

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)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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⁽¹⁾, and in particular Article 4(2), Article 13(10), Article 18(3), Article 19(10), Article 21(6), Article 22(3) and Article 24(5) thereof,

Whereas:

- (1) Directive 2004/39/EC establishes the framework for a regulatory regime for financial markets in the Community, governing, among other matters, operating conditions relating to the performance by investment firms of investment services and, where appropriate, ancillary services and investment activities; organisational requirements for investment firms performing such services and activities, and for regulated markets; reporting requirements in respect of transactions in financial instruments; and transparency requirements in respect of transactions in shares admitted to trading on a regulated market.
- (2) The rules for the implementation of the regime governing organisational requirements for investment firms performing investment services and, where appropriate, ancillary services and investment activities on a professional basis, and for regulated markets, should be consistent with the aim of Directive 2004/39/EC. They should be designed to ensure a high level of integrity, competence and soundness among investment firms and entities that operate regulated markets or MTFs, and to be applied in a uniform manner.
- (3) It is necessary to specify concrete organisational requirements and procedures for investment firms performing such services or activities. In particular, rigorous procedures should be provided for with regard to matters such as compliance, risk management, complaints handling, personal transactions, outsourcing and the identification, management and disclosure of conflicts of interest.

- (4) The organisational requirements and conditions for authorisation for investment firms should be set out in the form of a set of rules that ensures the uniform application of the relevant provisions of Directive 2004/39/EC. This is necessary in order to ensure that investment firms have equal access on equivalent terms to all markets in the Community and to eliminate obstacles, linked to authorisation procedures, to cross-border activities in the field of investment services.
- (5) The rules for the implementation of the regime governing operating conditions for the performance of investment and ancillary services and investment activities should reflect the aim underlying that regime. That is to say, they should be designed to ensure a high level of investor protection to be applied in a uniform manner through the introduction of clear standards and requirements governing the relationship between an investment firm and its client. On the other hand, as regards investor protection, and in particular the provision of investors with information or the seeking of information from investors, the retail or professional nature of the client or potential client concerned should be taken into account.
- (6) The form of a Directive is necessary in order to enable the implementing provisions to be adjusted to the specificities of the particular market and legal system in each Member State.
- (7) In order to ensure the uniform application of the various provisions of Directive 2004/39/EC, it is necessary to establish a harmonised set of organisational requirements and operating conditions for investment firms. Consequently, Member States and competent authorities should not add supplementary binding rules when transposing and applying the rules specified in this Directive, save where this Directive makes express provision to this effect.
- (8) However, in exceptional circumstances, it should be possible for Member States to impose requirements on investment firms additional to those laid down in the implementing rules. However, such intervention should be restricted to those cases where specific risks to investor protection or to market integrity including those related to the stability of the financial system have not been adequately addressed by the Community legislation, and it should be strictly proportionate.
- (9) Any additional requirements retained or imposed by Member States in conformity with this Directive must not restrict or otherwise affect the rights of investment firms under Articles 31 and 32 of Directive 2004/39/EC.
- (10) The specific risks addressed by any additional requirements retained by Member States at the date of application of this Directive should be of particular importance to the market structure of the State in question, including the behaviour of firms and consumers in that market. The assessment of those specific risks should be made in the context of the regulatory regime put in place by Directive 2004/39/EC and its detailed implementing rules. Any decision to retain additional requirements should be made with proper regard to the objectives of that Directive to remove barriers to the cross-border provision of investment service by harmonising the initial authorisation and operating requirements for investment firms.

