



EUROPEAN COMMISSION

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COM(2011) 656 final

2011/0298 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on markets in financial instruments repealing Directive 2004/39/EC of the European  
Parliament and of the Council**

**(Recast)**

(Text with EEA relevance)

{SEC(2011) 1226 final}

{SEC(2011) 1227 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

The Markets in Financial Instruments Directive (MiFID), in force since November 2007, is a core pillar in EU financial market integration. Adopted in accordance with the "Lamfalussy" process<sup>1</sup>, it consists of a framework Directive (Directive 2004/39/EC)<sup>2</sup>, an implementing Directive (Directive 2006/73/EC)<sup>3</sup> and an implementing Regulation (Regulation No 1287/2006)<sup>4</sup>. MiFID establishes a regulatory framework for the provision of investment services in financial instruments (such as brokerage, advice, dealing, portfolio management, underwriting etc.) by banks and investment firms and for the operation of regulated markets by market operators. It also establishes the powers and duties of national competent authorities in relation to these activities.

The overarching objective is to further the integration, competitiveness, and efficiency of EU financial markets. In concrete terms, it abolished the possibility for Member States to require all trading in financial instruments to take place on traditional exchanges and enabled Europe-wide competition between those exchanges and alternative venues. It also granted banks and investment firms a strengthened "passport" for providing investment services across the EU subject to compliance with both organisational and reporting requirements as well as comprehensive rules designed to ensure investor protection.

The result after 3.5 years in force is more competition between venues in the trading of financial instruments, and more choice for investors in terms of service providers and available financial instruments, progress which has been compounded by technological advances. Overall, transaction costs have decreased and integration has increased<sup>5</sup>

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<sup>1</sup> The Mifid review is based on the "Lamfalussy process" (a four-level regulatory approach recommended by the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Baron Alexandre Lamfalussy and adopted by the Stockholm European Council in March 2001 aiming at more effective securities markets regulation) as developed further by Regulation (EU) No 1095/2010 of the European Parliament and of the Council, establishing a European Supervisory Authority (European Securities and Markets Authority): at Level 1, the European Parliament and the Council adopt a directive in co-decision which contains framework principles and which empowers the Commission acting at Level 2 to adopt delegated acts (Art 290 The Treaty on the Functioning of the European Union C 115/47) or implementing acts (Art 291 The Treaty on the Functioning of the European Union C 115/47). In the preparation of the delegated acts the Commission will consult with experts appointed by Member States. At the request of the Commission, ESMA can advise the Commission on the technical details to be included in level 2 legislation. In addition, Level 1 legislation may empower ESMA to develop draft regulatory or implementing technical standards according to Art 10 and 15 of the ESMA Regulation which may be adopted by the Commission (subject to a right of objection by Council and Parliament in case of regulatory technical standards). At Level 3, ESMA also works on recommendations, guidelines and compares regulatory practice by way of peer review to ensure consistent implementation and application of the rules adopted at Levels 1 and 2. Finally, the Commission checks Member States' compliance with EU legislation and may take legal action against non-compliant Member States.

<sup>2</sup> Directive 2004/39/EC (MiFID Framework Directive)

<sup>3</sup> Directive 2006/73/EC (MiFID Implementing Directive) implementing Directive 2004/39/EC (MiFID Framework Directive)

<sup>4</sup> Regulation No 1287/2006 (MiFID Implementing Regulation) implementing Directive 2004/39/EC (MiFID Framework Directive) as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading and defined terms for the purposes of that Directive (OJ L 241/1 2.09.2006)

<sup>5</sup> Monitoring Prices, Costs and Volumes of Trading and Post-trading Services, Oxera, 2011

However, some problems have surfaced. First, the more competitive landscape has given rise to new challenges. The benefits from this increased competition have not flowed equally to all market participants and have not always been passed on to the end investors, retail or wholesale. The market fragmentation implied by competition has also made the trading environment more complex, especially in terms of collection of trade data. Second, market and technological developments have outpaced various provisions in MiFID. The common interest in a transparent level playing-field between trading venues and investment firms risks being undermined. Third, the financial crisis has exposed weaknesses in the regulation of instruments other than shares, traded mostly between professional investors. Previously held assumptions that minimal transparency, oversight and investor protection in relation to this trading is more conducive to market efficiency no longer hold. Finally, rapid innovation and growing complexity in financial instruments underline the importance of up-to-date, high levels of investor protection. While largely vindicated amid the experience of the financial crisis, the comprehensive rules of MiFID nonetheless exhibit the need for targeted but ambitious improvements.

The revision of MiFID therefore constitutes an integral part of the reforms aimed at establishing a safer, sounder, more transparent and more responsible financial system working for the economy and society as a whole in the aftermath of the financial crisis, as well as to ensure a more integrated, efficient and competitive EU financial market.<sup>6</sup> It is also an essential vehicle for delivering on the G20<sup>7</sup> commitment to tackle less regulated and more opaque parts of the financial system, and improve the organisation, transparency and oversight of various market segments, especially in those instruments traded mostly over the counter (OTC)<sup>8</sup>, complementing the legislative proposal on OTC derivatives, central counterparties and trade repositories<sup>9</sup>.

Targeted improvements are also required in order to improve oversight and transparency of commodity derivative markets in order to ensure their function for hedging and price discovery, as well as in light of developments in market structures and technology in order to ensure fair competition and efficient markets. Further, specific changes to the framework of investor protection are necessary, taking account of evolving practices and to support investor confidence.

Finally, in line with the recommendations of from the de Larosière group and the conclusion of the ECOFIN Council,<sup>10</sup> the EU has committed to minimise, where appropriate, discretions available to Member States across EU financial services directives. This is a common thread across all areas covered by the review of MiFID and will contribute to establishing a single rulebook for EU financial markets, help further develop a level playing field for Member States and market participants, improve supervision and enforcement, reduce costs for market

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6 See (COM (2010) 301 final) Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The European Central Bank: Regulating Financial Services For Sustainable Growth, June 2010

7 See G-20 Leaders' statement of Pittsburgh Summit, 24-25 September 2009, <http://www.pittsburghsummit.gov/mediacenter/129639.htm>

8 As a result, the Commission issued (COM (2009) 563 final) Communication by the Commission on ensuring efficient, safe and sound derivatives markets: future policy actions, 20 October 2009

9 See (COM (2010) 484) Proposal on Regulation on OTC derivatives, central counterparties and trade repositories, September 2010

10 See Report, High-level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, February 2009, and Council conclusions on strengthening EU financial supervision, 10862/09, June 2009

participants, and improve conditions of access and enhance the global competitiveness of the EU financial industry.

As a result, the proposal amending MiFID is divided in two. A Regulation sets out requirements in relation to the disclosure of trade transparency data to the public and transaction data to competent authorities, removing barriers to non-discriminatory access to clearing facilities, the mandatory trading of derivatives on organised venues, specific supervisory actions regarding financial instruments and positions in derivatives and the provision of services by third-country firms without a branch. A Directive amends specific requirements regarding the provision of investment services, the scope of exemptions from the current Directive, organisational and conduct of business requirements for investment firms, organisational requirements for trading venues, the authorisation and ongoing obligations applicable to providers of data services, powers available to competent authorities, sanctions, and rules applicable to third-country firms operating via a branch.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

The initiative is the result of an extensive and continuous dialogue and consultation with all major stakeholders, including securities regulators, all types of market participants including issuers and retail investors. It takes into consideration the views expressed in a public consultation from 8 December 2010 to 2 February 2011<sup>11</sup>, a large and well-attended public hearing was held over two days on 20-21 September 2010<sup>12</sup>, and input obtained through extensive meetings with a broad range of stakeholder groups since December 2009. Finally, the proposal takes into consideration the observations and analysis contained in the documents and technical advice published by the Committee of European Securities Regulators (CESR), now the European Securities and Markets Authority (ESMA)<sup>13</sup>.

In addition, two studies<sup>14</sup> have been commissioned from external consultants in order to prepare the revision of MiFID. The first one, requested from PriceWaterhouseCoopers on 10 February 2010 and received on 13 July 2010, focused on data gathering on market activities and other MiFID related issues. The second, from Europe Economics mandated on the 21 July 2010 and received on 23 May 2011 focused on a cost benefit analysis of the various policy options to be considered in the context of the revision of MiFID.

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of policy alternatives. Policy options were assessed against different criteria: transparency of

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11 See responses to public consultation on the review of MiFID: [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/financial\\_services/mifid\\_instruments&vm=detailed&sb=Title](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/mifid_instruments&vm=detailed&sb=Title) and summary in Annex 13 of the Impact Assessment Report

12 The summary is available at [http://ec.europa.eu/internal\\_market/securities/docs/isd/10-09-21-hearing-summary\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/isd/10-09-21-hearing-summary_en.pdf)

13 See CESR Technical Advice to the European Commission in the Context of the MiFID Review and Responses to the European Commission Request for Additional Information, 29 July 2010 <http://www.esma.europa.eu/popup2.php?id=7003> and CESR second set of Technical Advice to the European Commission in the Context of the MiFID Review and Responses to the European Commission Request for Additional Information, 13 October 2010 <http://www.esma.europa.eu/popup2.php?id=7279>

14 These studies have been completed by two external consultants that were selected according to the selection process established within the rules and regulations of the European Commission. These two studies do not reflect the views or opinions of the European Commission

market operations for regulators and market participants, investor protection and confidence, level playing field for market venues and trading systems in the EU, and cost-effectiveness, i.e. the extent to which the options achieve the sought objectives and facilitate the operation of securities markets in a cost effective and efficient way.

Overall, the review of MiFID is estimated to generate one-off compliance costs of between €12 and €32 million and ongoing costs of between €12 and €86 million. This represents one-off and ongoing cost impacts of respectively 0.10% to 0.15% and 0.06% to 0.12% of total operating spending of the EU banking sector. This is far less than the costs imposed at the time of the introduction of MiFID. The one-off cost impacts of the introduction of MiFID were estimated at 0.56% (retail and savings banks) and 0.68% (investment banks) of total operating spending while ongoing compliance costs were estimated at 0.11% (retail and savings banks) to 0.17% (investment banks) of total operating expenditure.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **3.1. Legal basis**

The proposal is based on Article 53(1) of the TFEU. This Directive would replace Directive 2004/39/EC with regard to the harmonisation of national provisions for the authorisation governing the provision of investment services and the carrying out of investment activities by investment firms, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the powers of supervisory authorities of home and host Member States in this regard, as well as the authorisation and operating conditions for regulated markets and providers of market data. The main objective and subject-matter of this proposal is to harmonise national provisions concerning the access to the activity of investment firms, regulated markets and data service providers, the modalities for their governance, and their supervisory framework. The proposal is therefore based on Article 53(1) TFEU.

This proposal is complementary to the proposed regulation [MiFIR], establishing uniform and directly applicable requirements which are necessary for the even functioning of the market in financial instruments in the field of, for example, publication of trade data, transaction reporting to competent authorities, and specific powers for competent authorities and ESMA.

#### **3.2. Subsidiarity and proportionality**

According to the principle of subsidiarity (Article 5.3 of the TFEU), action on EU level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU.

Most of the issues covered by the revision are already covered by the current MiFID legal framework. Further, financial markets are inherently cross-border in nature and are becoming more so. The conditions according to which firms and operators can compete in this context, whether it concerns rules on pre and post-trade transparency, investor protection or the assessment and control of risks by market participants, need to be common across borders and are all at the core of MiFID today. Action is now required at European level in order to update and modify the regulatory framework laid out by MiFID in order to take into account developments in financial markets since its implementation. The improvements that the

directive has already brought to the integration and efficiency of financial markets and services in Europe would thus be bolstered with appropriate adjustments to ensure the objectives of a robust regulatory framework for the single market are achieved. Because of this integration, isolated national intervention would be far less efficient and would lead to the fragmentation of markets, resulting in regulatory arbitrage and distortion of competition. For instance, different levels of market transparency or investor protection across Member States would fragment markets, compromise liquidity and efficiency, and lead to harmful regulatory arbitrage.

The European Securities and Markets Authority (ESMA) should also play a key role in the implementation of the new EU-wide framework. Specific competences for ESMA are necessary in order to improve the functioning of the single market in securities.

The proposal takes full account of the principle of proportionality, namely that EU action should be adequate to reach the objectives and does not go beyond what is necessary. It is compatible with this principle, taking into account the right balance of the public interest at stake and the cost-efficiency of the measure. The requirements imposed on the different parties have been carefully calibrated. In particular, the need to balance investor protection, efficiency of the markets and costs for the industry has been central in laying out these requirements.

### **3.3. Compliance with Articles 290 and 291 TFEU**

On 23 September 2009, the Commission adopted proposals for Regulations establishing EBA, EIOPA, and ESMA. In this respect the Commission wishes to recall the Statements in relation to Articles 290 and 291 TFEU it made at the adoption of the Regulations establishing the European Supervisory Authorities according to which: "As regards the process for the adoption of regulatory standards, the Commission emphasises the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognised in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with Articles 290 and 291 TFEU."

### **3.4. Detailed explanation of the proposal**

#### *3.4.1. General – Level-playing field*

A central aim of the proposal is to ensure that all organised trading is conducted on regulated trading venues: regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs). Identical pre and post trade transparency requirements will apply to all of these venues. Likewise, the requirements in terms of organisational aspects and market surveillance applicable to all three venues are nearly identical. This will ensure a level playing field where there are functionally similar activities bringing together third-party trading interests. Importantly however, the transparency requirements will be calibrated for different types of instruments, notably equity, bonds, and derivatives, and for different types of trading, notably order book and quote driven systems.

In all three venues the operator of the platform is neutral. Regulated markets and multilateral trading facilities are characterised by non-discretionary execution of transactions. This means that transactions will be executed according to predetermined rules. They also compete to offer access to a broad membership provided they meet a transparent set of criteria.

By contrast, the operator of an OTF has a degree of discretion over how a transaction will be executed. Consequently, the operator is subject to investor protection, conduct of business, and best execution requirements towards the clients using the platform. . Thus, while both the rules on access and execution methodology of an OTF have to be transparent and clear, they allow the operator to perform a service to clients which is qualitatively if not functionally different from the services provided by regulated markets and MTFs to their members and participants. Still, in order to ensure both the OTF operator's neutrality in relation to any transaction taking place and that the duties owed to clients thus brought together cannot be compromised by a possibility to profit at their expense, it is necessary to prohibit the OTF operator from trading against his own proprietary capital.

Finally, organised trading may also happen by systematic internalisation. A systematic internaliser (SI) may execute client transactions against his own proprietary capital. However, an SI may not bring together third party buying and selling interests in functionally the same way as a regulated market, MTF or OTF, and is therefore not a trading venue. Best execution and other conduct of business rules would apply, and the client would clearly know when he is trading with the investment firm and when he is trading against third parties. Specific pre-trade transparency and access requirements apply to SIs. Again, the transparency requirements will be calibrated for different types of instruments, notably equity, bonds, and derivatives and apply below specific thresholds. Any trading on own account by investment firms with clients, including other investment firms, is thus considered over-the counter (OTC). OTC trading activity which will not meet the definition of SI activity, to be made more inclusive through amendments to implementing legislation, will have to be non systematic and irregular.

#### *3.4.2. Extension of MiFID rules to like products and services (Articles 1, 3, 4)*

In the context of the work on packaged retail investment products (PRIIPs)<sup>15</sup>, the Commission has committed to ensuring a consistent regulatory approach based on MiFID provisions for the distribution to retail investors of different financial products which satisfy similar investor needs and raise comparable investor protection challenges. Second, concerns regarding the applicability of MiFID when investment firms or credit institutions issue and sell their own securities have been raised. While the application of MiFID is clear when investment advice is provided as part of the sale, greater clarity is needed in the case of non-advised services, where the investment firm or bank could be considered not to be providing a MiFID service. Finally, the disparity between Member State rules applicable to locally active entities exempt from MiFID offering a limited range of investment services is no longer tenable in view of the lessons of the financial crisis, the complexity of financial markets and products, and the need for investors to be able to rely on similar levels of protection irrespective of the location or the nature of the service providers.

The proposals therefore extend MiFID requirements, and particularly conduct of business and conflicts of interest rules, to the advised and non-advised sale of structured deposits by credit institutions, specify that MiFID also applies to investment firms and credit institutions selling their own securities when not providing any advice, and require Member States to apply authorisation and conduct of business requirements analogous to MiFID in national legislation applicable to locally-based entities.

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<sup>15</sup> [http://ec.europa.eu/internal\\_market/finservices-retail/investment\\_products\\_en.htm](http://ec.europa.eu/internal_market/finservices-retail/investment_products_en.htm)

### *3.4.3. Revision of exemptions from MiFID (Article 2)*

MiFID lists dealing on own account in financial instruments among the investment services and activities requiring authorisation. However, three key exemptions were introduced to exclude persons who deal on own account as an exclusive activity, as an ancillary part of another non-financial corporate activity, or as part of a non-financial commodity-trading activity. In line with G20 commitments, the appropriate coverage of MiFID provisions to firms providing investment services to clients and carrying out investment activities on a professional basis should be ensured. The proposals therefore limit the exemptions more clearly to activities which are less central to MiFID and primarily proprietary or commercial in nature, or which do not constitute high-frequency trading.

### *3.4.4. Upgrades to the market structure framework (Articles 18, 19, 20, 32, 33, 34, 53, 54)*

Market developments since MiFID have partially challenged the current regulatory framework applicable to different types of execution venues, intended to underpin fair competition, a level-playing field, and transparent and efficient markets. Its function and design built mainly around equity-trading, the need to improve transparency and resiliency in non-equity markets, and the fact that not all modes of organised trading which have evolved in recent years adequately correspond to the definitions and requirements of the three-pronged division foreseen in MiFID – regulated markets, multilateral trading facilities, systematic internalisers – all signal the need to provide for a refinement of the present framework. The proposals create a new category for organised trading facilities which do not correspond to any of the existing categories, underpinned by strong organisational requirements and identical transparency rules, and upgrade key requirements across all venues to account for the greater competition and cross-border trading generated together by technological advances and MiFID.

### *3.4.5. Improvements to corporate governance (Articles 9, 48)*

MiFID requires persons who effectively direct the business of an investment firm to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the investment firm. In line with the Commission's work on corporate governance in the financial sector,<sup>16</sup> it is proposed to strengthen these provisions with regard to the profile, role, responsibilities of both executive and non-executive directors and balance in the composition of management bodies. In particular, the proposals seek to ensure members of the management body possess the sufficient knowledge and skills and comprehend the risks associated with the activity of the firm in order to ensure the firm is managed in a sound and prudent way in the interests of investors and market integrity.

