive 85/611/EEC or any other task prescribed by law, shall have a duty to

report promptly to the competent authorities any fact or decision concerning that undertaking of which that person has become aware while carrying out that task and which is liable to:

- a constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of investment firms;
- b affect the continuous functioning of the investment firm;
- c lead to refusal to certify the accounts or to the expression of reservations.

That person shall also have a duty to report any facts and decisions of which the person becomes aware in the course of carrying out one of the tasks referred to in the first subparagraph in an undertaking having close links with the investment firm within which he is carrying out that task.

2 The disclosure in good faith to the competent authorities, by persons authorised within the meaning of Directive 84/253/EEC, of any fact or decision referred to in paragraph 1 shall not constitute a breach of any contractual or legal restriction on disclosure of information and shall not involve such persons in liability of any kind.

CHAPTER II

COOPERATION BETWEEN COMPETENT AUTHORITIES OF DIFFERENT MEMBER STATES

Article 56

Obligation to cooperate

1 Competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive, making use of their powers whether set out in this Directive or in national law.

Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate one single competent authority as a contact point for the purposes of this Directive. Member States shall communicate to the Commission and to the other Member States the names of the authorities which are designated to receive requests for exchange of information or cooperation pursuant to this paragraph.

2 When, taking into account the situation of the securities markets in the host Member State, the operations of a regulated market that has established arrangements in a host Member State have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the home and host competent authorities of the regulated market shall establish proportionate cooperation arrangements.

3 Member States shall take the necessary administrative and organisational measures to facilitate the assistance provided for in paragraph 1.

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Competent authorities may use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.

4 Where a competent authority has good reasons to suspect that acts contrary to the provisions of this Directive, carried out by entities not subject to its supervision, are being or have been carried out on the territory of another Member State, it shall notify this in as specific a manner as possible to the competent authority of the other Member State. The latter authority shall take appropriate action. It shall inform the notifying competent authority of the outcome of the action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the competent authority that has forwarded the information.

5 In order to ensure the uniform application of paragraph 2 the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to establish the criteria under which the operations of a regulated market in a host Member State could be considered as of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State.

Article 57

Cooperation in supervisory activities, on-the-spot verifications or in investigations

A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation. In the case of investment firms that are remote members of a regulated market the competent authority of the regulated market may choose to address them directly, in which case it shall inform the competent authority of the home Member State of the remote member accordingly.

Where a competent authority receives a request with respect to an on-the-spot verification or an investigation, it shall, within the framework of its powers:

- (a) carry out the verifications or investigations itself; or
- (b) allow the requesting authority to carry out the verification or investigation; or
- (c) allow auditors or experts to carry out the verification or investigation.

Article 58

Exchange of information

1 Competent authorities of Member States having been designated as contact points for the purposes of this Directive in accordance with Article 56(1) shall immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities, designated in accordance to Article 48(1), set out in the provisions adopted pursuant to this Directive.

Competent authorities exchanging information with other competent authorities under this Directive may indicate at the time of communication that such information must not be disclosed without their express agreement, in which case such information may be exchanged solely for the purposes for which those authorities gave their agreement.

2 The competent authority having been designated as the contact point may transmit the information received under paragraph 1 and Articles 55 and 63 to the authorities referred to in Article 49. They shall not transmit it to other bodies or natural or legal persons without the express agreement of the competent authorities which disclosed it and solely for the purposes for which those authorities gave their agreement, except in duly justified circumstances. In this last case, the contact point shall immediately inform the contact point that sent the information.

3 Authorities as referred to in Article 49 as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles 55 and 63 may use it only in the course of their duties, in particular:

- a to check that the conditions governing the taking-up of the business of investment firms are met and to facilitate the monitoring, on a non-consolidated or consolidated basis, of the conduct of that business, especially with regard to the capital adequacy requirements imposed by Directive 93/6/EEC, administrative and accounting procedures and internal-control mechanisms;
- b to monitor the proper functioning of trading venues;
- c to impose sanctions;
- d in administrative appeals against decisions by the competent authorities;
- e in court proceedings initiated under Article 52; or
- f in the extra-judicial mechanism for investors' complaints provided for in Article 53.

4 The Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures concerning procedures for the exchange of information between competent authorities.

5 Articles 54, 58 and 63 shall not prevent a competent authority from transmitting to central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks; likewise such authorities or bodies shall not be prevented from communicating to the competent authorities such information as they may need for the purpose of performing their functions provided for in this Directive.

Article 59

Refusal to cooperate

A competent authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity as provided for in Article 57 or to exchange information as provided for in Article 58 only where:

- (a) such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of the State addressed;
- (b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
- (c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

In the case of such a refusal, the competent authority shall notify the requesting competent authority accordingly, providing as detailed information as possible.