- (11) Investment firms vary widely in their size, their structure and the nature of their business. A regulatory regime should be adapted to that diversity while imposing certain fundamental regulatory requirements which are appropriate for all firms. Regulated entities should comply with their high level obligations and design and adopt measures that are best suited to their particular nature and circumstances.
- (12) However, a regulatory regime which entails too much uncertainty for investment firms may reduce efficiency. Competent authorities are expected to issue interpretative guidance on provisions on this Directive, with a view in particular to clarifying the practical application of the requirements of this Directive to particular kinds of firms and circumstances. Non-binding guidance of this kind might, among other things, clarify how the provisions of this Directive and Directive 2004/39/EC apply in the light of market developments. To ensure a uniform application of this Directive and Directive 2004/39/EC, the Commission may issue guidance by way of interpretative communications or other means. Furthermore, the Committee of European Securities Regulators may issue guidance in order to secure convergent application of this Directive and Directive 2004/39/EC by competent authorities.
- (13) The organisational requirements established under Directive 2004/39/EC are without prejudice to systems established by national law for the registration of individuals working within investment firms.
- (14) For the purposes of the provisions of this Directive requiring an investment firm to establish, implement and maintain an adequate risk management policy, the risks relating to the firm's activities, processes and systems should include the risks associated with the outsourcing of critical or important functions or of investment services or activities. Such risks should include those associated with the firm's relationship with the service provider, and the potential risks posed where the outsourced activities of multiple investment firms or other regulated entities are concentrated within a limited number of service providers.
- (15) The fact that risk management and compliance functions are performed by the same person does not necessarily jeopardise the independent functioning of each function. The conditions that persons involved in the compliance function should not also be involved in the performance of the functions that they monitor, and that the method of determining the remuneration of such persons should not be likely to compromise their objectivity, may not be proportionate in the case of small investment firms. However, they would only be disproportionate for larger firms in exceptional circumstances.
- (16) A number of the provisions of Directive 2004/39/EC require investment firms to collect and maintain information relating to clients and services provided to clients. Where those requirements involve the collection and processing of personal data, firms should ensure that they comply with national measures implementing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995⁽²⁾ on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

- (17) Where successive personal transactions are carried out on behalf of a person in accordance with prior instructions given by that person, the obligations under the provisions of this Directive relating to personal transactions should not apply separately to each such successive transaction if those instructions remain in force and unchanged. Similarly, those obligations should not apply to the termination or withdrawal of such instructions, provided that any financial instruments which had previously been acquired pursuant to the instructions are not disposed of at the same time as the instructions terminate or are withdrawn. However, those obligations should apply in relation to a personal transaction, or the commencement of successive personal transactions, carried out on behalf of the same person if those instructions are changed or if new instructions are issued.
- (18) Competent authorities should not make the authorisation to provide investment services or activities subject to a general prohibition on the outsourcing of one or more critical or important functions or investment services or activities. Investment firms should be allowed to outsource such activities if the outsourcing arrangements established by the firm comply with certain conditions.
- (19) For the purposes of the provisions of this Directive setting out conditions for outsourcing critical or important operational functions or investment services or activities, an outsourcing that would involve the delegation of functions to the extent that the firm becomes a letter box entity should be considered to undermine the conditions with which the investment firm must comply in order to be and remain authorised in accordance with Article 5 of Directive 2004/39/EC.
- (20) The outsourcing of investment services or activities or critical and important functions is capable of constituting a material change of the conditions for the authorisation of the investment firm, as referred to in Article 16(2) of Directive 2004/39/EC. If such outsourcing arrangements are to be put in place after the investment firm has obtained an authorisation according to the provisions included in Chapter I of Title II of Directive 2004/39/EC, those arrangements should be notified to the competent authority where required by Article 16(2) of Directive 2004/39/EC.
- (21) Investment firms are required by this Directive to give the responsible competent authority prior notification of any arrangement for the outsourcing of the management of retail client portfolios that it proposes to enter into with a service provider located in a third country, where certain specified conditions are not met. However, competent authorities are not expected to authorise or otherwise approve any such arrangement or its terms. The purpose of the notification, rather, is to ensure that the competent authority has the opportunity to intervene in appropriate cases. It is the responsibility of the investment firm to negotiate the terms of any outsourcing arrangement, and to ensure that those terms are consistent with the obligations of the firm under this Directive and Directive 2004/39/EC, without the formal intervention of the competent authority.
- (22) For the purposes of regulatory transparency, and in order to ensure an appropriate level of certainty for investment firms, this Directive requires each competent authority to publish a statement of its policy in relation to the outsourcing of retail portfolio management to service providers located in third countries. That statement must set

out examples of cases where the competent authority is unlikely to object to such outsourcing, and must include an explanation of why outsourcing in such cases is unlikely to impair the ability of the firm to comply with the general conditions for outsourcing under this Directive. In providing that explanation, a competent authority should always indicate the reasons why outsourcing in the cases in question would not impede the effectiveness of its access to all the information relating to the outsourced service that is necessary for the authority to carry out its regulatory functions in respect of the investment firm.