### *3.4.6. Enhanced organisational requirements to safeguard the efficient functioning and integrity of markets (Articles 16, 51)*

Technological developments in the trading of financial instruments present both opportunities and challenges. While the effects are generally perceived as positive for market liquidity and to have improved the efficiency of markets, specific regulatory and supervisory measures have been identified as necessary in order to adequately deal with the potential threats for the orderly functioning of markets arising from algorithmic and high-frequency trading. In

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<sup>16</sup> COM (2010) 284



particular, the proposals aim to bring all entities engaged in high-frequency trading into MiFID, require appropriate organisational safeguards from these firms and those offering market access to other high-frequency traders, and require venues to adopt appropriate risk controls to mitigate disorderly trading and ensure the resiliency of their platforms. They also aim to assist the oversight and monitoring of such activities by competent authorities.

#### *3.4.7. Enhancement of the investor protection framework (Articles 13, 24, 25, 27, 29, Annex I – Section A)*

MiFID is generally acknowledged to have improved the protection of both retail and professional investors. Nonetheless, experience indicates that modifications in a number of areas would help to mitigate cases where the possibilities for investor detriment are most acute. Notably the proposals strengthens the regulatory framework for the provision of investment advice and portfolio management and the possibility for investment firms to accept incentive by third parties (inducements) as well as it clarifies the conditions and arrangements under which investors are able to transact freely in the market in certain non-complex instruments with minimal duties or protections afforded on behalf of their investment firm. Furthermore, it introduces a framework to deal with cross-selling practices in order to ensure that investors are properly informed and that these practices are not detrimental for them. The proposal reinforces the requirements concerning the handling of funds or instruments belonging to clients by investment firms and their agents and classifies as an investment service the safekeeping of financial instruments on behalf of clients. The proposal helps improving the information to clients in relation to the services provided to them and to the execution of their orders.

#### *3.4.8. Heightened protections in the provision of investment services to non-retail clients (Article 30, Annex II)*

The MiFID classification of clients into retail, professional and eligible counterparties provides an adequate and satisfactory degree of flexibility and should thus largely remain unchanged. Nonetheless, extensive examples concerning transactions in complex instruments by local authorities and municipalities have demonstrated that their classification is inadequately reflected in the MiFID framework. Second, while many detailed conduct of business requirements are not meaningful in the relationship between eligible counterparties in their multiple daily dealings, the overarching high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading should apply irrespective of client categorization. Finally, it is proposed that eligible counterparties benefit from better information and documentation for services provided.

#### *3.4.9. New requirements for trading venues (Articles 27, 59, 60)*

Assessing best execution in MiFID today hinges on the availability of pre- and post-trade transparency data. Nevertheless, other information such as the number of orders cancelled prior to execution or the speed of execution can also be relevant. The proposal therefore introduces a requirement for trading venues to publish annual data on execution quality. Second, commodity derivative contracts traded on trading venues frequently attract the broadest participation by users and investors and can often serve as a benchmark price discovery venues feeding into, for example, retail energy and food prices. It is therefore proposed that all trading venues on which commodity derivative contracts are traded adopt appropriate limits or alternative arrangements to ensure the orderly functioning of the market and settlement conditions for physically delivered commodities, and provide systematic,

granular and standardised information on positions by different types of financial and commercial traders to regulators (including the category *and* identity of the end-client) and market participants (including only aggregate positions of categories of end-clients). The limits to be adopted by these venues may be harmonised in delegated acts by the Commission, and neither they nor any alternative arrangements are without prejudice to the ability of competent authorities and ESMA, pursuant to this Directive and MiFIR, to impose additional measures when necessary.

#### *3.4.10. An improved regime for SME markets (Article 35)*

To complement various recent EU initiatives to assist SMEs in obtaining financing, it is proposed to create a new subcategory of markets known as SME growth markets. An operator of such a market (which are usually operated as MTFs) could elect to apply to have the MTF also registered as an SME growth market if it meets certain conditions. The registration of these markets should raise their visibility and profile and help lead to common pan European regulatory standards for such markets, that are tailored to take into account the needs of issuers and investors in these markets while maintaining existing high levels of investor protection.

#### *3.4.11. Third country regime (Articles 41-50)*

The proposal creates a harmonised framework for granting access to EU markets for firms and market operators based in third countries in order to overcome the current fragmentation into national third country regimes and to ensure a level playing field for all financial services actors in the EU territory. The proposal introduces a regime based on a preliminary equivalence assessment of third country jurisdictions by the Commission. Third country firms from third countries for which an equivalence decision has been adopted would be able to request to provide services in the Union. The provision of services to retail clients would require the establishment of a branch; the third country firm should be authorised in the Member State where the branch is established and the branch would be subject to EU requirements in some areas (organisational requirements, conduct of business rules, conflicts of interest, transparency and others). Services provided to eligible counterparties would not require the establishment of a branch; third country firms could provide them subject to ESMA registration. They would be supervised in their country. Appropriate cooperation agreement between the supervisors in third countries and national competent authorities and ESMA would be necessary.

#### *3.4.12. Increased and more efficient data consolidation (Articles 61-68)*

The area of market data in terms of quality, format, cost and ability to consolidate is key to sustain the overarching principle of MiFID as regards transparency, competition and investor protection. In this area, the proposed provisions in the Regulation and the Directive bring in a number of fundamental changes.

The provisions will improve the quality and consistency of data by requiring that all firms publish their trade reports through Approved Publication Arrangement (APA). The provisions set procedures for competent authority to authorise the APAs and set organisational requirements for the APAs.

The proposed provisions will address one of the main criticisms made on the effects of the implementation of MiFID, which is data fragmentation. Besides requiring market data to be

reliable, timely and available at a reasonable cost, it is crucial for investors that market data can be brought together in a way that allows efficient comparison of prices and trades across venues. The multiplication of market venues further to the implementation of MiFID has made this exercise more difficult. The proposed provisions set the conditions for the emergence of consolidated tape providers. It defines the organisational requirements that such providers will need to meet in order to be able to operate such a scheme.

#### *3.4.13. Heightened powers over derivative-positions for competent authorities (Articles 61, 72, 83)*

As a result of the significant growth in the size of derivative markets in recent years, the proposals would overcome the current fragmentation in the powers of regulators to monitor and supervise positions. In the interests of the orderly functioning of markets or market integrity, they would be bestowed with explicit powers to demand information from any person regarding the positions held in the derivative instruments concerned as well as in emission allowances. The supervisory authorities would be able to intervene at any stage during the life of a derivative contract and take action that a position be reduced. This heightened position management would be complemented by the possibility to limit positions in an ex-ante, non-discriminatory fashion. All actions should be notified to ESMA.

#### *3.4.14. Effective sanctions (Articles 73-78)*

Member States should provide that appropriate administrative sanctions and measures can be applied to breaches of MiFID. To this end, the Directive will require them to comply with the following minimum rules.

First, administrative sanctions and measures should apply to those natural or legal persons and to investment firms responsible for a breach.

Second, in the case of a breach of provisions of this Directive and the Regulation, a minimum set of administrative sanctions and measures should be available to competent authorities. This includes withdrawal of authorisation, public statement, dismissal of management, administrative pecuniary sanctions.

Third, the maximum level of administrative pecuniary sanctions laid down in national legislation should exceed the benefits derived from the breach if they can be determined and, in any case, should not be lower than the level provided for by the Directive.

Fourth, the criteria taken into account by competent authorities when determining the type and level of the sanction to be applied in a particular case should include at least the criteria set out in the Directive (eg. benefits derived from the violation or losses caused to third parties, cooperative behaviour of the responsible person, etc).

Fifth, sanctions and measures applied should be published, as provided in this Directive.

Finally, appropriate mechanism should be put in place to encourage reporting of breaches within investment firms.

Criminal sanctions are not covered by this proposal.

### 3.4.15. *Emission allowances (Article Annex I, Section C)*

Unlike trading in derivatives, spot secondary markets in EU emission allowances (EUAs) are largely unregulated. A range of fraudulent practices have occurred in spot markets which could undermine trust in the emissions trading scheme (ETS), set up by the EU ETS Directive<sup>17</sup>. In parallel to measures within the EU ETS Directive to reinforce the system of EUA registries and conditions for opening an account to trade EUAs, the proposal would render the entire EUA market subject to financial market regulation. Both spot and derivative markets would be under a single supervisor. MiFID and the Directive 2003/6/EC on market abuse would apply, thereby comprehensively upgrading the security of the market without interfering with its purpose, which remains emissions reduction. Moreover, this will ensure coherence with the rules already applying to EUA derivatives and lead to greater security as banks and investment firms, entities obliged to monitor trading activity for fraud, abuse or money laundering, would assume a bigger role in vetting prospective spot traders.

## **4. BUDGETARY IMPLICATION**

The specific budget implications of the proposal relate to task allocated to ESMA as specified in the legislative financial statements accompanying this proposal. Specific budgetary implications for the Commission are also assessed in the financial statement accompanying this proposal.

The proposal has implications for the Community budget.

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<sup>17</sup> Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, as last amended by Directive 2009/29/EC, OJ L 140, 5.6.2009, p. 63.

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↓ 2004/39/EC

⇒ new

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**(Recast)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty  $\Rightarrow$  on the functioning of the European Union  $\Leftarrow$  ~~establishing the European Community~~, and in particular Article ~~53(1)~~~~47(2)~~ thereof,

Having regard to the proposal from the Commission<sup>18</sup>,

$\Rightarrow$  After transmission of the right legislative act to the national Parliaments,  $\Leftarrow$

Having regard to the Opinion of the European Economic and Social Committee<sup>19</sup>,

Having regard to the opinion of the European Central Bank<sup>20</sup>,

$\Rightarrow$  After consulting the European Data Protection Supervisor,  $\Leftarrow$

Acting in accordance with the  $\Rightarrow$  ordinary legislative  $\Leftarrow$  procedure ~~laid down in Article 251 of the Treaty~~<sup>21</sup>,

Whereas:

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<sup>18</sup> OJ C 71 E, 25.3.2003, p. 62.

<sup>19</sup> OJ C 220, 16.9.2003, p. 1.

<sup>20</sup> OJ C 144, 20.6.2003, p. 6.

<sup>21</sup> ~~Opinion of the European Parliament of 25 September 2003 (not yet published in the Official Journal), Council Common Position of 8 December 2003 (OJ C 60 E, 9.3.2004, p. 1), Position of the European Parliament of 30 March 2004 (not yet published in the Official Journal) and Decision of the Council of 7 April 2004.~~

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↓ new

- (1) 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<sup>22</sup> has been substantially amended several times. Since further amendments are to be made, it should be recast in the interests of clarity.

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↓ 2004/39/EC recital1

- (2) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field<sup>23</sup> sought to establish the conditions under which authorised investment firms and banks could provide specified services or establish branches in other Member States on the basis of home country authorisation and supervision. To this end, that Directive aimed to harmonise the initial authorisation and operating requirements for investment firms including conduct of business rules. It also provided for the harmonisation of some conditions governing the operation of regulated markets.

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↓ 2004/39/EC recital 2 (adapted)

- (3) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the ~~Community~~ ☒ Union ☒ should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the ~~Community~~ ☒ Union ☒, being a Single Market, on the basis of home country supervision. In view of the preceding, Directive 93/22/EEC ~~was~~should be replaced by ~~a new~~ Directive 2004/39/EC.

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↓ new

- (4) The financial crisis has exposed weaknesses in the functioning and in the transparency of financial markets. The evolution of financial markets have exposed the need to strengthen the framework for the regulation of markets in financial instruments in order to increase transparency, better protect investors, reinforce confidence, reduce unregulated areas, ensure that supervisors are granted adequate powers to fulfil their tasks.

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<sup>22</sup> OJ L 145, 30.4.2004, p. 1.

<sup>23</sup> OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

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↓ new

(5) There is agreement among regulatory bodies at international level that weaknesses in corporate governance in a number of financial institutions, including the absence of effective checks and balances within them, have been a contributory factor to the financial crisis. Excessive and imprudent risk taking may lead to the failure of individual financial institutions and systemic problems in Member States and globally. Incorrect conduct of firms providing services to clients may lead to investor detriment and loss of investor confidence. In order to address the potentially detrimental effect of these weaknesses in corporate governance arrangements, the provisions of this Directive should be supplemented by more detailed principles and minimum standards. These principles and standards should apply taking into account the nature, scale and complexity of investment firms.

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↓ new

(6) The High Level Group on Financial Supervision in the European Union invited the European Union to develop a more harmonised set of financial regulation. In the context of the future European supervision architecture, the European Council of 18 and 19 June 2009 also stressed the need to establish a European single rule book applicable to all financial institutions in the Single Market.

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↓ new

(7) In the light of the above, Directive 2004/39/EC is now partly recast as this new Directive and partly replaced by Regulation (EU) No .../... (MiFIR). Together, both legal instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets, data reporting services providers and third country firms providing investment services or activities in the Union. This Directive should therefore be read together with the Regulation. This Directive should contain the provisions governing the authorisation of the business, the acquisition of qualifying holding, the exercise of the freedom of establishment and of the freedom to provide services, the operating conditions for investment firms to ensure investor protection, the powers of supervisory authorities of home and host Member States, the sanctioning regime. Since the main objective and subject-matter of this proposal is to harmonise national provisions concerning the mentioned areas, the proposal should be based on Article 53(1) TFEU. The form of a Directive is appropriate in order to enable the implementing provisions in the areas covered by this Directive, when necessary, to be adjusted to any existing specificities of the particular market and legal system in each Member State.

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↓ 2004/39/EC recital 3

~~(3) Due to the increasing dependence of investors on personal recommendations, it is appropriate to include the provision of investment advice as an investment service requiring authorisation.~~

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↓ 2004/39/EC recital 4

~~(8)(4)~~ It is appropriate to include in the list of financial instruments certain commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments.

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↓ new

(9) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading schemes, set up by Directive 2003/87/EC, and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive and of Regulation ----/-- [Market Abuse Regulation], by classifying them as financial instruments.

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↓ 2004/39/EC recital 7 (adapted)

~~(10)(7)~~ The purpose of this Directive is to cover undertakings the regular occupation or business of which is to provide investment services and/or perform investment activities on a professional basis. Its scope should not therefore cover any person with a different professional activity.

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↓ 2004/39/EC recital 5

(11) It is necessary to establish a comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. A coherent and risk-sensitive framework for regulating the main types of order-execution arrangement currently active in the European financial marketplace should be provided for. It is necessary to recognise the emergence of a new generation of organised trading systems alongside regulated markets which should be subjected to obligations designed to preserve the efficient and orderly functioning of financial markets. ~~With a view to establishing a proportionate regulatory framework provision should be made for the inclusion of a new investment service which relates to the operation of an MTF.~~

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↓ 2004/39/EC recital 6

~~(12)(6) Definitions of regulated market and MTF should be introduced and closely aligned with each other to reflect the fact that they represent the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller. The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not~~

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~~obliged to operate a 'technical' system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest. The requirement that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term 'non-discretionary rules' means that these rules leave the investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract, meaning that execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.~~

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↓ new

- (12) All trading venues, namely regulated markets, MTFs, and OTFs, should lay down transparent rules governing access to the facility. However, while regulated markets and MTFs should continue to be subject to highly similar requirements regarding whom they may admit as members or participants, OTFs should be able to determine and restrict access based inter alia on the role and obligations which their operators have in relation to their clients.
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↓ new

- (13) An investment firm executing client orders against own proprietary capital should be deemed a systematic internaliser, unless the transactions are carried out outside regulated markets, MTFs and OTFs on an occasional, ad hoc and irregular basis. Systematic internalisers should be defined as investment firms which, on an organised, frequent and systematic basis, deal on own account by executing client orders outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of this definition to investment firms, any bilateral trading carried out with clients should be relevant and quantitative criteria should complement the qualitative criteria for the identification of investment firms required to register as systematic internalisers, laid down in Article 21 of Commission Regulation No 1287/2006 implementing Directive 2004/39/EC. While an OTF is any system or facility in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests.
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↓ 2004/39/EC recital 8 (adapted)  
⇒ new

- ~~(14)~~<sup>(8)</sup> Persons administering their own assets and undertakings, who do not provide investment services and/or perform investment activities other than dealing on own account ⇒ should not be covered by the scope of this Directive ⇐ unless they are market makers ⇐ , members or participants of a regulated market or MTF or they

execute orders from clients by dealing ~~or they deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis, by providing a system accessible to third parties in order to engage in dealings with them should not be covered by the scope of this Directive.~~ <sup>⇒</sup> By way of exception, persons who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof, as an ancillary activity to their main business, which on a group basis is neither the provision of investment services within the meaning of this Directive nor of banking services within the meaning of Directive 2006/48/EC, should not be covered by the scope of this Directive. Technical criteria for when an activity is ancillary to such a main business should be clarified in delegated acts. Dealing on own account by executing client orders should include firms executing orders from different clients by matching them on a matched principal basis (back to back trading), which should be regarded as acting as principals and should be subject to the provisions of this Directive covering both the execution of orders on behalf of clients and dealing on own account. The execution of orders in financial instruments as an ancillary activity between two persons whose main business, on a group basis, is neither the provision of investment services within the meaning of this Directive nor of banking services within the meaning of Directive 2006/48/EC should not be considered as dealing on own account by executing client orders. <sup>⇐</sup>

↓ 2004/39/EC recital 9

~~(15)~~<sup>(9)</sup> References in the text to persons should be understood as including both natural and legal persons.

↓ 2004/39/EC recital 10 (adapted)

~~(16)~~<sup>(10)</sup> Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to ~~Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession<sup>24</sup>, First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of direct insurance other than life assurance<sup>25</sup> and Council Directive 2002/83/EC of 5 November 2002 concerning life assurance<sup>26</sup>~~ <sup>⊗</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)<sup>27</sup> <sup>⊗</sup> should be excluded.

