

Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (Text with EEA relevance)

CHAPTER II

ORGANISATIONAL REQUIREMENTS

SECTION 1

Organisation

Article 5

(Article 13(2) to (8) of Directive 2004/39/EC) General organisational requirements

1 Member States shall require investment firms to comply with the following requirements:

- a to establish, implement and maintain decision-making procedures and an organisational structure which clearly and in documented manner specifies reporting lines and allocates functions and responsibilities;
- b to ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities;
- c to establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the investment firm;
- d to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them;
- e to establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the investment firm;
- f to maintain adequate and orderly records of their business and internal organisation;
- g to ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally.

Member States shall ensure that, for those purposes, investment firms take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business.

2 Member States shall require investment firms to establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.

3 Member States shall require investment firms to establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of investment services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their investment services and activities.

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4 Member States shall require investment firms to establish, implement and maintain accounting policies and procedures that enable them, at the request of the competent authority, to deliver in a timely manner to the competent authority financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.

5 Member States shall require investment firms to monitor and, on a regular basis, to evaluate the adequacy and effectiveness of their systems, internal control mechanisms and arrangements established in accordance with paragraphs 1 to 4, and to take appropriate measures to address any deficiencies.

Article 6

(Article 13(2) of Directive 2004/39/EC) Compliance

1 Member States shall ensure that investment firms establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the firm to comply with its obligations under Directive 2004/39/EC, as well as the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the competent authorities to exercise their powers effectively under that Directive.

Member States shall ensure that, for those purposes, investment firms take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business.

2 Member States shall require investment firms to establish and maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:

- a to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with the first subparagraph of paragraph 1, and the actions taken to address any deficiencies in the firm's compliance with its obligations;
- b to advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligations under Directive 2004/39/EC.

3 In order to enable the compliance function to discharge its responsibilities properly and independently, Member States shall require investment firms to ensure that the following conditions are satisfied:

- a the compliance function must have the necessary authority, resources, expertise and access to all relevant information;
- b a compliance officer must be appointed and must be responsible for the compliance function and for any reporting as to compliance required by Article 9(2);
- c the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor;
- d the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so.

However, an investment firm shall not be required to comply with point (c) or point (d) if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of investment services and activities, the requirement under that point is not proportionate and that its compliance function continues to be effective.

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Article 7

(second subparagraph of Article 13(5) of Directive 2004/39/EC)Risk management

- 1 Member States shall require investment firms to take the following actions:
 - a to establish, implement and maintain adequate risk management policies and procedures which identify the risks relating to the firm's activities, processes and systems, and where appropriate, set the level of risk tolerated by the firm;
 - b to adopt effective arrangements, processes and mechanisms to manage the risks relating to the firm's activities, processes and systems, in light of that level of risk tolerance;
 - c to monitor the following:
 - (i) the adequacy and effectiveness of the investment firm's risk management policies and procedures;
 - (ii) the level of compliance by the investment firm and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with point (b);
 - (iii) the adequacy and effectiveness of measures taken to address any deficiencies in those policies, procedures, arrangements, processes and mechanisms, including failures by the relevant persons to comply with such arrangements, processes and mechanisms or follow such policies and procedures.
- 2 Member States shall require investment firms, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of the investment services and activities undertaken in the course of that business, to establish and maintain a risk management function that operates independently and carries out the following tasks:
 - a implementation of the policy and procedures referred to in paragraph 1;
 - b provision of reports and advice to senior management in accordance with Article 9(2).

Where an investment firm is not required under the first sub-paragraph to establish and maintain a risk management function that functions independently, it must nevertheless be able to demonstrate that the policies and procedures which it has adopted in accordance with paragraph 1 satisfy the requirements of that paragraph and are consistently effective.

Article 8

(second subparagraph of Article 13(5) of Directive 2004/39/EC)Internal audit

Member States shall require investment firms, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business, to establish and maintain an internal audit function which is separate and independent from the other functions and activities of the investment firm and which has the following responsibilities:

- (a) to establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the investment firm's systems, internal control mechanisms and arrangements;

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- (b) to issue recommendations based on the result of work carried out in accordance with point (a);
- (c) to verify compliance with those recommendations;
- (d) to report in relation to internal audit matters in accordance with Article 9(2).

Article 9

(Article 13(2) of Directive 2004/39/EC) Responsibility of senior management

1 Member States shall require investment firms, when allocating functions internally, to ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the firm complies with its obligations under Directive 2004/39/EC.

In particular, senior management and, where appropriate, the supervisory function shall be required to assess and periodically to review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under Directive 2004/39/EC and to take appropriate measures to address any deficiencies.

2 Member States shall require investment firms to ensure that their senior management receive on a frequent basis, and at least annually, written reports on the matters covered by Articles 6, 7 and 8 indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies.

3 Member States shall require investment firms to ensure that the supervisory function, if any, receives on a regular basis written reports on the same matters.

4 For the purposes of this Article, ‘supervisory function’ means the function within an investment firm responsible for the supervision of its senior management.

Article 10

(Article 13(2) of Directive 2004/39/EC) Complaints handling

Member States shall require investment firms to establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from retail clients or potential retail clients, and to keep a record of each complaint and the measures taken for its resolution.

Article 11

(Article 13(2) of Directive 2004/39/EC) Meaning of personal transaction

For the purposes of Article 12 and Article 25, personal transaction means a trade in a financial instrument effected by or on behalf of a relevant person, where at least one of the following criteria are met:

- (a) that relevant person is acting outside the scope of the activities he carries out in that capacity;
- (b) the trade is carried out for the account of any of the following persons:
 - (i) the relevant person;

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- (ii) any person with whom he has a family relationship, or with whom he has close links;
- (iii) a person whose relationship with the relevant person is such that the relevant person has a direct or indirect material interest in the outcome of the trade, other than a fee or commission for the execution of the trade.

Article 12

(Article 13(2) of Directive 2004/39/EC) Personal transactions

1 Member States shall require investment firms to establish, implement and maintain adequate arrangements aimed at preventing the following activities in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 1(1) of Directive 2003/6/EC or to other confidential information relating to clients or transactions with or for clients by virtue of an activity carried out by him on behalf of the firm:

- a entering into a personal transaction which meets at least one of the following criteria:
 - (i) that person is prohibited from entering into it under Directive 2003/6/EC;
 - (ii) it involves the misuse or improper disclosure of that confidential information;
 - (iii) it conflicts or is likely to conflict with an obligation of the investment firm under Directive 2004/39/EC;
- b advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);
- c without prejudice to Article 3(a) of Directive 2003/6/EC, disclosing, other than in the normal course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:
 - (i) to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);
 - (ii) to advise or procure another person to enter into such a transaction.

2 The arrangements required under paragraph 1 must in particular be designed to ensure that:

- a each relevant person covered by paragraph 1 is aware of the restrictions on personal transactions, and of the measures established by the investment firm in connection with personal transactions and disclosure, in accordance with paragraph 1;
- b the firm is informed promptly of any personal transaction entered into by a relevant person, either by notification of that transaction or by other procedures enabling the firm to identify such transactions;

In the case of outsourcing arrangements the investment firm must ensure that the firm to which the activity is outsourced maintains a record of personal transactions entered into

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- by any relevant person and provides that information to the investment firm promptly on request.
- c a record is kept of the personal transaction notified to the firm or identified by it, including any authorisation or prohibition in connection with such a transaction.
- 3 Paragraphs 1 and 2 shall not apply to the following kinds of personal transaction:
- a personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;
 - b personal transactions in units in collective undertakings that comply with the conditions necessary to enjoy the rights conferred by Directive 85/611/EEC or are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.