- (23) Where an investment firm deposits funds it holds on behalf of a client with a qualifying money market fund, the units in that money market fund should be held in accordance with the requirements for holding financial instruments belonging to clients.
- (24) The circumstances which should be treated as giving rise to a conflict of interest should cover cases where there is a conflict between the interests of the firm or certain persons connected to the firm or the firm's group and the duty the firm owes to a client; or between the differing interests of two or more of its clients, to whom the firm owes in each case a duty. It is not enough that the firm may gain a benefit if there is not also a possible disadvantage to a client, or that one client to whom the firm owes a duty may make a gain or avoid a loss without there being a concomitant possible loss to another such client.
- (25) Conflicts of interest should be regulated only where an investment service or ancillary service is provided by an investment firm. The status of the client to whom the service is provided — as either retail, professional or eligible counterparty — is irrelevant for this purpose.
- (26) In complying with its obligation to draw up a conflict of interest policy under Directive 2004/39/EC which identifies circumstances which constitute or may give rise to a conflict of interest, the investment firm should pay special attention to the activities of investment research and advice, proprietary trading, portfolio management and corporate finance business, including underwriting or selling in an offering of securities and advising on mergers and acquisitions. In particular, such special attention is appropriate where the firm or a person directly or indirectly linked by control to the firm performs a combination of two or more of those activities.
- (27) Investment firms should aim to identify and manage the conflicts of interest arising in relation to their various business lines and their group's activities under a comprehensive conflicts of interest policy. In particular, the disclosure of conflicts of interest by an investment firm should not exempt it from the obligation to maintain and operate the effective organisational and administrative arrangements required under Article 13(3) of Directive 2004/39/EC. While disclosure of specific conflicts of interest is required by Article 18(2) of Directive 2004/39/EC, an over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be managed is not permitted.
- (28) Investment research should be a sub-category of the type of information defined as a recommendation in Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure

of conflicts of interest⁽³⁾, but it applies to financial instruments as defined in Directive 2004/39/EC. Recommendations, of the type so defined, which do not constitute investment research as defined in this Directive are nevertheless subject to the provisions of Directive 2003/125/EC as to the fair presentation of investment recommendations and the disclosure of conflicts of interest.

- (29) The measures and arrangements adopted by an investment firm to manage the conflicts of interests that might arise from the production and dissemination of material that is presented as investment research should be appropriate to protect the objectivity and independence of financial analysts and of the investment research they produce. Those measures and arrangements should ensure that financial analysts enjoy an adequate degree of independence from the interests of persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom the investment research is disseminated.
- (30) Persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom investment research is disseminated should include corporate finance personnel and persons involved in sales and trading on behalf of clients or the firm.
- (31) Exceptional circumstances in which financial analysts and other persons connected with the investment firm who are involved in the production of investment research may, with prior written approval, undertake personal transactions in instruments to which the research relates should include those circumstances where, for personal reasons relating to financial hardship, the financial analyst or other person is required to liquidate a position.
- (32) Small gifts or minor hospitality below a level specified in the firm's conflicts of interest policy and mentioned in the summary description of that policy that is made available to clients should not be considered as inducements for the purposes of the provisions relating to investment research.
- (33) The concept of dissemination of investment research to clients or the public should not include dissemination exclusively to persons within the group of the investment firm.
- (34) Current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed.
- (35) The same requirements should apply to the substantial alteration of investment research produced by a third party as apply to the production of research.
- (36) Financial analysts should not become involved in activities other than the preparation of investment research where such involvement is inconsistent with the maintenance of that person's objectivity. The following involvements should ordinarily be considered as inconsistent with the maintenance of that person's objectivity: participating in investment banking activities such as corporate finance business and underwriting, participating in 'pitches' for new business or 'road shows' for new issues of financial instruments; or being otherwise involved in the preparation of issuer marketing.