<sup>24</sup> ~~OJ 56, 4.4.1964, p. 878/64. Directive as amended by the 1972 Act of Accession.~~

<sup>25</sup> ~~OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2002/87/EC.~~

<sup>26</sup> ~~OJ L 345, 19.12.2002, p. 1.~~

<sup>27</sup> [please add OJ reference]

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↓ 2004/39/EC recital 11

~~(17)(11)~~ Persons who do not provide services for third parties but whose business consists in providing investment services solely for their parent undertakings, for their subsidiaries, or for other subsidiaries of their parent undertakings should not be covered by this Directive.

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↓ 2004/39/EC recital 12

~~(18)(12)~~ Persons who provide investment services only on an incidental basis in the course of professional activity should also be excluded from the scope of this Directive, provided that activity is regulated and the relevant rules do not prohibit the provision, on an incidental basis, of investment services.

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↓ 2004/39/EC recital 13

~~(19)(13)~~ Persons who provide investment services consisting exclusively in the administration of employee-participation schemes and who therefore do not provide investment services for third parties should not be covered by this Directive.

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↓ 2004/39/EC recital 14

~~(20)(14)~~ It is necessary to exclude from the scope of this Directive central banks and other bodies performing similar functions as well as public bodies charged with or intervening in the management of the public debt, which concept covers the investment thereof, with the exception of bodies that are partly or wholly State-owned the role of which is commercial or linked to the acquisition of holdings.

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↓ new

(21) In order to clarify the regime of exemptions for the European System of Central Banks, other national bodies performing similar functions and the bodies intervening in the management of public debt, it is appropriate to limit such exemptions to the bodies and institutions performing their functions in accordance with the law of one Member State or in accordance with the legislation of the Union as well as to international bodies of which one or more Member States are members.

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↓ 2004/39/EC recital 15 (adapted)

~~(22)(15)~~ It is necessary to exclude from the scope of this Directive collective investment undertakings and pension funds whether or not coordinated at ~~Community~~  Union  level, and the depositaries or managers of such undertakings, since they are subject to specific rules directly adapted to their activities.

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↓ 2004/39/EC recital 16

~~(23)(16)~~ In order to benefit from the exemptions from this Directive the person concerned should comply on a continuous basis with the conditions laid down for such

exemptions. In particular, if a person provides investment services or performs investment activities and is exempted from this Directive because such services or activities are ancillary to his main business, when considered on a group basis, he should no longer be covered by the exemption related to ancillary services where the provision of those services or activities ceases to be ancillary to his main business.

↓ 2004/39/EC recital 17

~~(24)(17)~~ Persons who provide the investment services and/or perform investment activities covered by this Directive should be subject to authorisation by their home Member States in order to protect investors and the stability of the financial system.

↓ 2004/39/EC recital 18 (adapted)

~~(25)(18)~~ Credit institutions that are authorised under Directive ~~2000/12/EC~~ ~~2000/12/EC~~ ~~2006/48/EC~~ ~~2006/48/EC~~ of the European Parliament and of the Council of ~~20 March 2000~~ ~~20 March 2000~~ ~~14 June 2006~~ ~~14 June 2006~~ relating to the taking up and pursuit of the business of credit institutions ~~28~~ ~~28~~ ~~28~~ should not need another authorisation under this Directive in order to provide investment services or perform investment activities. When a credit institution decides to provide investment services or perform investment activities the competent authorities, before granting an authorisation, should verify that it complies with the relevant provisions of this Directive.

↓ new

(26) Structured deposits have emerged as a form of investment product but are not covered under any legislation for the protection of investors at Union level, while other structured investments are covered by such legislation. It is appropriate therefore to strengthen the confidence of investors and to make regulatory treatment concerning the distribution of different packaged retail investment products more uniform in order to ensure an adequate level of investor protection across the Union. For this reason, it is appropriate to include in the scope of this Directive structured deposits. In this regard, it is necessary to clarify that since structured deposits are a form of investment product, they do not include deposits linked solely to interest rates, such as Euribor or Libor, regardless of whether or not the interest rates are predetermined, or are fixed or variable.

↓ new

(27) In order to strengthen the protection of investors in the Union, it is appropriate to limit the conditions under which Member States can exclude the application of this Directive to persons providing investment services to clients who, as a result, are not protected under the Directive. In particular, it is appropriate to require Member States to apply requirements at least analogous to the ones laid down in this Directive to those persons, notably in the phase of authorisation, in the assessment of their

<sup>28</sup> OJ L ~~177~~, 30.6.2006, p.1. ~~126~~, 26.5.2000, p. 1. Directive as last amended by ~~Directive 2002/87/EC~~.

reputation and experience and of the suitability of any shareholders, in the review of the conditions for initial authorisation and on-going supervision as well as on conduct of business obligations.

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↓ 2004/39/EC recital 19

~~(28)(19)~~ In cases where an investment firm provides one or more investment services not covered by its authorisation, or performs one or more investment activities not covered by its authorisation, on a non-regular basis it should not need an additional authorisation under this Directive.

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↓ 2004/39/EC recital 20

~~(29)(20)~~ For the purposes of this Directive, the business of the reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors.

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↓ new

(30) Investment firms and credit institutions distributing financial instruments they issue themselves should be subject to the provisions of this Directive when they provide investment advice to their clients. In order to eliminate uncertainty and strengthen investor protection, it is appropriate to provide for the application of this Directive when, in the primary market, investment firms and credit institutions distribute financial instruments issued by them without providing any advice. For this purpose, the definition of the service of execution of orders on behalf of clients should be extended.

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↓ 2004/39/EC recital 21(adapted)

~~(21) In the context of the forthcoming revision of the Capital Adequacy framework in Basel II, Member States recognise the need to re-examine whether or not investment firms who execute client orders on a matched principal basis are to be regarded as acting as principals, and thereby be subject to additional regulatory capital requirements.~~

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↓ 2004/39/EC recital 22

~~(31)(22)~~ The principles of mutual recognition and of home Member State supervision require that the Member States' competent authorities should not grant or should withdraw authorisation where factors such as the content of programmes of operations, the geographical distribution or the activities actually carried on indicate clearly that an investment firm has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities. An investment firm which is a legal person should be authorised in the Member State in which it has its registered office. An investment firm which is not a legal person should be authorised in the Member State in which it has its head office. In addition,

Member States should require that an investment firm's head office must always be situated in its home Member State and that it actually operates there.

↓ new

(32) Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector<sup>29</sup> has provided for detailed criteria for the prudential assessment of proposed acquisitions in an investment firm and for a procedure for their application. In order to provide legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof, it is appropriate to confirm the criteria and the process of prudential assessment laid down in Directive 2007/44/EC. In particular, competent authorities should appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria: the reputation of the proposed acquirer; the reputation and experience of any person who will direct the business of the investment firm; the financial soundness of the proposed acquirer; whether the investment firm will be able to comply with the prudential requirements based on this Directive and other Directives, notably, Directives 2002/87/EC<sup>30</sup> and 2006/49/EC<sup>31</sup>; whether there are reasonable grounds to suspect that money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC<sup>32</sup> is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

↓ 2004/39/EC recital 23 (adapted)

~~(33)(23)~~ An investment firm authorised in its home Member State should be entitled to provide investment services or perform investment activities throughout the ~~Community~~  Union  without the need to seek a separate authorisation from the competent authority in the Member State in which it wishes to provide such services or perform such activities.

↓ 2004/39/EC recital 24 (adapted)

~~(34)(24)~~ Since certain investment firms are exempted from certain obligations imposed by ~~Council Directive 93/6/EEC of 15 March 1993~~  2006/49/EC of the European Parliament and of the Council of 14 June 2006  on the capital adequacy of investment firms and credit institutions  (recast)   <sup>33</sup>  , they should be

<sup>29</sup> OJ L 247 , 21/09/2007, p. 1

<sup>30</sup> Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (OJ L 35, 11.2.2003, p. 1).

<sup>31</sup> Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201).

<sup>32</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

<sup>33</sup> OJ L ~~141, 11.6.1993~~  177, 30.6.2006, p. 201  ~~p. 1. Directive as last amended by Directive 2002/87/EC.~~

obliged to hold either a minimum amount of capital or professional indemnity insurance or a combination of both. The adjustments of the amounts of that insurance should take into account adjustments made in the framework of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation<sup>34</sup>. This particular treatment for the purposes of capital adequacy should be without prejudice to any decisions regarding the appropriate treatment of these firms under future changes to ~~Community~~  Union  legislation on capital adequacy.

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↓ 2004/39/EC recital 25

~~(35)(25)~~ Since the scope of prudential regulation should be limited to those entities which, by virtue of running a trading book on a professional basis, represent a source of counterparty risk to other market participants, entities which deal on own account in financial instruments, including those commodity derivatives covered by this Directive, as well as those that provide investment services in commodity derivatives to the clients of their main business on an ancillary basis to their main business when considered on a group basis, provided that this main business is not the provision of investment services within the meaning of this Directive, should be excluded from the scope of this Directive.

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↓ 2004/39/EC recital 26

~~(36)(26)~~ In order to protect an investor's ownership and other similar rights in respect of securities and his rights in respect of funds entrusted to a firm those rights should in particular be kept distinct from those of the firm. This principle should not, however, prevent a firm from doing business in its name but on behalf of the investor, where that is required by the very nature of the transaction and the investor is in agreement, for example stock lending.

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↓ 2004/39/EC recital 27 (adapted)  
⇒ new

~~(37)(27)~~ ~~Where a client, in line with Community legislation and in particular Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements<sup>35</sup>, transfers full ownership of financial instruments or funds to an investment firm for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, such financial instruments or funds should likewise no longer be regarded as belonging to the client.~~ ⇒ The requirements concerning the protection of client assets are a crucial tool for the protection of clients in the provision of services and activities. These requirements can be excluded when full ownership of funds and financial instrument is transferred to an investment firm to cover any present or future, actual or contingent or prospective obligations. This broad possibility may create uncertainty and jeopardise the effectiveness of the requirements concerning the safeguard of client assets. Thus, at least when retail clients' assets are involved, it is appropriate to limit the possibility

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<sup>34</sup> OJ L 9, 15.1.2003, p. 3.

<sup>35</sup> ~~OJ L 168, 27.6.2002, p. 43.~~

of investment firms to conclude title transfer financial collateral arrangements as defined under Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements<sup>36</sup>, for the purpose of securing or otherwise covering their obligations. ↩

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↓ 2004/39/EC recital 28

~~(28) The procedures for the authorisation, within the Community, of branches of investment firms authorised in third countries should continue to apply to such firms. Those branches should not enjoy the freedom to provide services under the second paragraph of Article 49 of the Treaty or the right of establishment in Member States other than those in which they are established. In view of cases where the Community is not bound by any bilateral or multilateral obligations it is appropriate to provide for a procedure intended to ensure that Community investment firms receive reciprocal treatment in the third countries concerned.~~

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↓ new

(38) It is necessary to strengthen the role of management bodies of investment firms in ensuring sound and prudent management of the firms, the promotion of the integrity of the market and the interest of investors. The management body of an investment firm should at all time commit sufficient time and possess adequate knowledge, skills and experience to be able to understand the business of the investment firm and its main risk. To avoid group thinking and facilitate critical challenge, management boards of investment firms should be sufficiently diverse as regards age, gender, provenance, education and professional background to present a variety of views and experiences. Gender balance is of a particular importance to ensure adequate representation of demographical reality.

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↓ new

(39) In order to have an effective oversight and control over the activities of investment firms, the management body should be responsible and accountable for the overall strategy of the investment firm, taking into account the investment firm's business and risk profile. The management body should assume clear responsibilities across the business cycle of the investment firm, in the areas of the identification and definition of the strategic objectives of the firm, of the approval of its internal organization, including criteria for selection and training of personnel, of the definition of the overall policies governing the provision of services and activities, including the remuneration of sales staff and the approval of new products for distribution to clients. Periodic monitoring and assessment of the strategic objectives of investment firms, their internal organization and their policies for the provision of services and activities should ensure their continuous ability to deliver sound and prudent management, in the interest of the integrity of the markets and the protection of investors.

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<sup>36</sup> OJ L 168, 27.6.2002, p. 43.



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↓ 2004/39/EC recital 29

~~(40)(29)~~ The expanding range of activities that many investment firms undertake simultaneously has increased potential for conflicts of interest between those different activities and the interests of their clients. It is therefore necessary to provide for rules to ensure that such conflicts do not adversely affect the interests of their clients.

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↓ new

(41) Member States should ensure the respect of the right to the protection of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)<sup>37</sup> which govern the processing of personal data carried out in application of this Directive. Processing of personal data by ESMA in the application of this Directive is subject to Regulation (EU) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>38</sup>.

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↓ new

(42) 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<sup>39</sup> allows Member States to require, in the context of organisational requirements for investment firms, the recording of telephone conversations or electronic communications involving client orders. Recording of telephone conversations or electronic communications involving client orders is compatible with the Charter of Fundamental Rights of the European Union and is justified in order to strengthen investor protection, to improve market surveillance and increase legal certainty in the interest of investment firms and their clients. The importance of such records is also mentioned in the technical advice to the European Commission, released by the Committee of European Securities Regulators on 29 July 2010. For these reasons, it is appropriate to provide in this Directive for the principles of a general regime concerning the recording of telephone conversations or electronic communications involving client orders.

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↓ new

(43) Member States should ensure the right to the protection of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October

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<sup>37</sup> OJ L 201 , 31.7.2002, p. 37

<sup>38</sup> OJ L 8, 12.1.2001, p. 1.

<sup>39</sup> OJ L 241, 2.9.2006, p. 26.

1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data and Directive 2002/58/EC. This protection should notably extend to telephone and electronic recording as required under Article 13.

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↓ new

(44) The use of trading technology has evolved significantly in the past decade and is now extensively used by market participants. Many market participants now make use of algorithmic trading where a computer algorithm automatically determines aspects of an order with minimal or no human intervention. A specific subset of algorithmic trading is high frequency trading where a trading system analyses data or signals from the market at high speed and then sends or updates large numbers of orders within a very short time period in response to that analysis. High frequency trading is typically done by the traders using their own capital to trade and rather than being a strategy in itself is usually the use of sophisticated technology to implement more traditional trading strategies such as market making or arbitrage.

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↓ new

(45) In line with Council conclusions on strengthening Union financial supervision of June 2009, and in order to contribute to the establishment of a single rulebook for Union financial markets, help further develop a level playing field for Member States and market participants, enhance investor protection and improve supervision and enforcement, the Union has committed to minimise, where appropriate, discretions available to Member States across Union financial services legislation. Besides the introduction in this directive of a common regime for the recording of telephone conversations or electronic communications involving client orders, it is appropriate to reduce the possibility of competent authorities to delegate supervisory tasks in certain cases, to limit discretions in the requirements applicable to tied agents and to the reporting from branches.

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↓ new

(46) The use of trading technology has increased the speed, capacity and complexity of how investors trade. It has also enabled market participants to facilitate direct access by their clients to markets through the use of their trading facilities, through direct electronic access or sponsored and direct market access. Trading technology has provided benefits to the market and market participants generally such as wider participation in markets, increased liquidity, narrower spreads, reduced short term volatility and the means to obtain better execution of orders for clients. Yet, this trading technology also gives rise to a number of potential risks such as an increased risk of the overloading of the systems of trading venues due to large volumes of orders, risks of algorithmic trading generating duplicative or erroneous orders or otherwise malfunctioning in a way that may create a disorderly market. In addition there is the risk of algorithmic trading systems overreacting to other market events which can exacerbate volatility if there is a pre-existing market problem. Finally, algorithmic trading or high frequency can lend itself to certain forms of abusive behaviour if misused.

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↓ new

(47) These potential risks from increased use of technology are best mitigated by a combination of specific risk controls directed at firms who engage in algorithmic or high frequency trading and other measures directed at operators of trading venues that are accessed by such firms. It is desirable to ensure that all high frequency trading firms be authorised when they are a direct member of a trading venue. This should ensure they are subject to organisational requirements under the Directive and are properly supervised.

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↓ new

(48) Both firms and trading venues should ensure robust measures are in place to ensure that automated trading does not create a disorderly market and cannot be used for abusive purposes. Trading venues should also ensure their trading systems are resilient and properly tested to deal with increased order flows or market stresses and that circuit breakers are in place to temporarily halt trading if there are sudden unexpected price movements.

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↓ new

(49) In addition to measures relating to algorithmic and high frequency trading it is appropriate to include controls relating to investment firms providing direct electronic access to markets for clients as electronic trading can be carried out via a firm providing electronic market access and many similar risks. It is also appropriate that firms providing direct electronic access ensure that persons using this service are properly qualified and that risk controls are imposed on the use of the service. It is appropriate that detailed organisational requirements regarding these new forms of trading should be prescribed in more detail in delegated acts. This should ensure that requirements may be amended where necessary to deal with further innovation and developments in this area.

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↓ new

(50) There is a multitude of trading venues currently operating in the EU , among which a number are trading identical instruments. In order to address potential risks to the interests of investors it is necessary to formalise and further harmonise the processes on the consequences for trading on other venues if one trading venue decides to suspend or remove a financial instrument from trading. In the interest of legal certainty and to adequately address conflicts of interests when deciding to suspend or to remove instruments from trading, it should be ensured that if one regulated market or MTF stops trading due to non disclosure of information about an issuer or financial instrument, the others follow that decision unless continuing trading may be justified due to exceptional circumstances. In addition, it is necessary to formalise and improve the exchange of information and the cooperation of trading venues in cases of exceptional conditions in relation to a particular instrument that is traded on various venues.

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↓ new

(51) More investors have become active in the financial markets and are offered a more complex wide-ranging set of services and instruments and, in view of these developments, it is necessary to provide for a degree of harmonisation to offer investors a high level of protection across the Union. When Directive 2004/39/EC was adopted, the increasing dependence of investors on personal recommendations required to include the provision of investment advice as an investment service subject to authorisation and to specific conduct of business obligations. The continuous relevance of personal recommendations for clients and the increasing complexity of services and instruments require enhancing the conduct of business obligations in order to strengthen the protection of investors.

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↓ new

(52) In order to give all relevant information to investors, it is appropriate to require investment firms providing investment advice to clarify the basis of the advice they provide, notably the range of products they consider in providing personal recommendations to clients, whether they provide investment advice on an independent basis and whether they provide the clients with the on-going assessment of the suitability of the financial instruments recommended to them. It is also appropriate to require investment firms to explain their clients the reasons of the advice provided to them. In order to further define the regulatory framework for the provision of investment advice, while at the same time leaving choice to investment firms and clients, it is appropriate to establish the conditions for the provisions of this service when firms inform clients that the service is provided on an independent basis. In order to strengthen the protection of investors and increase clarity to clients as to the service they receive, it is appropriate to further restrict the possibility for firms to accept or receive inducements from third parties, and particularly from issuers or product providers, when providing the service of investment advice on an independent basis and the service of portfolio management. In such cases, only limited non-monetary benefits as training on the features of the products should be allowed subject to the condition that they do not impair the ability of investment firms to pursue the best interest of their clients, as further clarified in Directive 2006/73/EC.