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Article 60

Inter-authority consultation prior to authorisation

1 The competent authorities of the other Member State involved shall be consulted prior to granting authorisation to an investment firm which is:

- a a subsidiary of an investment firm or credit institution authorised in another Member State; or
- b a subsidiary of the parent undertaking of an investment firm or credit institution authorised in another Member State; or
- c controlled by the same natural or legal persons as control an investment firm or credit institution authorised in another Member State.

2 The competent authority of the Member State responsible for the supervision of credit institutions or insurance undertakings shall be consulted prior to granting an authorisation to an investment firm which is:

- a a subsidiary of a credit institution or insurance undertaking authorised in the Community; or
- b a subsidiary of the parent undertaking of a credit institution or insurance undertaking authorised in the Community; or
- c controlled by the same person, whether natural or legal, who controls a credit institution or insurance undertaking authorised in the Community.

3 The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders or members and the reputation and experience of persons who effectively direct the business involved in the management of another entity of the same group. They shall exchange all information regarding the suitability of shareholders or members and the reputation and experience of persons who effectively direct the business that is of relevance to the other competent authorities involved, for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

Article 61

Powers for host Member States

1 Host Member States may, for statistical purposes, require all investment firms with branches within their territories to report to them periodically on the activities of those branches.

2 In discharging their responsibilities under this Directive, host Member States may require branches of investment firms to provide the information necessary for the monitoring of their compliance with the standards set by the host Member State that apply to them for the cases provided for in Article 32(7). Those requirements may not be more stringent than those which the same Member State imposes on established firms for the monitoring of their compliance with the same standards.

Article 62

Precautionary measures to be taken by host Member States

1 Where the competent authority of the host Member State has clear and demonstrable grounds for believing that an investment firm acting within its territory under the freedom to provide services is in breach of the obligations arising from the provisions adopted pursuant to this Directive or that an investment firm that has a branch within its territory is in breach of the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authority of the host Member State, it shall refer those findings to the competent authority of the home Member State.

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the investment firm persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State, after informing the competent authority of the home Member State shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. This shall include the possibility of preventing offending investment firms from initiating any further transactions within their territories. The Commission shall be informed of such measures without delay.

2 Where the competent authorities of a host Member State ascertain that an investment firm that has a branch within its territory is in breach of the legal or regulatory provisions adopted in that State pursuant to those provisions of this Directive which confer powers on the host Member State's competent authorities, those authorities shall require the investment firm concerned to put an end to its irregular situation.

If the investment firm concerned fails to take the necessary steps, the competent authorities of the host Member State shall take all appropriate measures to ensure that the investment firm concerned puts an end to its irregular situation. The nature of those measures shall be communicated to the competent authorities of the home Member State.

If, despite the measures taken by the host Member State, the investment firm persists in breaching the legal or regulatory provisions referred to in the first subparagraph in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to penalise further irregularities and, in so far as necessary, to prevent that investment firm from initiating any further transactions within its territory. The Commission shall be informed of such measures without delay.

3 Where the competent authority of the host Member State of a regulated market or an MTF has clear and demonstrable grounds for believing that such regulated market or MTF is in breach of the obligations arising from the provisions adopted pursuant to this Directive, it shall refer those findings to the competent authority of the home Member State of the regulated market or the MTF.

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the said regulated market or the MTF persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State, after informing the competent authority of the home Member State,

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shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. This shall include the possibility of preventing the said regulated market or the MTF from making their arrangements available to remote members or participants established in the host Member State. The Commission shall be informed of such measures without delay.

4 Any measure adopted pursuant to paragraphs 1, 2 or 3 involving sanctions or restrictions on the activities of an investment firm or of a regulated market shall be properly justified and communicated to the investment firm or to the regulated market concerned.

CHAPTER III

COOPERATION WITH THIRD COUNTRIES

Article 63

Exchange of information with third countries

1 Member States may conclude cooperation agreements providing for the exchange of information with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 54. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

Member States may transfer personal data to a third country in accordance to Chapter IV of Directive 95/46/EC.

Member States may also conclude cooperation agreements providing for the exchange of information with third country authorities, bodies and natural or legal persons responsible for:

- (i) the supervision of credit institutions, other financial organisations, insurance undertakings and the supervision of financial markets;
- (ii) the liquidation and bankruptcy of investment firms and other similar procedures;
- (iii) carrying out statutory audits of the accounts of investment firms and other financial institutions, credit institutions and insurance undertakings, in the performance of their supervisory functions, or which administer compensation schemes, in the performance of their functions;
- (iv) overseeing the bodies involved in the liquidation and bankruptcy of investment firms and other similar procedures;
- (v) overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions,

only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 54. Such exchange of information must be intended for the performance of the tasks of those authorities or bodies or natural or legal persons.

2 Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have transmitted it and, where

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appropriate, solely for the purposes for which those authorities gave their agreement. The same provision applies to information provided by third country competent authorities.

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- (1) [OJ L 126, 12.5.1984, p. 20.](#)
- (2) [OJ L 222, 14.8.1978, p. 11.](#) Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council ([OJ L 178, 17.7.2003, p. 16.](#))