- (37) Without prejudice to the provisions of this Directive relating to the production or dissemination of investment research, it is recommended that producers of investment research that are not investment firms should consider adopting internal policies and procedures designed to ensure that they also comply with the principles set out in this Directive as to the protection of the independence and objectivity of that research.
- (38) Requirements imposed by this Directive, including those relating to personal transactions, to dealing with knowledge of investment research and to the production or dissemination of investment research, apply without prejudice to other requirements of Directive 2004/39/EC and Directive 2003/6/EC of the European parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)⁽⁴⁾ and their respective implementing measures.
- (39) For the purposes of the provisions of this Directive concerning inducements, the receipt by an investment firm of a commission in connection with investment advice or general recommendations, in circumstances where the advice or recommendations are not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the investment advice to the client.
- (40) This Directive permits investment firms to give or receive certain inducements only subject to specific conditions, and provided they are disclosed to the client, or are given to or by the client or a person on behalf of the client.
- (41) This Directive requires investment firms that provide investment services other than investment advice to new retail clients to enter into a written basic agreement with the client, setting out the essential rights and obligations of the firm and the client. However, it imposes no other obligations as to the form, content and performance of contracts for the provisions of investment or ancillary services.
- (42) This Directive sets out requirements for marketing communications only with respect to the obligation in Article 19(2) of Directive 2004/39/EC that information addressed to clients, including marketing communications, should be fair, clear and not misleading.
- (43) Nothing in this Directive requires competent authorities to approve the content and form of marketing communications. However, neither does it prevent them from doing so, insofar as any such pre-approval is based only on compliance with the obligation in Directive 2004/39/EC that information to clients, including marketing communications, should be fair, clear and not misleading.
- (44) Appropriate and proportionate information requirements should be established which take account of the status of a client as either retail or professional. An objective of Directive 2004/39/EC is to ensure a proportionate balance between investor protection and the disclosure obligations which apply to investment firms. To this end, it is appropriate that less stringent specific information requirements be included in this Directive with respect to professional clients than apply to retail clients. Professional clients should, subject to limited exceptions, be able to identify for themselves the information that is necessary for them to make an informed decision, and to ask the investment firm to provide that information. Where such information requests are reasonable and proportionate investment firms should provide additional information.

- (45) Investment firms should provide clients or potential clients with adequate information on the nature of financial instruments and the risks associated with investing in them so that their clients can take each investment decision on a properly informed basis. The level of detail of this information may vary according to the client's categorisation as either a retail client or a professional client and the nature and risk profile of the financial instruments that are being offered, but should never be so general as to omit any essential elements. It is possible that for some financial instruments only the information referring to the type of an instrument will be sufficient whereas for some others the information will need to be product-specific.
- (46) The conditions with which information addressed by investment firms to clients and potential clients must comply in order to be fair, clear and not misleading should apply to communications intended for retail clients in a way that is appropriate and proportionate, taking into account, for example, the means of communication, and the information that the communication is intended to convey to the clients or potential clients. In particular, it would not be appropriate to apply such conditions to marketing communications which consist only of one or more of the following: the name of the firm, a logo or other image associated with the firm, a contact point, a reference to the types of investment services provided by the firm, or to its fees or commissions.
- (47) For the purposes of Directive 2004/39/EC and of this Directive, information should be considered to be misleading if it has a tendency to mislead the person or persons to whom it is addressed or by whom it is likely to be received, whether or not the person who provides the information considers or intends it to be misleading.
- (48) In determining what constitutes the provision of information in good time before a time specified in this Directive, an investment firm should take into account, having regard to the urgency of the situation and the time necessary for the client to absorb and react to the specific information provided, the client's need for sufficient time to read and understand it before taking an investment decision. A client is likely to require less time to review information about a simple or standardised product or service, or a product or service of a kind he has purchased previously, than he would require for a more complex or unfamiliar product or service.
- (49) Nothing in this Directive obliges investment firms to provide all required information about the investment firm, financial instruments, costs and associated charges, or concerning the safeguarding of client financial instruments or client funds immediately and at the same time, provided that they comply with the general obligation to provide the relevant information in good time before the time specified in this Directive. Provided that the information is communicated to the client in good time before the provision of the service, nothing in this Directive obliges firms to provide it either separately, as part of a marketing communication, or by incorporating the information in a client agreement.
- (50) In cases where an investment firm is required to provide information to a client before the provision of a service, each transaction in respect of the same type of financial instrument should not be considered as the provision of a new or different service.