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↓ new

(53) Investment firms are allowed to provide investment services that only consist of execution and/or the reception and transmission of client orders, without the need to obtain information regarding the knowledge and experience of the client in order to assess the appropriateness of the service or the instrument for the client. Since these services entail a relevant reduction of clients' protections, it is appropriate to improve the conditions for their provision. In particular, it is appropriate to exclude the possibility to provide these services in conjunction with the ancillary service consisting of granting credits or loans to investors to allow them to carry out a transaction in which the investment firm is involved, since this increases the complexity of the transaction and makes more difficult the understanding of the risk involved. It is also appropriate to better define the criteria for the selection of the financial instruments to which these services should relate in order to exclude the

financial instruments, including collective investment in transferable securities (UCITS), which embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved.

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↓ new

(54) Cross-selling practices are a common strategy for retail financial service providers throughout the Union. They can provide benefits to retail clients but can also represent practices where the interest of the client is not adequately considered. For instance, certain forms of cross-selling practices, namely tying practices where two or more financial services are sold together in a package and at least one of those services is not available separately, can distort competition and negatively affect clients' mobility and their ability to make informed choices. An example of tying practices can be the necessary opening of current accounts when an investment service is provided to a retail client. While practices of bundling, where two or more financial services are sold together in a package, but each of the services can also be purchased separately, may also distort competition and negatively affect customer mobility and clients' ability to make informed choices, they at least leave choice to the client and may therefore pose less risk to the compliance of investment firms with their obligations under this directive. The use of such practices should be carefully assessed in order to promote competition and consumer choice.

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↓ 2004/39/EC recital 30

~~(55)(30)~~ A service should be considered to be provided at the initiative of a client unless the client demands it in response to a personalised communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction. A service can be considered to be provided at the initiative of the client notwithstanding that the client demands it on the basis of any communication containing a promotion or offer of financial instruments made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.

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↓ 2004/39/EC recital 31

⇒ new

~~(56)(31)~~ One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties). ⇒ However, in order to enhance the regulatory framework applicable to the provision of services irrespective of the categories of clients concerned, it is appropriate to make it clear that principles to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading apply to the relationship with any clients. ⇐

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↓ 2004/39/EC recital 32

~~(57)(32)~~ By way of derogation from the principle of home country authorisation, supervision and enforcement of obligations in respect of the operation of branches, it

is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.

↓ 2004/39/EC recital 33

~~(58)(33)~~ It is necessary to impose an effective ‘best execution’ obligation to ensure that investment firms execute client orders on terms that are most favourable to the client. This obligation should apply to the firm which owes contractual or agency obligations to the client.

↓ new

(59) In order to enhance the conditions under which investment firms comply with their obligation to execute orders on terms most favourable to their clients in accordance with this Directive, it is appropriate to require execution venues to make available to the public data relating to the quality of execution of transactions on each venue.

↓ new

(60) Information provided by investment firms to clients in relation to their order execution policies often are generic and standard and do not allow clients to understand how an order will be executed and to verify firms' compliance with their obligation to execute orders on term most favourable to their clients. In order to enhance investor protection it is appropriate to specify the principles concerning the information given by investment firms to their clients on the order execution policies and to require firms to make public, on an annual basis, for each class of financial instruments, the top five execution venues where they executed client orders in the preceding year.

↓ 2004/39/EC recital 34

~~(34) Fair competition requires that market participants and investors be able to compare the prices that trading venues (i.e. regulated markets, MTFs and intermediaries) are required to publish. To this end, it is recommended that Member States remove any obstacles which may prevent the consolidation at European level of the relevant information and its publication.~~

↓ 2004/39/EC recital 35 (adapted)

~~(61)(35)~~ When establishing the business relationship with the client the investment firm might ask the client or potential client to consent at the same time to the execution policy as well as to the possibility that his orders may be executed outside a regulated market ~~or an~~ MTF ☒ , OTF or systematic internaliser ☒ .

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↓ 2004/39/EC recital 36

~~(62)(36)~~ Persons who provide investment services on behalf of more than one investment firm should not be considered as tied agents but as investment firms when they fall under the definition provided in this Directive, with the exception of certain persons who may be exempted.

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↓ 2004/39/EC recital 37

~~(63)(37)~~ This Directive should be without prejudice to the right of tied agents to undertake activities covered by other Directives and related activities in respect of financial services or products not covered by this Directive, including on behalf of parts of the same financial group.

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↓ 2004/39/EC recital 38

~~(64)(38)~~ The conditions for conducting activities outside the premises of the investment firm (door-to-door selling) should not be covered by this Directive.

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↓ 2004/39/EC recital 39

~~(65)(39)~~ Member States' competent authorities should not register or should withdraw the registration where the activities actually carried on indicate clearly that a tied agent has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities.

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↓ 2004/39/EC recital 40

~~(66)(40)~~ For the purposes of this Directive eligible counterparties should be considered as acting as clients.

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↓ 2004/39/EC recital 41

~~(41) For the purposes of ensuring that conduct of business rules (including rules on best execution and handling of client orders) are enforced in respect of those investors most in need of these protections, and to reflect well-established market practice throughout the Community, it is appropriate to clarify that conduct of business rules may be waived in the case of transactions entered into or brought about between eligible counterparties.~~

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↓ new

(67) The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To this extent, it is appropriate to extend some information and reporting

requirements to the relationship with eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and monies as well as information and reporting requirements concerning more complex financial instruments and transaction. In order to better define the classification of municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing these clients to ask a treatment as professional clients on request.

↓ 2004/39/EC recital 42

~~(68)(42)~~ In respect of transactions executed between eligible counterparties, the obligation to disclose client limit orders should only apply where the counter party is explicitly sending a limit order to an investment firm for its execution.

↓ 2004/39/EC recital 43

~~(69)(43)~~ Member States shall protect the right to privacy of natural persons with respect to the processing of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data.<sup>40</sup>

↓ 2004/39/EC recital 44

~~(44) With the two fold aim of protecting investors and ensuring the smooth operation of securities markets, it is necessary to ensure that transparency of transactions is achieved and that the rules laid down for that purpose apply to investment firms when they operate on the markets. In order to enable investors or market participants to assess at any time the terms of a transaction in shares that they are considering and to verify afterwards the conditions in which it was carried out, common rules should be established for the publication of details of completed transactions in shares and for the disclosure of details of current opportunities to trade in shares. These rules are needed to ensure the effective integration of Member State equity markets, to promote the efficiency of the overall price formation process for equity instruments, and to assist the effective operation of 'best execution' obligations. These considerations require a comprehensive transparency regime applicable to all transactions in shares irrespective of their execution by an investment firm on a bilateral basis or through regulated markets or MTFs. The obligations for investment firms under this Directive to quote a bid and offer price and to execute an order at the quoted price do not relieve investment firms of the obligation to route an order to another execution venue when such internalisation could prevent the firm from complying with 'best execution' obligations.~~

<sup>40</sup> OJ L 281, 23.11.1995, p. 31.



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↓ 2004/39/EC recital 45

~~(45) Member States should be able to apply transaction reporting obligations of the Directive to financial instruments that are not admitted to trading on a regulated market.~~

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↓ 2004/39/EC recital 46

~~(46) A Member State may decide to apply the pre- and post-trade transparency requirements laid down in this Directive to financial instruments other than shares. In that case those requirements should apply to all investment firms for which that Member State is the home Member State for their operations within the territory of that Member State and those carried out cross border through the freedom to provide services. They should also apply to the operations carried out within the territory of that Member State by the branches established in its territory of investment firms authorised in another Member State.~~

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↓ 2004/39/EC recital 47 (adapted)

~~(70)~~<sup>(47)</sup> Investment firms should all have the same opportunities of joining or having access to regulated markets throughout the ~~Community~~  Union . Regardless of the manner in which transactions are at present organised in the Member States, it is important to abolish the technical and legal restrictions on access to regulated markets.

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↓ 2004/39/EC recital 48 (adapted)

~~(71)~~<sup>(48)</sup> In order to facilitate the finalisation of cross-border transactions, it is appropriate to provide for access to clearing and settlement systems throughout the ~~Community~~  Union  by investment firms, irrespective of whether transactions have been concluded through regulated markets in the Member State concerned. Investment firms which wish to participate directly in other Member States' settlement systems should comply with the relevant operational and commercial requirements for membership and the prudential measures to uphold the smooth and orderly functioning of the financial markets.

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↓ new

(72) The provision of services by third country firms in the Union is subject to national regimes and requirements. These regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level. The regime should harmonize the existing fragmented framework, ensure certainty and uniform treatment of third country firms accessing the Union, ensure that and equivalence assessment has been carried out by the Commission in relation to the regulatory and supervisory framework of third countries and should provide for a comparable level of protections to investors in the EU receiving services by third country firms.

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↓ new

(73) The provision of services to retail clients should always require the establishment of a branch in the Union. The establishment of the branch shall be subject to authorisation and supervision in the Union. Proper cooperation arrangements should be in place between the competent authority concerned and the competent authority in the third country. Sufficient initial capital should be at free disposal of the branch. Once authorised the branch should be subject to supervision in the Member State where the branch is established; the third country firm should be able to provide services in other Member States through the authorised and supervised branch, subject to a notification procedure. The provision of services without branches should be limited to eligible counterparties. It should be subject to registration by ESMA and to supervision in the third country. Proper cooperation arrangements should be in place between ESMA and the competent authorities in the third country.

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↓ new

(74) The provision of this directive regulating the provision of services by third country firms in the Union should not affect the possibility for persons established in the Union to receive investment services by a third country firm at their own exclusive initiative. When a third country firm provides services at own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.

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↓ 2004/39/EC recital 49 (adapted)  
⇒ new

~~(75)(49)~~ The authorisation to operate a regulated market should extend to all activities which are directly related to the display, processing, execution, confirmation and reporting of orders from the point at which such orders are received by the regulated market to the point at which they are transmitted for subsequent finalisation, and to activities related to the admission of financial instruments to trading. This should also include transactions concluded through the medium of designated market makers appointed by the regulated market which are undertaken under its systems and in accordance with the rules that govern those systems. Not all transactions concluded by members or participants of the regulated market, ~~or~~ MTF ~~or~~ OTF ~~or~~ are to be considered as concluded within the systems of a regulated market, ~~or~~ MTF ~~or~~ OTF ~~or~~. Transactions which members or participants conclude on a bilateral basis and which do not comply with all the obligations established for a regulated market, ~~or~~ an MTF ~~or~~ an OTF ~~or~~ under this Directive should be considered as transactions concluded outside a regulated market, ~~or~~ an MTF ~~or~~ an OTF ~~or~~ for the purposes of the definition of systematic internaliser. In such a case the obligation for investment firms to make public firm quotes should apply if the conditions established by this Directive are met.

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↓ new

(76) The provision of core market data services which are pivotal for users to be able to obtain a desired overview of trading activity across Union markets and for competent authorities to receive accurate and comprehensive information on relevant transactions should be subject to authorisation and regulation to ensure the necessary level of quality.

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↓ new

(77) The introduction of approved publication arrangements should improve the quality of trade transparency information published in the OTC space and contribute significantly to ensuring that such data is published in a way facilitating its consolidation with data published by trading venues.

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↓ new

(78) The introduction of a commercial solution for a consolidated tape for equities should contribute to creating a more integrated European market and make it easier for market participants to gain access to a consolidated view of trade transparency information that is available. The envisaged solution is based on an authorisation of providers working along pre-defined and supervised parameters which are in competition with each other in order to achieve technically highly sophisticated and innovative solutions, serving the market to the greatest extent possible.

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↓ 2004/39/EC recital 50

~~(50) Systematic internalisers might decide to give access to their quotes only to retail clients, only to professional clients, or to both. They should not be allowed to discriminate within those categories of clients.~~

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↓ 2004/39/EC recital 51

~~(51) Article 27 does not oblige systematic internalisers to publish firm quotes in relation to transactions above standard market size.~~

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↓ 2004/39/EC recital 52

~~(52) Where an investment firm is a systematic internaliser both in shares and in other financial instruments, the obligation to quote should only apply in respect of shares without prejudice to Recital 46.~~

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↓ 2004/39/EC recital 53

~~(53) It is not the intention of this Directive to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by~~

~~dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.~~

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↓ 2004/39/EC recital 54

~~(54) The standard market size for any class of share should not be significantly disproportionate to any share included in that class.~~

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↓ 2004/39/EC recital 55 (adapted)

~~(79)(55)~~ Revision of Directive ~~93/6/EEC~~  2006/49/EC  should fix the minimum capital requirements with which regulated markets should comply in order to be authorised, and in so doing should take into account the specific nature of the risks associated with such markets.

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↓ 2004/39/EC recital 56

~~(80)(56)~~ Operators of a regulated market should also be able to operate an MTF in accordance with the relevant provisions of this Directive.

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↓ 2004/39/EC recital 57

~~(81)(57)~~ The provisions of this Directive concerning the admission of instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities<sup>41</sup>. A regulated market should not be prevented from applying more demanding requirements in respect of the issuers of securities or instruments which it is considering for admission to trading than are imposed pursuant to this Directive.

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↓ 2004/39/EC recital 58

~~(82)(58)~~ Member States should be able to designate different competent authorities to enforce the wide-ranging obligations laid down in this Directive. Such authorities should be of a public nature guaranteeing their independence from economic actors and avoiding conflicts of interest. In accordance with national law, Member States should ensure appropriate financing of the competent authority. The designation of public authorities should not exclude delegation under the responsibility of the competent authority.

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<sup>41</sup> OJ L 184, 6.7.2001, p. 1. Directive as last amended by European Parliament and Council Directive 2003/71/EC (OJ L 345, 31.12.2003, p. 64.).

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↓ new

(83) The G20 summit in Pittsburgh on 25 September 2009 agreed to improve the regulation, functioning and transparency of financial and commodity markets to address excessive commodity price volatility. The Commission Communications of 28 October 2009 on A Better Functioning Food Supply Chain in Europe, and of 2 February 2011 on Tackling the Challenges in Commodity Markets and Raw Materials outlined measures that fall to be taken in the context of the review of Directive 2004/39/EC.

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↓ new

(84) The powers made available to competent authorities should be complemented with explicit powers to demand information from any person regarding the size and purpose of a position in derivatives contracts related to commodities and to request the person to take steps to reduce the size of the position in the derivative contracts.

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↓ new

(85) Explicit powers should be granted to competent authorities to limit the ability of any person or class of persons from entering into a derivative contract in relation to a commodity. The application of a limit should be possible both in the case of individual transactions and positions built up over time. In the latter case in particular, the competent authority should ensure that these position limits are non-discriminatory, clearly spelled out, take due account of the specificity of the market in question, and are necessary to secure the integrity and orderly functioning of the market.

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↓ new

(86) All venues which offer trading in commodity derivatives should have in place appropriate limits or suitable alternative arrangements designed to support liquidity, prevent market abuse, and ensure the orderly pricing and settlement conditions. ESMA should maintain and publish a list containing summaries of all such measures in force. These limits or arrangements should be applied in a consistent manner and take account of the specific characteristics of the market in question. They should be clearly spelled out as regards to whom they apply and any exemptions thereto, as well as to the relevant quantitative thresholds which constitute the limits or which may trigger other obligations. The Commission should be empowered to adopt delegated acts, including with a view to avoiding any divergent effects of the limits or arrangements applicable to comparable contracts on different venues.

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↓ new

(87) Venues where the most liquid commodity derivatives are traded should publish an aggregated weekly breakdown of the positions held by different types of market participants, including the clients of those not trading on their own behalf. A comprehensive and detailed breakdown both by the type and identity of the market participant should be made available to the competent authority upon request.

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↓ new

(88) Considering the communiqué of G20 finance ministers and central bank governors of 15 April 2011 on ensuring that participants on commodity derivatives markets should be subject to appropriate regulation and supervision, the exemptions from Directive 2004/39/EC for various participants active in commodity derivative markets should be modified to ensure that activities by firms, which are not part of a financial group, involving the hedging of production-related and other risks as well as the provision of investment services in commodity or exotic derivatives on an ancillary basis to clients of the main business remain exempt, but that firms specialising in trading commodities and commodity derivatives are brought within this Directive.

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↓ new

(89) It is desirable to facilitate access to capital for smaller and medium sized enterprises and to facilitate the further development of specialist markets that aim to cater for the needs of smaller and medium sized issuers. These markets which are usually operated under this Directive as MTFs are commonly known as SME markets, growth markets or junior markets. The creation within the MTF category of a new sub category of SME growth market and the registration of these markets should raise their visibility and profile and aid the development of common pan-European regulatory standards for those markets.

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↓ new

(90) The requirements applying to this new category of markets need to provide sufficient flexibility to be able to take into account the current range of successful market models that exist across Europe. They also need to strike the correct balance between maintaining high levels of investor protection, which are essential to fostering investor confidence in issuers on these markets, while reducing unnecessary administrative burdens for issuers on those markets. It is proposed that more details about SME market requirements such as those relating to criteria for admission to trading on such a market would be further prescribed in delegated acts or technical standards.

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↓ new

(91) Given the importance of not adversely affecting existing successful markets the option should remain for operators of markets aimed at smaller and medium sized issuers to choose to continue to operate such a market in accordance with the requirements under the Directive without seeking registration as an SME growth market.

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↓ 2004/39/EC recital 59

~~(92)(59)~~ Any confidential information received by the contact point of one Member State through the contact point of another Member State should not be regarded as purely domestic.

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↓ 2004/39/EC recital 60

~~(93)(60)~~ It is necessary to enhance convergence of powers at the disposal of competent authorities so as to pave the way towards an equivalent intensity of enforcement across the integrated financial market. A common minimum set of powers coupled with adequate resources should guarantee supervisory effectiveness.

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↓ new

(94) In view of the significant impact and market share acquired by various MTFs, it is appropriate to ensure that adequate cooperation arrangements are established between the competent authority of the MTF and that of the jurisdiction in which the MTF is providing services. In order to anticipate any similar developments, this should be extended to OTFs.