- (51) In cases where an investment firm providing portfolio management services is required to provide to retail clients or potential retail clients information on the types of financial instruments that may be included in the client portfolio and the types of transactions that may be carried out in such instruments, such information should state separately whether the investment firm will be mandated to invest in financial instruments not admitted to trading on a regulated market, in derivatives, or in illiquid or highly volatile instruments; or to undertake short sales, purchases with borrowed funds, securities financing transactions, or any transactions involving margin payments, deposit of collateral or foreign exchange risk.
- (52) The provision by an investment firm to a client of a copy of a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading⁽⁵⁾ should not be treated as the provision by the firm of information to a client for the purposes of the operating conditions under Directive 2004/39/EC which relate to the quality and contents of such information, if the firm is not responsible under that directive for the information given in the prospectus.
- (53) The information which an investment firm is required to give to a retail client concerning costs and associated charges includes information about the arrangements for payment or performance of the agreement for the provision of investment services and any other agreement relating to a financial instrument that is being offered. For this purpose, arrangements for payment will generally be relevant where a financial instrument contract is terminated by cash settlement. Arrangements for performance will generally be relevant where, upon termination, a financial instrument requires the delivery of shares, bonds, a warrant, bullion or another instrument or commodity.
- (54) As regards collective investment undertakings covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)⁽⁶⁾, it is not the purpose of this Directive to regulate the content of the simplified prospectus as defined by Article 28 of Directive 85/611/EEC. No information should be added to the simplified prospectus as a result of the implementation of this Directive.
- (55) The simplified prospectus provides, notably, sufficient information in relation to the costs and associated charges in respect to the UCITS itself. However, investment firms distributing units in UCITS should additionally inform their clients about all the other costs and associated charges related to their provision of investment services in relation to units in UCITS.
- (56) It is necessary to make different provision for the application of the suitability test in Article 19(4) of Directive 2004/39/EC and the appropriateness test in Article 19(5) of that Directive. These tests have different scope with regards to the investment services to which they relate, and have different functions and characteristics.
- (57) For the purposes of Article 19(4) of Directive 2004/39/EC, a transaction may be unsuitable for the client or potential client because of the risks of the financial

instruments involved, the type of transaction, the characteristics of the order or the frequency of the trading. A series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client. In the case of portfolio management, a transaction might also be unsuitable if it would result in an unsuitable portfolio.

- (58) In accordance with Article 19(4) of Directive 2004/39/EC, a firm is required to assess the suitability of investment services and financial instruments to a client only when it is providing investment advice or portfolio management to that client. In the case of other investment services, the firm is required by Article 19(5) of that Directive to assess the appropriateness of an investment service or product for a client, and then only if the product is not offered on an execution-only basis under Article 19(6) of that Directive (which applies to non-complex products).
- (59) For the purposes of the provisions of this Directive requiring investment firms to assess the appropriateness of investment services or products offered or demanded, a client who has engaged in a course of dealings involving a specific type of product or service beginning before the date of application of Directive 2004/39/EC should be presumed to have the necessary experience and knowledge in order to understand the risks involved in relation to that product or investment service. Where a client engages in a course of dealings of that kind through the services of an investment firm, beginning after the date of application of that Directive, the firm is not required to make a new assessment on the occasion of each separate transaction. It complies with its duty under Article 19(5) of that Directive provided that it makes the necessary assessment of appropriateness before beginning that service.
- (60) A recommendation or request made, or advice given, by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation within the meaning of Article 19(4) of Directive 2004/39/EC.
- (61) For the purposes of determining whether a unit in a collective investment undertaking which does not comply with the requirements of Directive 85/611/EC, that has been authorised for marketing to the public, should be considered as non-complex, the circumstances in which valuation systems will be independent of the issuer should include where they are overseen by a depositary that is regulated as a provider of depositary services in a Member State.
- (62) Nothing in this Directive requires competent authorities to approve the content of the basic agreement between an investment firm and its retail clients. However, neither does it prevent them from doing so, insofar as any such approval is based only on the firm's compliance with its obligations under Directive 2004/39/EC to act honestly, fairly and professionally in accordance with the best interests of its clients, and to establish a record that sets out the rights and obligations of investment firms and their clients, and the other terms on which firms will provide services to their clients.
- (63) The records an investment firm is required to keep should be adapted to the type of business and the range of investment services and activities performed, provided

that the record-keeping obligations set out in Directive 2004/39/EC and this Directive are fulfilled. For the purposes of the reporting obligations in respect of portfolio management, a contingent liability transaction is one that involves any actual or potential liability for the client that exceeds the cost of acquiring the instrument.