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↓ new

(95) In order to ensure compliance by investment firms and regulated markets, those who effectively control their business and the members of the investment firms and regulated markets' management body with the obligations deriving from this Directive and from Regulation [inserted by OP] and to ensure that they are subject to similar treatment across the Union, Member States should be required to provide for administrative sanctions and measures which are effective, proportionate and dissuasive. Therefore, administrative sanctions and measures set out by Member States should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or measure, publication, key sanctioning powers and levels of administrative pecuniary sanctions.

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↓ new

(96) In particular, competent authorities should be empowered to impose pecuniary sanctions which are sufficiently high to offset the benefits that can be expected and to be dissuasive even for larger institutions and their managers.

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↓ new

(97) In order to ensure a consistent application of sanctions across Member States, when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, Member States should be required to ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities take into account all relevant circumstances.

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↓ new

(98) In order to ensure sanctions have a dissuasive effect on the public at large, sanctions should normally be published, except in certain well-defined circumstances.

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↓ new

(99) In order to detect potential breaches, competent authorities should have the necessary investigatory powers, and should establish effective mechanisms to encourage reporting of potential or actual breaches. These mechanisms should be without prejudice to adequate safeguards for accused persons. Appropriate procedures should be established to ensure the right of the reported person of defence and to be heard before the adoption of a final decision concerning him as well as the right to seek remedy before a tribunal against a decision concerning him.

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↓ new

(100) This Directive should refer to both administrative sanctions and measures in order to cover all actions applied after a violation is committed, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or a measure under national law.

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↓ new

(101) This Directive should be without prejudice to any provisions in the law of Member States relating to criminal sanctions.

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↓ 2004/39/EC (adapted)

⇒ new

~~(102)(61)~~ With a view to protecting clients and without prejudice to the right of customers to bring their action before the courts, it is appropriate that Member States ~~ensure that encourage~~ public or private bodies  are  established with a view to settling disputes out-of-court, to cooperate in resolving cross-border disputes, taking into account Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes<sup>42</sup> ⇒ and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes ⇐. When implementing provisions on complaints and redress procedures for out-of-court settlements, Member States should be encouraged to use existing cross-border cooperation mechanisms, notably the Financial Services Complaints Network (FIN-Net).

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↓ 2004/39/EC recital 62

⇒ new

~~(103)(62)~~ Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC ⇒ of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of

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<sup>42</sup> OJ L 115, 17.4.1998, p. 31.



such data<sup>43</sup>. Any exchange or transmission of personal data by ESMA with third countries should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 ⇐.

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↓ 2004/39/EC recital 63

~~(104)(63)~~ It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.

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↓ 2004/39/EC recital 64

~~(64)~~ At its meeting on 17 July 2000, the Council set up the Committee of Wise Men on the Regulation of European Securities Markets. In its final report, the Committee of Wise Men proposed the introduction of new legislative techniques based on a four-level approach, namely framework principles, implementing measures, cooperation and enforcement. Level 1, the Directive, should confine itself to broad general 'framework' principles while Level 2 should contain technical implementing measures to be adopted by the Commission with the assistance of a committee.

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↓ 2004/39/EC recital 65

~~(65)~~ The Resolution adopted by the Stockholm European Council of 23 March 2001 endorsed the final report of the Committee of Wise Men and the proposed four-level approach to make the regulatory process for Community securities legislation more efficient and transparent.

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↓ 2004/39/EC recital 66

~~(66)~~ According to the Stockholm European Council, Level 2 implementing measures should be used more frequently, to ensure that technical provisions can be kept up to date with market and supervisory developments, and deadlines should be set for all stages of Level 2 work.

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↓ 2004/39/EC recital 67

~~(67)~~ The Resolution of the European Parliament of 5 February 2002 on the implementation of financial services legislation also endorsed the Committee of Wise Men's report, on the basis of the solemn declaration made before Parliament the same day by the Commission and the letter of 2 October 2001 addressed by the Internal Market

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<sup>43</sup> OJ L 281, 23.11.1995, p. 31.

~~Commissioner to the chairman of Parliament's Committee on Economic and Monetary Affairs with regard to the safeguards for the European Parliament's role in this process.~~

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↓ 2004/39/EC recital 68(adapted)

~~(68) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>44</sup>.~~

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↓ 2006/31/EC Art. 1.1

~~(105)(69)~~ The European Parliament should be given a period of three months from the first transmission of draft amendments and implementing measures to allow it to examine them and to give its opinion. However, in urgent and duly justified cases, it should be possible to shorten that period. If, within that period, a resolution is adopted by the European Parliament, the Commission should re-examine the draft amendments or measures.

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↓ 2004/39/EC recital 70

~~(70) With a view to taking into account further developments in the financial markets the Commission should submit reports to the European Parliament and the Council on the application of the provisions concerning professional indemnity insurance, the scope of the transparency rules and the possible authorisation of specialised dealers in commodity derivatives as investment firms.~~

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↓ new

(106) In order to attain the objectives set out in this Directive, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of details concerning exemptions, the clarification of definitions, the criteria for the assessment of proposed acquisitions of an investment firm, the organisational requirements for investment firms, the management of conflicts of interest, conduct of business obligations in the provision of investment services, the execution of orders on terms most favourable to the client, the handling of client orders, the transactions with eligible counterparties, the SME growth markets, the conditions for the assessment of initial capital of third country firms, measures concerning systems resilience, circuit breakers and electronic trading, the admission of financial instruments to trading, the suspension and removal of financial instruments from trading, the thresholds for position reporting held by categories of traders, the cooperation between competent authorities. It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

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<sup>44</sup> ~~OJL 184, 17.7.1999, p. 23.~~

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↓ new

(107) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. These powers relate to the adoption of the equivalence decision concerning third country legal and supervisory framework for the provision of services by third country firms and the sending of positions reports by categories of traders to ESMA and they should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers<sup>45</sup>.

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↓ new

(108) Technical standards in financial services should ensure consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.

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↓ new

(109) The Commission should adopt the draft regulatory technical standards developed by ESMA in Article 7 regarding procedures for granting and refusing requests for authorisation of investment firms, Articles 9 and 48 regarding requirements for management bodies, Article 12 regarding acquisition of qualifying holding, Article 27 regarding obligation to execute orders on terms most favourable to clients, Articles 34 and 54 regarding cooperation and exchange of information, Article 36 regarding freedom to provide investment services and activities, Article 37 regarding establishment of a branch, Article 44 regarding provision of services by third country firms, Article 63 regarding procedures for granting and refusing requests for authorisation of data reporting services providers, Articles 66 and 67 regarding organisational requirements for APAs and CTPs and Article 84 regarding cooperation among competent authorities. The Commission should adopt these draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

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↓ new

(110) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010. ESMA should be entrusted with drafting implementing technical standards for submission to the Commission with regard to Article 7 regarding procedures for granting and refusing requests for authorisation of investment firms, Article 12 regarding acquisition of qualifying holding, Article 18 regarding trading process on finalisation of transactions

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<sup>45</sup> OJ L 55, 28.2.2011, p. 13.

in MTFs and OTFs, Articles 32, 33 and 53 regarding suspension and removal of instruments from trading, Article 36 regarding freedom to provide investment services and activities, Article 37 regarding establishment of a branch, Article 44 regarding provision of services by third country firms, Article 60 regarding position reporting by categories of traders, Article 78 regarding submission of information to ESMA, Article 83 regarding obligation to cooperate, Article 84 regarding cooperation among competent authorities, Article 85 regarding exchange of information and Article 88 regarding consultation prior to authorisation.

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↓ new

(111) The Commission should submit a report to the European Parliament and the Council assessing the functioning of organised trading facilities, the functioning of the regime for SME growth markets, the impact of requirements regarding automated and high-frequency trading, the experience with the mechanism for banning certain products or practices and the impact of the measures regarding commodity derivatives markets.

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↓ 2004/39/EC (adapted)

~~(112)(71)~~ The objective of creating an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the ~~Community~~  Union  and governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the European financial system as a whole. Since this objective may be better achieved at ~~Community~~  Union  level, the ~~Community~~  Union  may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective<sub>3</sub>.

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↓ new

(113) The establishment of a consolidated tape for non-equity instruments is deemed to be more difficult to implement than the consolidated tape for equity instruments and potential providers should be able to gain experience with the latter before constructing it. In order to facilitate the proper establishment of the consolidated tape for non-equity financial instruments, it is therefore appropriate to provide for an extended date of application of the national measures transposing the relevant provision.

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↓ new

(114) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably the right to the protection of personal data, the freedom to conduct a business, the right to consumer protection, the right to an effective remedy and to a fair trial, the right not to be tried or punished twice for the same offence and has to be implemented in accordance with those rights and principles.

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↓ 2004/39/EC (adapted)

HAVE ADOPTED THIS DIRECTIVE:

## TITLE I

### DEFINITIONS AND SCOPE

#### Article 1

##### Scope

1. This Directive shall apply to investment firms, ~~and~~ regulated markets ☒, data reporting service providers and third country firms providing investment services or activities in the Union ☒.

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↓ new

2. This Directive establishes requirements in relation to the following:

(a) authorisation and operating conditions for investment firms;

(b) provision of investment services or activities by third country firms with the establishment of a branch;

(c) authorisation and operation of regulated markets;

(d) authorisation and operation of data reporting service providers; and

(e) supervision, cooperation and enforcement by competent authorities.

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↓ 2004/39/EC (adapted)

⇒ new

~~32.~~ The following provisions shall also apply to credit institutions authorised under Directive ~~2000/12/EC~~ ☒ 2006/48/EC ☒, when providing one or more investment services and/or performing investment activities ⇒ and when selling or advising clients in relation to deposits other than those with a rate of return which is determined in relation to an interest rate ⇐:

- Articles 2(2), ⇒ 9(6), ⇐ ~~1411~~, ~~16~~, ~~1713~~ and ~~1814~~,
- Chapter II of Title II excluding ~~Article 23(2)~~ second subparagraph ☒ of Article 29(2) ☒,
- Chapter III of Title II excluding Articles ~~3631(2)~~ ~~to 31~~ ☒, (3) and ☒ (4) and ~~3732(2)~~ ~~to 32~~ ☒, (3), (4), (5), ☒ (6), ~~32(98)~~ and ~~32(109)~~.

- Articles ~~6948~~ to ~~8053~~, ~~☒~~ and Articles ~~☒~~ ~~8457~~, ~~8961~~ and ~~9062~~, and
- ~~Article 71(1).~~

## *Article 2*

### **Exemptions**

1. This Directive shall not apply to:

(a) insurance undertakings ~~as defined in Article 1 of Directive 73/239/EEC or assurance undertakings as defined in Article 1 of Directive 2002/83/EC~~ or undertakings carrying on the reinsurance and retrocession activities referred to in Directive ~~64/225/EEC~~ ~~☒~~ 2009/138/EC ~~☒~~ ;

(b) persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

(c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;

(d) persons who do not provide any investment services or activities other than dealing on own account unless they:

(i) are market makers

⇒(ii) are a member of or a participant in a regulated market or MTF; ⇐ or

(iii) deal on own account ⇐ by executing client orders ⇐ ~~outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;~~

⇒ This exemption does not apply to persons exempt under Article 2(1)(i) who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof; ⇐

(e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;

(f) persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

(g) the members of the European System of Central Banks and other national bodies performing similar functions ⇐ in the Union, ⇐ ~~and~~ other public bodies charged

with or intervening in the management of the public debt  $\Rightarrow$  in the Union and international bodies of which one or more Member States are members  $\Leftarrow$ ;

(h) collective investment undertakings and pension funds whether coordinated at ~~Community~~  $\times$  Union  $\times$  level or not and the depositaries and managers of such undertakings;

(i) persons  $\Rightarrow$  who:  $\Leftarrow$

$\Rightarrow$  - deal  $\Leftarrow$  ~~dealing~~ on own account in financial instruments,  $\Rightarrow$  excluding persons who deal on own account by executing client orders,  $\Leftarrow$  or

$\Rightarrow$  - provide  $\Leftarrow$  ~~providing~~ investment services  $\Rightarrow$ , other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or  $\Leftarrow$

$\Rightarrow$  - provide investment services, other than dealing on own account,  $\Leftarrow$  in commodity derivatives or derivative contracts included in Annex I, Section C 10  $\Rightarrow$  or emission allowances or derivatives thereof  $\Leftarrow$  to the clients of their main business,

provided  $\Rightarrow$  that in all cases  $\Leftarrow$  this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive ~~2000/12/EC~~  $\times$  2006/48/EC  $\times$  ;

(j) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;

~~(k) persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;~~

~~(k)~~ (l) firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;

~~(l)~~ (m) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;

~~(m)~~ (n) 'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998.

⇒ (n) transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations. ⇐

2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.

3. ⇐ The Commission shall adopt delegated acts in accordance with Article 94 concerning measures ⇐ ~~In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission may~~ ; in respect of exemptions (c) ☒ and ☒ (i), ~~to and (k) define the criteria for determining~~ ☒ clarifying ☒ when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner.

⇓ new

The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements:

- the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity,

- the capital employed for carrying out the activity.

⇓ 2004/39/EC (adapted)  
⇒ new

### Article 3

#### Optional exemptions

1. Member States may choose not to apply this Directive to any persons for which they are the home Member State that:

- are not allowed to hold clients' funds or securities and which for that reason are not allowed at any time to place themselves in debit with their clients, and
- are not allowed to provide any investment service except the ⇐ provision of investment advice, with or without ⇐ the reception and transmission of orders in transferable securities and units in collective investment undertakings ~~and the provision of investment advice in relation to such financial instruments~~, and
- in the course of providing that service, are allowed to transmit orders only to:
  - (i) investment firms authorised in accordance with this Directive;



(ii) credit institutions authorised in accordance with Directive ~~2000/12/EC~~  2006/48/EC  ;

(iii) branches of investment firms or of credit institutions which are authorised in a third country and which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those laid down in this Directive, in Directive ~~2000/12/EC~~  2006/48/EC  or in Directive ~~93/6/EEC~~  2006/49/EC  ;

(iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings;

(v) investment companies with fixed capital, as defined in Article 15(4) of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent<sup>46</sup>, the securities of which are listed or dealt in on a regulated market in a Member State;

provided that the activities of those persons are  authorised and  regulated at national level.  National regimes should submit those persons to requirements which are at least analogous to the following requirements under the present directive:

(i) conditions and procedures for authorisation and on-going supervision as established in Article 5 (1) and (3), Articles 7, 8, 9, 10, 21 and 22;

(ii) conduct of business obligations as established in Article 24 (1), (2), (3), (5), Article 25(1), (4) and (5) and the respective implementing measures in Directive 2006/73/EC.

Member States shall require persons excluded from the scope of this Directive under paragraph 1 to be covered under an investor-compensation scheme recognized in accordance with Directive 97/9/EC or under a system ensuring equivalent protection to their clients.

2004/39/EC

2. Persons excluded from the scope of this Directive according to paragraph 1 cannot benefit from the freedom to provide services and/or activities or to establish branches as provided for in Articles ~~36 and 37~~~~31 and 32~~ respectively.

new

3. Member States shall communicate to the European Commission and to ESMA whether they exercise the option under this Article and shall ensure that each authorisation granted in accordance with paragraph 1 mentions that it is granted according to this Article.

<sup>46</sup> OJ L 26, 31.1.1977, p. 1. Directive as last amended by the 1994 Act of Accession.

4. Member States shall communicate to ESMA the provisions of national law analogous to the requirements of the present directive listed in paragraph 1.

↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.2  
⇒ new

## Article 4

### Definitions

⇒ 1. For the purposes of this Directive, the definitions provided in Article 2 of Regulation (EU) No .../... [MiFIR] shall apply to this Directive. ⇐

~~21. For the purposes of this Directive, The~~ the following definitions shall ⇐ also ⇐ apply:

~~1) 'Investment firm' means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;~~

~~Member States may include in the definition of investment firms undertakings which are not legal persons, provided that:~~

~~— (a) their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons, and~~

~~— (b) they are subject to equivalent prudential supervision appropriate to their legal form.~~

~~However, where a natural person provides services involving the holding of third parties' funds or transferable securities, he may be considered as an investment firm for the purposes of this Directive only if, without prejudice to the other requirements imposed in this Directive and in Directive 93/6/EEC, he complies with the following conditions:~~

~~— (a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;~~

~~— (b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;~~

~~— (c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;~~

~~— (d) where the firm has only one proprietor, he must make provision for the protection of investors in the event of the firm's cessation of business following his death, his incapacity or any other such event;~~

~~12)~~ 'Investment services and activities' means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

The Commission shall ~~→~~<sub>1</sub> ~~---~~ ~~←~~ ~~⇒~~ adopt by means of delegated acts in accordance with Article 94 measures specifying ~~⇐~~ :

- the derivative contracts mentioned in Section C 7 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
- the derivative contracts mentioned in Section C 10 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls;

~~23)~~ 'Ancillary service' means any of the services listed in Section B of Annex I;

~~34)~~ 'Investment advice' means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;

~~45)~~ 'Execution of orders on behalf of clients' means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients ~~⇒~~ . Execution of orders includes the conclusion of agreements to sell financial instruments issued by a credit institution or an investment firm at the moment of their issuance ~~⇐~~;

~~56)~~ 'Dealing on own account' means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

~~7)~~ ~~'Systematic internaliser' means an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF;~~

~~68)~~ 'Market maker' means a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him;

~~79)~~ 'Portfolio management' means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments;

~~810)~~ 'Client' means any natural or legal person to whom an investment firm provides investment ~~and~~ or ancillary services;

~~911)~~ 'Professional client' means a client meeting the criteria laid down in Annex II;

~~102)~~ 'Retail client' means a client who is not a professional client;

~~13) 'Market operator' means a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself;~~

~~14) 'Regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third party buying and selling interests in financial instruments in the system and in accordance with its non-discretionary rules in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III;~~

~~15) 'Multilateral trading facility (MTF)' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third party buying and selling interests in financial instruments in the system and in accordance with non-discretionary rules in a way that results in a contract in accordance with the provisions of Title II;~~

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↓ new

11) "SME growth market" means a MTF that is registered as an SME growth market in accordance with Article 35;

12) "Small and medium-sized enterprise" for the purposes of this Directive, means a company that had an average market capitalisation of less than EUR 100 000 000 on the basis of end-year quotes for the previous three calendar years;

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↓ 2004/39/EC (adapted)  
⇒ new

~~1316)~~ 'Limit order' means an order to buy or sell a financial instrument at its specified price limit or better and for a specified size;

~~1417)~~ 'Financial instrument' means those instruments specified in Section C of Annex I;

~~2118)~~ 'Transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

~~(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;~~

~~(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;~~

~~(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;~~

~~1519~~) ‘Money-market instruments’ means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;

~~1620~~) ‘Home Member State’ means:

- (a) in the case of investment firms:
  - (i) if the investment firm is a natural person, the Member State in which its head office is situated;
  - (ii) if the investment firm is a legal person, the Member State in which its registered office is situated;
  - (iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;
- (b) in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;

~~1721~~) ‘Host Member State’ means the Member State, other than the home Member State, in which an investment firm has a branch or performs services and/or activities or the Member State in which a regulated market provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same Member State;

~~1822~~) ‘Competent authority’ means the authority, designated by each Member State in accordance with Article 48, unless otherwise specified in this Directive;

~~1923~~) ‘Credit institutions’ means credit institutions as defined under Directive ~~2006/48/EC~~  ~~2000/12/EC~~;

~~2024~~) ‘UCITS management company’ means a management company as defined in ~~Council Directive 85/611/EEC~~  2009/65/EC of the European Parliament and of the Council of 13 July 2009 ~~of 20 December 1985~~, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)  <sup>47</sup>  ;

~~2125~~) ‘Tied agent’ means a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf it acts, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments ~~and/or~~ provides advice to clients or prospective clients in respect of those financial instruments or services;

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<sup>47</sup> OJ L ~~375~~, 31.12.1985, p. 3  302, 17.11.2009, p. 32  . ~~Directive as last amended by Directive 2001/108/EC of the European Parliament and of the Council (OJ L 41, 13.2.2002, p. 35).~~

~~2226~~) 'Branch' means a place of business other than the head office which is a part of an investment firm, which has no legal personality and which provides investment services and/or activities and which may also perform ancillary services for which the investment firm has been authorised; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State shall be regarded as a single branch;

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↓ 2007/44/EC Art. 3.1

~~2327~~) 'Qualifying holding' means any direct or indirect holding in an investment firm which represents 10 % or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;

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↓ 2004/39/EC (adapted)

~~2428~~) 'Parent undertaking' means a parent undertaking as defined in Articles 1 and 2 of Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts<sup>48</sup>;

~~2529~~) 'Subsidiary' means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;

~~30) 'Control' means control as defined in Article 1 of Directive 83/349/EEC;~~

~~2631~~) 'Close links' means a situation in which two or more natural or legal persons are linked by:

- (a) 'participation' which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking;
- (b) 'control' which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings;
- (c) ~~A~~ a situation in which ~~two or more natural or legal persons~~  they  are permanently linked to one and the same person by a control relationship ~~shall also be regarded as constituting a close link between such persons;~~

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<sup>48</sup> OJ L 193, 18.7.1983, p. 1. 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).

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↓ new

- 27) "Management body" means the governing body of a firm, comprising the supervisory and the managerial functions, which has the ultimate decision-making authority and is empowered to set the firm's strategy, objectives and overall direction. Management body shall include persons who effectively direct the business of the firm;
- 28) "Management body in its supervisory function" means the management body acting in its supervisory function of overseeing and monitoring management decision-making;
- 29) "Senior management" means those individuals who exercise executive functions with a firm and who are responsible and accountable for the day-to-day management of the firm, including the implementation of the policies concerning the distribution of services and products to clients by the firm and its personnel;
- 30) "Algorithmic trading" means trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention. This definition does not include any system that is only used for the purpose of routing orders to one or more trading venues or for the confirmation of orders;
- 31) "Direct electronic access" in relation to a trading venue, means an arrangement where a member or participant of a trading venue permits a person to use its trading code so the person can electronically transmit orders relating to a financial instrument directly to the trading venue. This definition includes such an arrangement whether or not it also involves the use by the person of the infrastructure of the member or participant, or any connecting system provided by the member or participant, to transmit the orders;
- 32) "Market Abuse Regulation" means Regulation (EC) No .../... of the European Parliament and of the Council on insider dealing and market manipulation (market abuse);
- 33) "Cross-selling practice" means the offering of an investment service together with another service or product as part of a package or as a condition for the same agreement or package.

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↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.2(b)  
⇒ new

~~32.~~ ⇒ The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to ~~← In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission~~ →<sub>1</sub> --- ← ~~may clarify~~ ⇒ specify some technical elements of ~~←~~ the definitions laid down in paragraph 1 of this Article ~~↗~~, to adjust them to market developments ~~↘~~.

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↓ 2008/10/EC Art. 1.2(b)

~~The measures referred to in this Article, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2).~~

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↓ 2004/39/EC  
⇒ new

## TITLE II

### AUTHORISATION AND OPERATING CONDITIONS FOR INVESTMENT FIRMS

#### CHAPTER I

#### CONDITIONS AND PROCEDURES FOR AUTHORISATION

##### *Article 5*

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

1. Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis be subject to prior authorisation in accordance with the provisions of this Chapter. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article ~~6948~~.
  2. By way of derogation from paragraph 1, Member States shall allow any market operator to operate an MTF ⇒ or an OTF ⇐, subject to the prior verification of their compliance with the provisions of this Chapter, ~~excluding Articles 11 and 15~~.
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↓ 2010/78/EU Art. 6.1 (adapted)

3. Member States shall register all investment firms. The register shall be publicly accessible and shall contain information on the services or activities for which the investment firm is authorised. It shall be updated on a regular basis. Every authorisation shall be notified to the ~~European Supervisory Authority (European Securities and Markets Authority) (hereinafter 'ESMA'), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council~~<sup>49</sup>.

ESMA shall establish a list of all investment firms in the Union. The list shall contain information on the services or activities for which ~~the~~ ☒ each ☒ investment firm is

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<sup>49</sup> [OJL 331, 15.12.2010, p. 84](#)



authorised and it shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website.

Where a competent authority has withdrawn an authorisation in accordance with Article 8(b) to (d), that withdrawal shall be published on the list for a period of 5 years.

↓ 2004/39/EC (adapted)

4. Each Member State shall require that:

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

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

#### Article 6

##### Scope of authorisation

1. The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex I. Authorisation shall in no case be granted solely for the provision of ancillary services.
2. An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension of its authorisation.
3. The authorisation shall be valid for the entire ~~Community~~  Union  and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the ~~Community~~  Union  , either through the establishment of a branch or the free provision of services.

#### Article 7

##### Procedures for granting and refusing requests for authorisation

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

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

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

↓ 2010/78/EU Art. 6.2 (adapted)  
⇒ new

4. ~~In order to ensure consistent application of this Article and of Article 9(2) to (4), Article 10(1) and (2),~~ ESMA ~~may~~ ⇒ shall ⇐ develop draft regulatory technical standards to specify:

(a) the information to be provided to the competent authorities under Article 7(2) including the programme of operations;

⇒ (b) the tasks of nomination committees required under Article 9 (2) ⇐

~~(c)(b)~~ the requirements applicable to the management of investment firms under Article 9(~~8~~) and the information for the notifications under Article 9(~~5~~);

~~(d)(c)~~ the requirements applicable to shareholders and members with qualifying holdings, as well as obstacles which may prevent effective exercise of the supervisory functions of the competent authority, under Article 10(1) and (2).

⇒ ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2016]. ⇐

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with ☒ the procedure laid down in ☒ Articles 10 to 14 of Regulation (EU) No 1095/2010.

☒ 5. ☒ ~~In order to ensure uniform conditions of application of Article 7(2) and Article 9(2),~~ ESMA ~~may~~ ⇒ shall ⇐ develop draft implementing technical standards to determine standard forms, templates and procedures for the notification or provision of information provided for in ~~those~~ Articles ☒ 7(2) and Article 9(5) ☒ .

⇒ ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred to in the ~~third~~ ☒ first ☒ subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC (adapted)

*Article 8*

**Withdrawal of authorisations**

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

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted, such as compliance with the conditions set out in Directive ~~93/6/EEC~~  2006/49/EC  ;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive governing the operating conditions for investment firms;
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

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↓ 2010/78/EU Art. 6.3

Every withdrawal of authorisation shall be notified to ESMA.

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↓ 2004/39/EC

*Article 9*

**Management body** ~~Persons who effectively direct the business~~

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

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

1. Member States shall require that all members of the management body of any investment firm shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. Member States shall ensure that members of the management body shall, in particular, fulfil the following requirements:

(a) Members of the management body shall commit sufficient time to perform their functions in the investment firm.

They shall not combine at the same time more than one of the following combinations:

(i) one executive directorship with two non-executive directorships

(ii) four non-executive directorships.

Executive or non-executive directorships held within the same group shall be considered as one single directorship.

Competent authorities may authorise a member of the management body of an investment firm to combine more directorships than allowed under the previous subparagraph, taking into account individual circumstances and the nature, scale and complexity of the investment firm's activities.

(b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the investment firm's activities, and in particular the main risk involved in those activities.

(c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management.

Member States shall require investment firms to devote adequate resources to the induction and training of members of the management body.

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

2. Member States shall require investment firms, where appropriate and proportionate in view of the nature, scale and complexity of their business, to establish a nomination committee to assess compliance with the first paragraph and to make recommendations, when needed, on the basis of their assessment. The nomination committee shall be composed of members of the management body who do not perform any executive function in the institution concerned. Where, under national law, the management body does not have any competence in the process of appointment of its members, this paragraph shall not apply.

3. Member States shall require investment firms to take into account diversity as one of the criteria for selection of members of the management body. In particular, taking into account

the size of their management body, investment firms shall put in place a policy promoting gender, age, educational, professional and geographical diversity on the management body.

4. ESMA shall develop draft regulatory standards to specify the following:

- (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the investment firm which competent authorities must take into account when they authorise a member of the management body to combine more directorships than permitted as referred to in paragraph 1(a);
- (b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in paragraph 1(b),
- (c) to notions of honesty, integrity and independence of mind of a member of the management body as referred to in paragraph 1(b),
- (d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body,
- (e) the notion of diversity to be taken into account for the selection of members of the management body.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2014].

↓ 2004/39/EC  
⇒ new

52. Member States shall require the investment firm to notify the competent authority of ⇒ all members of its management body and of ⇐ any changes to its membership management, along with all information needed to assess whether the ⇒ firm complies with paragraphs 1, 2 and 3 of this Article ⇐ ~~new staff appointed to manage the firm are of sufficiently good repute and sufficiently experienced.~~

↓ new

6. Member States shall require the management body of an investment firm to ensure that the firm is managed in a sound and prudent way and in a manner that promotes the integrity of the market and the interest of the its clients. To this end, the management body shall:

- (a) define, approve and oversee the strategic objectives of the firm,
- (b) define, approve and oversee the organization of the firm, including the skills, knowledge and expertise required to personnel, the resources, the procedures and the arrangements for the provision of services and activities by the firm, taking into

account the nature, scale and complexity of its business and all the requirements the firm has to comply with,

- (c) define, approve and oversee a policy as to services, activities, products and operations offered or provided by the firm, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate;
- (d) provide effective oversight of senior management.

The management body shall monitor and periodically assess the effectiveness of the investment firm's organization and the adequacy of the policies relating to the provision of services to clients and take appropriate steps to address any deficiencies.

Members of the management body in its supervisory function shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.

↓ 2004/39/EC (adapted)

⇒ new

~~73.~~ The competent authority shall refuse authorisation if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that ~~proposed changes to the management of the firm~~ ⊗ the management body of the firm may ⊗ pose a threat to its ⊗ effective, ⊗ sound and prudent management ⇒ and to the adequate consideration of the interest of its clients and the integrity of the market ⇐ .

~~84.~~ Member States shall require that the management of investment firms is undertaken by at least two persons meeting the requirements laid down in paragraph 1.

By way of derogation from the first subparagraph, Member States may grant authorisation to investment firms that are natural persons or to investment firms that are legal persons managed by a single natural person in accordance with their constitutive rules and national laws. Member States shall nevertheless require that:

- (i) alternative arrangements be in place which ensure the sound and prudent management of such investment firms ⇒ and the adequate consideration of the interest of clients and the integrity of the market; ⇐
- (ii) ⇒ the natural persons concerned are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. ⇐

#### Article 10

##### Shareholders and members with qualifying holdings

1. The competent authorities shall not authorise the performance of investment services or activities by an investment firm until they have been informed of the identities of the

shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

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

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

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

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↓ new

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

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

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↓ 2007/44/EC Art. 3.2 (adapted)

## ⊠ Article 11 ⊠

### ⊠ Notification of proposed acquisitions ⊠

13. Member States shall require any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (hereinafter referred to as the proposed acquisition), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article ~~13(4)~~10b(4).

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

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

In determining whether the criteria for a qualifying holding referred to in  Article 10 and in  this Article are fulfilled, Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

24. The relevant competent authorities shall work in full consultation with each other when carrying out the assessment provided for in Article 13(1) ~~10b(1)~~ (hereinafter referred to as the assessment) if the proposed acquirer is one of the following:

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

The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the investment firm in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

↓ 2004/39/EC (adapted)

35. Member States shall require that, if an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in the first subparagraph of paragraph 13, that investment firm is to inform the competent authority without delay.

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



~~46. Member States shall require that, where the influence exercised by the persons referred to in the first subparagraph of paragraph 1 is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation.~~

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

~~Similar measures~~  Member States shall require that competent authorities take measures similar to those referred to in paragraph 3 of Article 10  ~~shall be taken~~ in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.

↓ 2007/44/EC Art. 3.3 (adapted)

#### Article ~~12~~10a

### Assessment period

1. The competent authorities shall, promptly and in any event within two working days following receipt of the notification required under the first subparagraph of Article 11(1)(3), as well as following the possible subsequent receipt of the information referred to in paragraph 2 of this Article, acknowledge receipt thereof in writing to the proposed acquirer.

The competent authorities shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article ~~13~~10a(4) (hereinafter referred to as the assessment period), to carry out the assessment.

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

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

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

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

(a) ☒ a natural or legal person ☒ situated or regulated outside the ~~Community~~ ☒ Union ☒ ; ~~or~~

(b) a natural or legal person not subject to supervision under this Directive or Directives ~~85/611/EEC, 92/49/EEC<sup>50</sup>, 2002/83/EC~~ ☒ 2009/65/EC ☒ , ~~2005/68/EC<sup>51</sup>~~ ☒ 2009/138/EC ☒ or 2006/48/EC<sup>52</sup>.

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

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

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

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

↓ 2010/78/EU Art. 6.4 (adapted)

8. ~~In order to ensure consistent application of this Article,~~ ESMA shall develop draft regulatory technical standards to establish an exhaustive list of information, referred to in paragraph 4 to be included by proposed acquirers in their notification, without prejudice to paragraph 2.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with ☒ the procedure laid down in ☒ Articles 10 to 14 of Regulation (EU) No 1095/2010.

<sup>50</sup> ~~Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance (third non-life insurance Directive) (OJ L 228, 11.8.1992, p. 1). Directive as last amended by Directive 2007/44/EC of the European Parliament and of the Council (OJ L 247, 21.9.2007, p. 1).~~

<sup>51</sup> ~~Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (OJ L 323, 9.12.2005, p. 1). Directive as amended by Directive 2007/44/EC.~~

<sup>52</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1). Directive as last amended by Directive 2007/44/EC.

~~In order to ensure uniform conditions of application of Articles 10, 10a and 10b, ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the modalities of the consultation process between the relevant competent authorities as referred to in Article 11(1)~~11(1)~~~~10a(2)~~~~(4)~~.~~

ESMA shall submit those draft implementing technical standards to the Commission by 1 January 2014.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the fourth subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

↓ 2007/44/EC Art. 3.3  
⇒ new

### *Article ~~13~~10b*

#### **Assessment**

1. In assessing the notification provided for in Article ~~11(1)~~10(3) and the information referred to in Article ~~12(2)~~10a(2), the competent authorities shall, in order to ensure the sound and prudent management of the investment firm in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment firm, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

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

~~In order to take account of future developments and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in~~

~~Article 64(2), may adopt implementing~~ ⇒ The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94⇐ measures which adjust the criteria set out in the first subparagraph of this paragraph.

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

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

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article ~~11(1)10(3)~~. The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5. Notwithstanding Article ~~12(1)10a(1)~~, (2) and (3), where two or more proposals to acquire or increase qualifying holdings in the same investment firm have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

↓ 2004/39/EC (adapted)

#### *Article ~~1411~~*

### **Membership of an authorised Investor Compensation Scheme**

The competent authority shall verify that any entity seeking authorisation as an investment firm meets its obligations under Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes<sup>53</sup> at the time of authorisation.

#### *Article ~~1512~~*

### **Initial capital endowment**

Member States shall ensure that the competent authorities do not grant authorisation unless the investment firm has sufficient initial capital in accordance with the requirements of Directive ~~93/6/EEC~~  2006/49/EC  having regard to the nature of the investment service or activity in question.

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

<sup>53</sup> OJ L 84, 26.3.1997, p. 22.

### Organisational requirements

1. The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8 ~~(X)~~ and in Article 17 ~~(X)~~ .

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

3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article ~~2318~~ from adversely affecting the interests of its clients.

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

5. An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations.

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

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↓ 2004/39/EC

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

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↓ new

7. Records shall include the recording of telephone conversations or electronic communications involving, at least, transactions concluded when dealing on own account and client orders when the services of reception and transmission of orders and execution of orders on behalf of clients are provided.

Records of telephone conversation or electronic communications recorded in accordance with sub-paragraph 1 shall be provided to the clients involved upon request and shall be kept for a period of three years.

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↓ 2004/39/EC

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

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

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↓ new

10. An investment firm shall not conclude title transfer collateral arrangements with retail clients for the purpose of securing or covering clients' present or future, actual or contingent or prospective obligations.

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↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.3(a)  
→<sub>2</sub> 2008/10/EC Art. 1.3(b)  
⇒ new

11. In the case of branches of investment firms, the competent authority of the Member State in which the branch is located shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in paragraph 6 ☒ and 7 ☒ with regard to transactions undertaken by the branch.