- (64) For the purposes of the provisions on reporting to clients, a reference to the type of the order should be understood as referring to its status as a limit order, market order, or other specific type of order.
- (65) For the purposes of the provisions on reporting to clients, a reference to the nature of the order should be understood as referring to orders to subscribe for securities, or to exercise an option, or similar client order.
- (66) When establishing its execution policy in accordance with Article 21(2) of Directive 2004/39/EC, an investment firm should determine the relative importance of the factors mentioned in Article 21(1) of that Directive, or at least establish the process by which it determines the relative importance of these factors, so that it can deliver the best possible result to its clients. In order to give effect to that policy, an investment firm should select the execution venues that enable it to obtain on a consistent basis the best possible result for the execution of client orders. An investment firm should apply its execution policy to each client order that it executes with a view to obtaining the best possible result for the client in accordance with that policy. The obligation under Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for the client should not be treated as requiring an investment firm to include in its execution policy all available execution venues.
- (67) For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client.
- (68) When an investment firm executes an order following specific instructions from the client, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the client instructions relate. The fact that the client has given specific instructions which cover one part or aspect of the order should not be treated as releasing the investment firm from its best execution obligations in respect of any other parts or aspects of the client order that are not covered by such instructions. An investment firm should not induce a client to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the client, when the firm ought reasonably to know that an instruction to that effect is likely to prevent it from obtaining the best possible result for that client. However, this should not prevent a firm inviting a client to choose between two or more

specified trading venues, provided that those venues are consistent with the execution policy of the firm.

- (69) Dealing on own account with clients by an investment firm should be considered as the execution of client orders, and therefore subject to the requirements under Directive 2004/39/EC and this Directive and, in particular, those obligations in relation to best execution. However, if an investment firm provides a quote to a client and that quote would meet the investment firm's obligations under Article 21(1) of Directive 2004/39/EC if the firm executed that quote at the time the quote was provided, then the firm will meet those same obligations if it executes its quote after the client accepts it, provided that, taking into account the changing market conditions and the time elapsed between the offer and acceptance of the quote, the quote is not manifestly out of date.
- (70) The obligation to deliver the best possible result when executing client orders applies in relation to all types of financial instruments. However, given the differences in market structures or the structure of financial instruments, it may be difficult to identify and apply a uniform standard of and procedure for best execution that would be valid and effective for all classes of instrument. Best execution obligations should therefore be applied in a manner that takes into account the different circumstances associated with the execution of orders related to particular types of financial instruments. For example, transactions involving a customised OTC financial instrument that involve a unique contractual relationship tailored to the circumstances of the client and the investment firm may not be comparable for best execution purposes with transactions involving shares traded on centralised execution venues.
- (71) For the purposes of determining best execution when executing retail client orders, the costs related to execution should include an investment firm's own commissions or fees charged to the client for limited purposes, in cases where more than one venue listed in the firm's execution policy is capable of executing a particular order. In such cases, the firm's own commissions and costs for executing the order on each of the eligible execution venues should be taken into account in order to assess and compare the results for the client that would be achieved by executing the order on each such venue. However, it is not intended to require a firm to compare the results that would be achieved for its client on the basis of its own execution policy and its own commissions and fees, with results that might be achieved for the same client by any other investment firm on the basis of a different execution policy or a different structure of commissions or fees. Nor is it intended to require a firm to compare the differences in its own commissions which are attributable to differences in the nature of the services that the firm provides to clients.
- (72) The provisions of this Directive that provide that costs of execution should include an investment firm's own commissions or fees charged to the client for the provision of an investment service should not apply for the purpose of determining what execution venues must be included in the firm's execution policy for the purposes of Article 21(3) of Directive 2004/39/EC.
- (73) It should be considered that an investment firm structures or charges its commissions in a way which discriminates unfairly between execution venues if it charges a different

commission or spread to clients for execution on different execution venues and that difference does not reflect actual differences in the cost to the firm of executing on those venues.