~~12. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 2 to 9, the Commission shall~~ ⇒ The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to ~~adopt~~ →<sub>1</sub> --- ← implementing measures which specify the concrete organisational requirements laid down in paragraphs 2 to 9 to be imposed on investment firms ⇒ and on branches of third country firms authorised in accordance with article 43 ⇐ performing different investment services and/or activities and ancillary services or combinations thereof. →<sub>2</sub> Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2). ←

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↓ new

## Article 17

### Algorithmic trading

1. An investment firm that engages in algorithmic trading shall have in place effective systems and risk controls to ensure that its trading systems are resilient and have sufficient capacity, are subject to appropriate trading thresholds and limits and prevent the sending of erroneous orders or the system otherwise functioning in a way that may create or contribute to

a disorderly market. Such a firm shall also have in place effective systems and risk controls to ensure the trading systems cannot be used for any purpose that is contrary to Regulation (EU) No [MAR] or to the rules of a trading venue to which it is connected. The firm shall have in place effective continuity business arrangements to deal with any unforeseen failure of its trading systems and shall ensure its systems are fully tested and properly monitored to ensure they meet the requirements in this paragraph.

2. An investment firm that engages in algorithmic trading shall at least annually provide to its home Competent Authority a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the system is subject, the key compliance and risk controls that it has in place to ensure the conditions in paragraph 1 are satisfied and details of the testing of its systems. A competent authority may at any time request further information from an investment firm about its algorithmic trading and the systems used for that trading.

3. An algorithmic trading strategy shall be in continuous operation during the trading hours of the trading venue to which it sends orders or through the systems of which it executes transactions. The trading parameters or limits of an algorithmic trading strategy shall ensure that the strategy posts firm quotes at competitive prices with the result of providing liquidity on a regular and ongoing basis to these trading venues at all times, regardless of prevailing market conditions.

4. An investment firm that provides direct electronic access to a trading venue shall have in place effective systems and controls which ensure a proper assessment and review of the suitability of persons using the service, that persons using the service are prevented from exceeding appropriate pre set trading and credit thresholds, that trading by persons using the service is properly monitored and that appropriate risk controls prevent trading that may create risks to the investment firm itself or that could create or contribute to a disorderly market or be contrary to Regulation (EU) No [MAR] or the rules of the trading venue. The investment firm shall ensure that there is a binding written agreement between the firm and the person regarding the essential rights and obligations arising from the provision of the service and that under the agreement the firm retains responsibility for ensuring trading using that service complies with the requirements of this Directive, the Regulation (EU) No [MAR] and the rules of the trading venue.

5. An investment firm that acts as a general clearing member for other persons shall have in place effective systems and controls to ensure clearing services are only applied to persons who are suitable and meet clear criteria and that appropriate requirements are imposed on those persons to reduce risks to the firm and to the market. The investment firm shall ensure that there is a binding written agreement between the firm and the person regarding the essential rights and obligations arising from the provision of that service.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to specify the detailed organisational requirements laid down in paragraphs 1 to 5 to be imposed on investment firms performing different investment services and/or activities and ancillary services or combinations thereof.

Article ~~1814~~

**Trading process and finalisation of transactions in an MTF ⇒ and an OTF ⇐**

1. Member States shall require that investment firms or market operators operating an MTF ⇒ or an OTF ⇐, in addition to meeting the requirements laid down in Article ~~1613~~, establish transparent ~~and non-discretionary~~ rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders. ⇒ They shall have arrangements for the sound management of the technical operations of the facility, including the establishment of effective contingency arrangements to cope with risks of systems disruption. ⇐

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

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

~~3. Member States shall ensure that Articles 19, 21 and 22 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. However, the members of or participants in the MTF shall comply with the obligations provided for in Articles 19, 21 and 22 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.~~ Member States shall require that investment firms or market operators operating an MTF ⇒ or an OTF ⇐ establish ⇒, publish ⇐ and maintain transparent rules, based on objective criteria, governing access to its facility. ~~These rules shall comply with the conditions established in Article 42(3).~~

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

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

6. Member States shall require that any investment firm or market operator operating an MTF ⇒ or an OTF ⇐ comply immediately with any instruction from its competent authority pursuant to Article ~~72(1)50(1)~~ to suspend or remove a financial instrument from trading.



8. Member States shall require investment firms and market operators operating an MTF or an OTF to provide the competent authority with a detailed description of the functioning of the MTF or OTF. Every authorisation to an investment firm or market operator as an MTF and an OTF shall be notified to ESMA. ESMA shall establish a list of all MTFs and OTFs in the Union. The list shall contain information on the services an MTF or an OTF provides and entail the unique code identifying the MTF and the OTF for use in reports in accordance with Article 23 and Articles 5 and 9 of Regulation (EU) No .../... [MiFIR]. It shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website.

9. ESMA shall develop draft implementing technical standards to determine the content and format of the description and notification referred to in paragraph 8.

ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 19*

##### **Specific requirements for MTFs**

1. Member States shall require that investment firms or market operators operating an MTF, in addition to meeting the requirements laid down in Articles 16 and 18, shall establish non-discretionary rules for the execution of orders in the system.

2. Member States shall require that the rules mentioned in Article 18(4) governing access to an MTF comply with the conditions established in Article 55(3).

3. Member States shall require that investment firms or market operators operating an MTF to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the MTF or for its participants, of any conflict of interest between the interest of the MTF, its owners or its operator and the sound functioning of the MTF.

4. Member States shall require a MTF to have in place effective systems, procedures and arrangements to comply with the conditions in Article 51.

5. Member States shall ensure that Articles 24, 25, 27 and 28 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. However, the members of or participants in the MTF shall comply with the obligations provided for in Articles 24, 25, 27 and 28 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.

#### *Article 20*

##### **Specific requirements for OTFs**

1. Member States shall require that investment firms and market operators operating an OTFs establish arrangements preventing the execution of client orders in an OTF against the proprietary capital of the investment firm or market operator operating the OTF. The investment firm shall not act as a systematic internaliser in an OTF operated by itself. An OTF shall not connect with another OTF in a way which enables orders in different OTFs to interact.

2. A request for authorisation as an OTF shall include a detailed explanation why the system does not correspond to and cannot operate as either a regulated market, MTF, or systematic internaliser.

3. Member States shall ensure that Articles 24, 25, 27 and 28 are applied to the transactions concluded on an OTF.

4. Member States shall require that, where OTFs allow for or enable algorithmic trading to take place through their systems, they have in place effective systems, procedures and arrangements to comply with the conditions of Article 51.

↓ 2004/39/EC

#### *Article 15*

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

↓ 2010/78/EU Art. 6.5(a)

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

↓ 2010/78/EU Art. 6.5(b)

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

~~The European Parliament shall be immediately and fully informed at all stages of the procedure in accordance with Article 217 of the Treaty on the Functioning of the European Union (TFEU).~~

~~ESMA shall assist the Commission for the purposes of this Article.~~

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.4

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

~~In the circumstances referred to in the first subparagraph, the Commission may decide, →<sub>1</sub> in accordance with the regulatory procedure referred to in Article 64(3), ← at any time and in addition to the initiation of negotiations, that the competent authorities of the Member States must limit or suspend their decisions regarding requests pending or future requests for authorisation and the acquisition of holdings by direct or indirect parent undertakings governed by the law of the third country in question. Such limitations or suspensions may not be applied to the setting up of subsidiaries by investment firms duly authorised in the Community or by their subsidiaries, or to the acquisition of holdings in Community investment firms by such firms or subsidiaries. The duration of such measures may not exceed three months.~~

~~Before the end of the three-month period referred to in the second subparagraph and in the light of the results of the negotiations, the Commission may decide, →<sub>1</sub> in accordance with the regulatory procedure referred to in Article 64(3), ← to extend these measures.~~

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

~~(a) of any application for the authorisation of any firm which is the direct or indirect subsidiary of a parent undertaking governed by the law of the third country in question;~~

~~(b) whenever they are informed in accordance with Article 10(3) that such a parent undertaking proposes to acquire a holding in a Community investment firm, in consequence of which the latter would become its subsidiary.~~

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

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

## CHAPTER II

### OPERATING CONDITIONS FOR INVESTMENT FIRMS

#### SECTION 1

##### GENERAL PROVISIONS

###### *Article ~~21~~16*

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

1. Member States shall require that an investment firm authorised in their territory comply at all times with the conditions for initial authorisation established in Chapter I of this Title.
2. Member States shall require competent authorities to establish the appropriate methods to monitor that investment firms comply with their obligation under paragraph 1. They shall require investment firms to notify the competent authorities of any material changes to the conditions for initial authorisation.

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↓ 2010/78/EU Art. 6.6

ESMA may develop guidelines regarding the monitoring methods referred to in this paragraph.

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↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.5(a)  
⇒ new

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

###### *Article ~~22~~17*

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

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

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

#### Article ~~23~~<sup>18</sup>

### Conflicts of interest

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

2. Where organisational or administrative arrangements made by the investment firm in accordance with Article ~~16(3)~~<sup>13(3)</sup> to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the investment firm shall clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business on its behalf.

~~3. In order to take account of technical developments on financial markets and to ensure uniform application of paragraphs 1 and 2, the Commission shall adopt~~ <sup>→</sup><sub>1</sub> --- <sup>←</sup><sub>implementing</sub> ⇒ The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 <sup>⇐</sup> measures to:

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

↓ 2008/10/EC Art. 1.5(b)

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

## SECTION 2

### PROVISIONS TO ENSURE INVESTOR PROTECTION

#### *Article ~~2419~~*

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

##### ⊗ General principles and information to clients ⊗

1. Member States shall require that, when providing investment services ~~and/or~~, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in ~~paragraphs 2 to 8~~ ⊗ this Article and in Article 25 ⊗.

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

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

- ~~the investment firm and its services;~~ ⇒ when investment advice is provided, information shall specify whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market and shall indicate whether the investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients, ⇐
- financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,
- execution venues, ~~and~~
- costs and associated charges.

⊗ The information referred to in the first subparagraph should be provided in a comprehensible form in such a manner ⊗ so that ~~they~~ ⊗ clients or potential clients ⊗ are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.

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↓ 2004/39/EC (adapted)  
⇒ new

~~49.~~ In cases where an investment service is offered as part of a financial product which is already subject to other provisions of ~~Community~~ ⇒ Union ⇐ legislation or common European standards related to credit institutions and consumer credits with respect to ~~risk assessment of clients and/or~~ information requirements, this service shall not be additionally subject to the obligations set out in ~~this Article~~ ⇒ paragraphs 2 and 3 ⇐.

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↓ new

5. When the investment firm informs the client that investment advice is provided on an independent basis, the firm:

(i) shall assess a sufficiently large number of financial instruments available on the market. The financial instruments should be diversified with regard to their type and issuers or product providers and should not be limited to financial instruments issued or provided by entities having close links with the investment firm,

(ii) shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients.

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↓ new

6. When providing portfolio management the investment firm shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients.

7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.

ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1.

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↓ new

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those delegated acts shall take into account:

(a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;

(b) the nature of the products being offered or considered including different types of financial instruments and deposits referred to in Article 1 (2) ;

(c) the retail or professional nature of the client or potential clients or, in the case of paragraph 3, their classification as eligible counterparties.

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↓ 2004/39/EC (adapted)

⊠ Article 25 ⊠

⊠ Assessment of suitability and appropriateness and reporting to clients ⊠

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

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↓ 2004/39/EC (adapted)  
⇒ new

25. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 14, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

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

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

3. Member States shall allow investment firms when providing investment services that only consist of execution ~~and~~ or the reception and transmission of client orders with or without ancillary services ⇒ , with the exclusion of the ancillary service specified in Section B (1) of Annex 1 ⇐ , to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 25 where all the following conditions are met:

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↓ 2010/78/EU Art. 6.7 (adapted)  
⇒ new

a)- the services referred to ~~in the introductory part relate to~~ ⇐ any of the following financial instruments: ⇐



(i) shares admitted to trading on a regulated market or ~~on an~~ an equivalent third-country market, ~~⇒ or on a MTF, where these are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative;~~ ⇐

(ii) ⇐ bonds or other forms of securitised debt, admitted to trading on a regulated market or on an equivalent third country market or on a MTF, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; ⇐

(iii) money market instruments, ~~bonds or other forms of securitised debt (excluding those bonds or securitised debt~~ ⇐ excluding those ⇐ that embed a derivative), ⇐ or incorporate a structure which makes it difficult for the client to understand the risk involved; ⇐

(iv) ⇐ shares or units in ⇐ UCITS ~~and~~ ⇐ excluding structured UCITS as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010; ⇐

(v) other non-complex financial instruments ⇐ for the purpose of this paragraph ⇐.

⇐ For the purpose of this point, if the requirements and the procedure laid down under subparagraphs 3 and 4 of paragraph 1 of Article 4 of Directive 2003/71/EC [*Prospectus Directive*] are fulfilled, a ⇐ ~~A~~ third-country market shall be considered as equivalent to a regulated market, ~~if it complies with equivalent requirements to those established under Title III. The Commission and ESMA shall publish on their websites a list of those markets that are to be considered as equivalent. That list shall be updated periodically. ESMA shall assist the Commission in the assessment of third country markets.~~

↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.6(a)  
⇐ new

b) the service is provided at the initiative of the client or potential client,

c) the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability ⇐ or appropriateness ⇐ of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules. ~~This, this~~ warning may be provided in a standardised format,

d) the investment firm complies with its obligations under Article ~~2318~~.

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

5. The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall ⇐ include periodic communications to clients, taking into

account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client. When providing investment advice, the investment firm shall specify how the advice given meets the personal characteristics of the client.

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

~~610. In order to ensure the necessary protection of investors and the uniform application of paragraphs 1 to 8, the Commission shall adopt <sup>1</sup> implementing measures~~ The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those delegated acts shall take into account:

- (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;
- (b) the nature of the products/financial instruments being offered or considered, including different types of financial instruments and banking deposits referred to in Article 1 (2) ;
- (c) the retail or professional nature of the client or potential clients or, in the case of paragraphs 5, their classification as eligible counterparties.

↓ 2008/10/EC Art. 1.6(b)

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

↓ new

7. ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment of financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved in accordance with paragraph 3 (a).

↓ 2004/39/EC

#### Article ~~2620~~

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

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

the instructions will remain responsible for the completeness and accuracy of the information transmitted.

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

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

*Article ~~27~~<sup>24</sup>*

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

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

↓ new

2. Member States shall require that each execution venue makes available to the public, without any charges, data relating to the quality of execution of transactions on that venue on at least an annual basis. Periodic reports shall include details about price, speed of execution and likelihood of execution for individual financial instruments.

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.7(a)  
⇒ new

~~32~~. Member States shall require investment firms to establish and implement effective arrangements for complying with paragraph 1. In particular Member States shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result in accordance with paragraph 1.

~~43~~. The order execution policy shall include, in respect of each class of instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue. It shall at least include those venues that enable the investment firm to obtain on a consistent basis the best possible result for the execution of client orders.

Member States shall require that investment firms provide appropriate information to their clients on their order execution policy. ⇒ That information shall explain clearly, in sufficient detail and in a way that can be easily understood by clients, how orders will be executed by

the firm for the client. ⇐ Member States shall require that investment firms obtain the prior consent of their clients to the execution policy.

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

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

⇒ Member States shall require investment firms to summarize and make public on an annual basis, for each class of financial instruments, the top five execution venues where they executed client orders in the preceding year. ⇐

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

~~76. In order to ensure the protection necessary for investors, the fair and orderly functioning of markets, and to ensure the uniform application of paragraphs 1, 3 and 4, the Commission shall~~ →<sub>1</sub> --- ← ~~adopt~~ implementing ⇒ The Commission shall be empowered to adopt delegated acts in accordance with Article 94 ⇐ ~~measures~~ concerning:

- (a) the criteria for determining the relative importance of the different factors that, pursuant to paragraph 1, may be taken into account for determining the best possible result taking into account the size and type of order and the retail or professional nature of the client;
- (b) factors that may be taken into account by an investment firm when reviewing its execution arrangements and the circumstances under which changes to such arrangements may be appropriate. In particular, the factors for determining which venues enable investment firms to obtain on a consistent basis the best possible result for executing the client orders;
- (c) the nature and extent of the information to be provided to clients on their execution policies, pursuant to paragraph 43.

↓ new

8. ESMA shall develop draft regulatory technical standards to determine:

a) the specific content, the format and the periodicity of data related to the quality of execution to be published in accordance with paragraph 2, taking into account the type of execution venue and the type of financial instrument concerned;

b) the content and the format of information to be published by investment firms in accordance with paragraph 5, second subparagraph.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX]

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

↓ 2008/10/EC Art. 1.7(b)

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

↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.8(a)  
⇒ new

## Article ~~28~~<sup>22</sup>

### Client order handling rules

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

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

2. Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. Member States may decide that investment firms comply with this obligation by transmitting the client limit order to a regulated market ~~and/or~~ MTF. Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article ~~44(2)~~ ~~⊗~~ 4 of Regulation (EU) No .../... [MiFIR] ~~⊗~~ .

~~3. In order to ensure that measures for the protection of investors and fair and orderly functioning of markets take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall adopt~~ →<sub>1</sub> --- ←

~~implementing~~ ⇒ The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning ⇐ measures which define:

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

↓ 2008/10/EC Art. 1.8(b)

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

↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2010/78/EU Art. 6.8  
→<sub>2</sub> 2008/10/EC Art. 1.9(a)  
⇒ new

#### Article ~~29~~<sup>29</sup>

### Obligations of investment firms when appointing tied agents

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

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

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

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

3. →<sup>1</sup> ~~Member States that decide to allow investment firms to appoint tied agents shall establish a public register.~~ Tied agents shall be registered in the public register in the Member State where they are established. ESMA shall publish on its website references or hyperlinks to the public registers established under this Article by the Member States that decide to allow investment firms to appoint tied agents. ←

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

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

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

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

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

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

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

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

#### *Article ~~30~~<sup>24</sup>*

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

1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Articles ~~24~~<sup>19</sup> ⇒ (with the exception of paragraph 3), 25 (with the exception of paragraph 5) ⇐, ~~27~~<sup>21</sup> and ~~28(1)~~<sup>22(1)</sup> in respect of those transactions or in respect of any ancillary service directly related to those transactions.

⇒ Member States shall ensure that, in their relationship with eligible counterparties, investment firms act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business. ⇐

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

Classification as an eligible counterparty under the first subparagraph shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to Articles ~~2449~~,  25,  ~~2724~~ and ~~2822~~.