- (74) The provisions of this Directive as to execution policy are without prejudice to the general obligation of an investment firm under Article 21(4) of Directive 2004/39/EC to monitor the effectiveness of its order execution arrangements and policy and assess the venues in its execution policy on a regular basis.
- (75) This Directive is not intended to require a duplication of effort as to best execution between an investment firm which provides the service of reception and transmission of order or portfolio management and any investment firm to which that investment firm transmits its orders for execution.
- (76) The best execution obligation under Directive 2004/39/EC requires investment firms to take all reasonable steps to obtain the best possible result for their clients. The quality of execution, which includes aspects such as the speed and likelihood of execution (fill rate) and the availability and incidence of price improvement, is an important factor in the delivery of best execution. Availability, comparability and consolidation of data related to execution quality provided by the various execution venues is crucial in enabling investment firms and investors to identify those execution venues that deliver the highest quality of execution for their clients. This Directive does not mandate the publication by execution venues of their execution quality data, as execution venues and data providers should be permitted to develop solutions concerning the provision of execution quality data. The Commission should submit a report by 1 November 2008 on the market-led developments in this area with a view to assessing availability, comparability and consolidation at a European level of information concerning execution quality.
- (77) For the purposes of the provisions of this Directive concerning client order handling, the reallocation of transactions should be considered as detrimental to a client if, as an effect of that reallocation, unfair precedence is given to the investment firm or to any particular client.
- (78) Without prejudice to Directive 2003/6/EC, for the purposes of the provisions of this Directive concerning client order handling, client orders should not be treated as otherwise comparable if they are received by different media and it would not be practicable for them to be treated sequentially. For the further purposes of those provisions, any use by an investment firm of information relating to a pending client order in order to deal on own account in the financial instruments to which the client order relates, or in related financial instruments, should be considered a misuse of that information. However, the mere fact that market makers or bodies authorised to act as counterparties confine themselves to pursuing their legitimate business of buying and selling financial instruments, or that persons authorised to execute orders on behalf of third parties confine themselves to carrying out an order dutifully, should not in itself be deemed to constitute a misuse of information.
- (79) Advice about financial instruments given in a newspaper, journal, magazine or any other publication addressed to the general public (including by means of the internet),

or in any television or radio broadcast, should not be considered as a personal recommendation for the purposes of the definition of ‘investment advice’ in Directive 2004/39/EC.

- (80) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.
- (81) Generic advice about a type of financial instrument is not investment advice for the purposes of Directive 2004/39/EC, because this Directive specifies that, for the purposes of Directive 2004/39/EC, investment advice is restricted to advice on particular financial instruments. However, if an investment firm provides generic advice to a client about a type of financial instrument which it presents as suitable for, or based on a consideration of the circumstances of, that client, and that advice is not in fact suitable for the client, or is not based on a consideration of his circumstances, depending on the circumstances of the particular case, the firm is likely to be acting in contravention of Article 19(1) or (2) of Directive 2004/39/EC. In particular, a firm which gives a client such advice would be likely to contravene the requirement of Article 19(1) to act honestly, fairly and professionally in accordance with the best interests of its clients. Similarly or alternatively, such advice would be likely to contravene the requirement of Article 19(2) that information addressed by a firm to a client should be fair, clear and not misleading.
- (82) Acts carried out by an investment firm that are preparatory to the provision of an investment service or carrying out an investment activity should be considered as an integral part of that service or activity. This would include, for example, the provision of generic advice by an investment firm to clients or potential clients prior to or in the course of the provision of investment advice or any other investment service or activity.
- (83) The provision of a general recommendation (that is, one which is intended for distribution channels or the public) about a transaction in a financial instrument or a type of financial instrument constitutes the provision of an ancillary service within Section B(5) of Annex I of Directive 2004/39/EC, and consequently Directive 2004/39/EC and its protections apply to the provision of that recommendation.
- (84) The Committee of European Securities Regulators, established by Commission Decision 2001/527/EC⁽⁷⁾ has been consulted for technical advice.
- (85) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DIRECTIVE:

- (1) [OJ L 145, 30.4.2004, p. 1](#). Directive as amended by Directive 2006/31/EC ([OJ L 114, 27.4.2006, p. 60](#)).
- (2) [OJ L 281, 23.11.1995, p. 31](#). Directive as amended by Regulation (EC) No 1882/2003 ([OJ L 284, 31.10.2003, p. 1](#)).
- (3) [OJ L 339, 24.12.2003, p. 73](#).
- (4) [OJ L 96, 12.4.2003, p. 16](#).
- (5) [OJ L 345, 31.12.2003, p. 64](#).
- (6) [OJ L 375, 31.12.1985, p. 3](#). Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council ([OJ L 79, 24.3.2005, p. 9](#)).
- (7) [OJ L 191, 13.7.2001, p. 43](#).