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

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

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

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

~~5. In order to ensure the uniform application of paragraphs 2, 3 and 4 in the light of changing market practice and to facilitate the effective operation of the single market, the Commission may adopt~~ → ~~2~~ --- ← ~~implementing~~ ⇒ The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to specify ⇐ measures which define:

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



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↓ 2008/10/EC Art. 1.9(b)

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

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↓ 2004/39/EC

### SECTION 3

## MARKET TRANSPARENCY AND INTEGRITY

### ~~Article 25~~

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

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↓ 2010/78/EU Art. 6.9(a)

~~1. Without prejudice to the allocation of responsibilities for enforcing the provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>54</sup>, Member States coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall ensure that appropriate measures are in place to enable the competent authority to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.~~

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↓ 2010/78/EU Art. 6.9(b)

~~2. Member States shall require investment firms to keep at the disposal of the competent authority, for at least 5 years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Directive 2005/60/EC.~~

~~ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.~~

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<sup>54</sup> OJL 96, 12.4.2003, p. 16.

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.10(a)  
→<sub>2</sub> 2008/10/EC Art. 1.10(b)  
⇒ new

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

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

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

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

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

~~7. In order to ensure that measures for the protection of market integrity are modified to take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 to 5, the Commission may adopt →<sub>1</sub> ← implementing measures which define the methods and arrangements for reporting financial transactions, the form and content of these reports and the criteria for defining a relevant market in accordance with paragraph 3. →<sub>2</sub> Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 64(2). ←~~

#### *Article 31~~26~~*

### **Monitoring of compliance with the rules of the MTF ⇒ or the OTF ⇐ and with other legal obligations**

1. Member States shall require that investment firms and market operators operating an MTF ⇒ or OTF ⇐ establish and maintain effective arrangements and procedures, relevant to the MTF ⇒ or OTF ⇐, for the regular monitoring of the compliance by its users ⇒ or clients ⇐ with their rules. Investment firms and market operators operating an MTF ⇒ or an OTF ⇐

shall monitor the transactions undertaken by their users ⇨ or clients ⇩ under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

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

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↓ new

## *Article 32*

### **Suspension and removal of instruments from trading on an MTF**

1. Member States shall require that an investment firm or a market operator operating an MTF that suspends or removes from trading a financial instrument makes public this decision, communicates it to regulated markets, other MTFs and OTFs trading the same financial instrument and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States. Member States shall require that other regulated markets, MTFs and OTFs trading the same financial instrument shall also suspend or remove that financial instrument from trading where the suspension or removal is due to the non-disclosure of information about the issuer or financial instrument except where this could cause significant damage to the investors' interests or the orderly functioning of the market. Member States shall require the other regulated markets, MTFs and OTFs to communicate their decision to their competent authority and all regulated markets, MTFs and OTFs trading the same financial instrument, including an explanation if the decision was not to suspend or remove the financial instrument from trading.

2. ESMA shall develop draft implementing technical standards to determine format and timing of the communications and the publication referred to in paragraph 1.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft implementing technical standards to the Commission by [XXX].

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to list the specific situations constituting significant damage to the investors' interests and the orderly functioning of the internal market referred to in paragraphs 1 and 2 and to determine issues relating to the non-disclosure of information about the issuer or financial instrument as referred to in paragraph 1.

### Article 33

#### **Suspension and removal of instruments from trading on an OTF**

1. Member States shall require that an investment firm or a market operator operating an OTF that suspends or removes from trading a financial instrument makes public this decision, communicates it to regulated markets, MTFs and other OTFs trading the same financial instrument and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States.

2. ESMA shall develop draft implementing technical standards determining format and timing of the communications and the publication referred to in paragraph 1.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft implementing technical standards to the Commission by [XXX].

### Article 34

#### **Cooperation and exchange of information for MTFs and OTFs**

1. Member States shall require that an investment firm or a market operator operating an MTF or an OTF immediately informs investment firms and market operators of other MTFs, OTFs and regulated markets of:

- (a) disorderly trading conditions;
- (b) conduct that may indicate abusive behaviour within the scope of *[add reference MAR]*; and
- (c) system disruptions;

in relation to a financial instrument.

2. ESMA shall develop draft regulatory technical standards to determine the specific circumstances that trigger an information requirement as referred to in paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

↓ 2004/39/EC

### Article 27

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

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

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

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

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

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

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↓ 2010/78/EU Art. 6.10

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

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.11(a)

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

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

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

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

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

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

~~4. The competent authorities shall check:~~

~~(a) that investment firms regularly update bid and/or offer prices published in accordance with paragraph 1 and maintain prices which reflect the prevailing market conditions;~~

~~(b) that investment firms comply with the conditions for price improvement laid down in the fourth subparagraph of paragraph 3.~~

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

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

~~7. In order to ensure the uniform application of paragraphs 1 to 6, in a manner which supports the efficient valuation of shares and maximises the possibility of investment firms of obtaining the best deal for their clients, the Commission shall →<sub>1</sub> ← adopt implementing measures which:~~

~~(a) specify the criteria for application of paragraphs 1 and 2;~~

~~(b) specify the criteria determining when a quote is published on a regular and continuous basis and is easily accessible as well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:~~

~~(i) through the facilities of any regulated market which has admitted the instrument in question to trading;~~

~~(ii) through the offices of a third party;~~

~~(iii) through proprietary arrangements;~~

~~(c) specify the general criteria for determining those transactions where execution in several securities is part of one transaction or orders that are subject to conditions other than current market price;~~

~~(d) specify the general criteria for determining what can be considered as exceptional market circumstances that allow for the withdrawal of quotes as well as conditions for updating quotes;~~

~~(e) specify the criteria for determining what is a size customarily undertaken by a retail investor.~~

~~(f) specify the criteria for determining what constitutes considerably exceeding the norm as set down in paragraph 6;~~

~~(g) specify the criteria for determining when prices fall within a public range close to market conditions.~~

↓ 2008/10/EC Art. 1.11(b)

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

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.12(a)

## ~~Article 28~~

### ~~Post-trade disclosure by investment firms~~

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

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

~~3. In order to ensure the transparent and orderly functioning of markets and the uniform application of paragraph 1, the Commission shall adopt →<sub>1</sub> ← implementing measures which:~~

~~(a) specify the means by which investment firms may comply with their obligations under paragraph 1 including the following possibilities:~~

~~— (i) through the facilities of any regulated market which has admitted the instrument in question to trading or through the facilities of an MTF in which the share in question is traded;~~

~~— (ii) through the offices of a third party;~~

~~— (iii) through proprietary arrangements;~~

~~— (b) clarify the application of the obligation under paragraph 1 to transactions involving the use of shares for collateral, lending or other purposes where the exchange of shares is determined by factors other than the current market valuation of the share.~~

↓ 2008/10/EC Art. 1.12(b)

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

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.13(a)

#### *Article 29*

### **Pre-trade transparency requirements for MTFs**

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

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

~~3. In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall →<sub>1</sub> ← adopt implementing measures as regards:~~



~~(a) the range of bid and offers or designated market maker quotes, and the depth of trading interest at those prices, to be made public;~~

~~(b) the size or type of orders for which pre-trade disclosure may be waived under paragraph 2;~~

~~(c) the market model for which pre-trade disclosure may be waived under paragraph 2 and in particular, the applicability of the obligation to trading methods operated by an MTF which conclude transactions under their rules by reference to prices established outside the systems of the MTF or by periodic auction;~~

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

↓ 2008/10/EC Art. 1.13(b)

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

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.14(a)

### ~~Article 30~~

#### ~~Post-trade transparency requirements for MTFs~~

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

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

~~3. In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall →<sub>1</sub> ← adopt implementing measures in respect of:~~

~~(a) the scope and content of the information to be made available to the public;~~

~~(b) the conditions under which investment firms or market operators operating an MTF may provide for deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed.~~

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

↓ 2008/10/EC Art. 1.14(b)

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

↓ new

## SECTION 4

### SME MARKETS

#### Article 35

#### SME growth markets

1. Member States shall provide that the operator of a MTF may apply to its home competent authority to have the MTF registered as an SME growth market.
2. Member States shall provide that the home competent authority may register the MTF as an SME growth market if the competent authority receives an application referred to in paragraph 1 and is satisfied that the requirements in paragraph 3 are complied with in relation to the MTF.
3. The MTF shall be subject to effective rules, systems and procedures which ensure that the following is complied with:
  - (a) the majority of issuers whose financial instruments are admitted to trading on the market are small and medium-sized enterprises;
  - (b) appropriate criteria are set for initial and ongoing admission to trading of financial instruments of issuers on the market;
  - (c) on initial admission to trading of financial instruments on the market there is sufficient information published to enable investors to make an informed judgment about whether or not to invest in the instruments, either an appropriate admission document or a prospectus if the requirements in [Directive 2003/71/EC of the European Parliament and of the Council] are

applicable in respect of a public offer being made in conjunction with the admission to trading;

- (d) there is appropriate ongoing periodic financial reporting by or on behalf of an issuer on the market, for example audited annual reports;
- (e) issuers on the market and persons discharging managerial responsibilities in the issuer and persons closely associated with them comply with relevant requirements applicable to them under the Market Abuse Regulation;
- (f) the storage and public dissemination of regulatory information concerning the issuers on the market;
- (g) there are effective systems and controls aimed at preventing and detecting market abuse on that market as required under the Regulation (EU) No .../... [Market Abuse Regulation].

4. The criteria in paragraph 3 are without prejudice to compliance by the operator of the MTF with other obligations under this Directive relevant to the operation of MTFs. They also do not prevent the operator of the MTF from imposing additional requirements to those specified in that paragraph.

5. Member States shall provide that the home competent authority may deregister a MTF as an SME growth market in any of the following cases:

- (a) the operator of the market applies for its deregistration;
- (b) the requirements in paragraph 3 are no longer complied with in relation to the MTF.

6. Member States shall require that if a home competent authority registers or deregisters an MTF as an SME growth market under this Article it shall as soon as possible notify ESMA of that registration. ESMA shall publish on its website a list of SME growth markets and shall keep the list up to date.

7. Member States shall require that where a financial instrument of an issuer is admitted to trading on one SME growth market, the financial instrument may also be traded on another SME growth market without the consent of the issuer. In such a case however, the issuer shall not be subject to any obligation relating to corporate governance or initial, ongoing or ad hoc disclosure with regard to the latter SME market.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 further specifying the requirements in paragraph 3. The measures shall take into account the need for the requirements to maintain high levels of investor protection to promote investor confidence in those markets while minimising the administrative burdens for issuers on the market.

## CHAPTER III

### RIGHTS OF INVESTMENT FIRMS

#### *Article ~~36~~<sup>31</sup>*

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

1. Member States shall ensure that any investment firm authorised and supervised by the competent authorities of another Member State in accordance with this Directive, and in respect of credit institutions in accordance with Directive ~~2000/12/EC~~ <sup>2006/48/EC</sup> , may freely perform investment services and/or activities as well as ancillary services within their territories, provided that such services and activities are covered by its authorisation. Ancillary services may only be provided together with an investment service and/or activity.

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

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

- (a) the Member State in which it intends to operate;
- (b) a programme of operations stating in particular the investment services and/or activities as well as ancillary services which it intends to perform and whether it intends to use tied agents in the territory of the Member States in which it intends to provide services. ⇒ Where an investment firm intends to use tied agents, the investment firm shall communicate to the competent authority of its home Member State the identity of those tied agents. ⇐

~~Where an~~<sup>In cases where the</sup> investment firm intends to use tied agents, the competent authority of the home Member State of the investment firm shall, ~~at the request of the competent authority of the host Member State and within a reasonable time, communicate~~ <sup>⇒</sup> , within one month from the reception of the information, communicate to the competent authority of the host Member State designated as contact point in accordance with Article 83(1) ⇐ the identity of the tied agents that the investment firm intends to use <sup>⇒</sup> to provide services ⇐ in that Member State. The host Member State ~~shall~~<sup>may</sup> ~~publish~~<sup>make public</sup> such information. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC

3. The competent authority of the home Member State shall, within one month of receiving the information, forward it to the competent authority of the host Member State designated as contact point in accordance with Article ~~83(1)56(1)~~ 83(1). The investment firm may then start to provide the investment service or services concerned in the host Member State.

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

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↓ new

5. Any credit institution wishing to provide investment services or activities as well as ancillary services according to paragraph 1 through tied agents shall communicate to the competent authority of its home Member State the identity of those tied agents.

Where the credit institution intends to use tied agents, the competent authority of the home Member State of the credit institution shall, within one month from the reception of the information, communicate to the competent authority of the host Member State designated as contact point in accordance with Article 83(1) the identity of the tied agents that the credit institution intends to use to provide services in that Member State. The host Member State shall publish such information.

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↓ 2004/39/EC

⇒ new

~~65~~. Member States shall, without further legal or administrative requirement, allow investment firms and market operators operating MTFs ⇒ and OTFs ⇐ from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory.

~~76~~. The investment firm or the market operator that operates an MTF shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State of the MTF shall communicate, within one month, this information to the Member State in which the MTF intends to provide such arrangements.

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

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↓ 2010/78/EU Art. 6.11(b)  
(adapted)  
⇒ new

~~87. In order to ensure consistent application of this Article, ESMA may~~ ⇒ shall ⇐ develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2, 4 and ~~7~~.

⇒ ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2016]. ⇐

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with  the procedure laid down in  Articles 10 to 14 of Regulation (EU) No 1095/2010.

⇒ 9. ⇐ ESMA ~~may~~ ⇒ shall ⇐ develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 3, 4 and ~~7~~.

⇒ ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred to in the ~~first~~<sup>third</sup> subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC (adapted)

### Article ~~37~~<sup>32</sup>

#### Establishment of a branch

1. Member States shall ensure that investment services and/or activities as well as ancillary services may be provided within their territories in accordance with this Directive and Directive ~~2000/12/EC~~  2006/48/EC  through the establishment of a branch provided that those services and activities are covered by the authorisation granted to the investment firm or the credit institution in the home Member State. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements save those allowed under paragraph ~~87~~, on the organisation and operation of the branch in respect of the matters covered by this Directive.

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

- (a) the Member States within the territory of which it plans to establish a branch;

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

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

3. Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of an investment firm, taking into account the activities envisaged, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article ~~83(1)56(1)~~ and inform the investment firm concerned accordingly.

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

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

6. On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the branch may be established and commence business.

7. Any credit institution wishing to use a tied agent established in a Member State outside its home Member State to provide investment services and/or activities as well as ancillary services in accordance with this Directive shall notify the competent authority of its home Member State

Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of a credit institution, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article 83(1) and inform the credit institution concerned accordingly.

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

On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the tied agent can commence business. Such tied agent shall be subject to the provisions of this Directive relating to branches.

↓ 2004/39/EC (adapted)

~~87~~. The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles ~~2419~~, ☒ 25, ☒ ~~2721~~, ~~2822~~, ~~25, 27 and 28~~ ☒ of this Directive and Articles 13 to 23 of Regulation (EU) No .../... [MiFIR] and ☒ in measures adopted pursuant thereto.

The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles ~~2419~~, ☒ 25, ☒ ~~2721~~, ~~2822~~, ~~25, 27 and 28~~ ☒ of this Directive and Articles 13 to 23 of Regulation (EU) No .../... [MiFIR] ☒ and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory.

~~98~~. Each Member State shall provide that, where an investment firm authorised in another Member State has established a branch within its territory, the competent authority of the home Member State of the investment firm, in the exercise of its responsibilities and after informing the competent authority of the host Member State, may carry out on-site inspections in that branch.

~~109~~. In the event of a change in any of the information communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the host Member State shall also be informed of that change by the competent authority of the home Member State.

↓ 2010/78/EU Art. 6.12 (adapted)  
⇒ new

~~1140~~. ~~In order to ensure consistent application of this Article, ESMA may~~ ⇒ shall ⇐ develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2, 4 and ~~109~~.

⇒ ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2016]. ⇐

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with ☒ the procedure laid down ☒ Articles 10 to 14 of Regulation (EU) No 1095/2010.



~~In order to ensure uniform conditions of application of this Article,~~ ⇒ 12. ⇐ ESMA ~~may~~  
⇒ shall ⇐ develop draft implementing technical standards to establish standard forms,  
templates and procedures for the transmission of information in accordance with paragraphs 3  
and 109.

⇒ ESMA shall submit those draft implementing technical standards to the Commission by  
[31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred  
to in the ~~first~~<sup>third</sup> subparagraph in accordance with Article 15 of Regulation (EU) No  
1095/2010.

↓ 2004/39/EC (adapted)  
⇒ new

### *Article ~~3833~~*

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

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

(a) directly, by setting up branches in the host Member States;

(b) by becoming remote members of or having remote access to the regulated market without having to be established in the home Member State of the regulated market, where the trading procedures and systems of the market in question do not require a physical presence for conclusion of transactions on the market.

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

### *Article ~~3934~~*

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

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

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

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

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

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

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

#### *Article ~~40~~<sup>35</sup>*

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

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

2. The competent authority of investment firms and market operators operating an MTF may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in Article ~~39(2)~~<sup>34(2)</sup>.

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

## CHAPTER IV

### Provision of services by third country firms

#### SECTION 1

#### PROVISION OF SERVICES WITH ESTABLISHMENT OF A BRANCH

##### *Article 41*

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

1. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services in their territory through a branch acquire a prior authorisation by the competent authorities of those Member States in accordance with the following provisions:

- (a) the Commission has adopted a decision in accordance with paragraph 3;
- (b) the provision of services for which the third country firm requests authorisation is subject to authorisation and supervision in the third country where the firm is established and the requesting firm is properly authorised. The third country where the third country firm is established shall not be listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing;
- (c) cooperation arrangements, that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the competent authorities in the Member State concerned and competent supervisory authorities of the third country where the firm is established;
- (d) sufficient initial capital is at free disposal of the branch;
- (e) one or more persons responsible for the management of the branch are appointed and they comply with the requirement established under Article 9 (1);
- (f) the third country where the third country firm is established has signed an agreement with the Member State where the branch should be established, which fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective

exchange of information in tax matters, including, if any, multilateral tax agreements;

- (g) the firm has requested membership of an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on Investor-Compensation Schemes.

2. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services to retail clients in those Member States' territory shall establish a branch in the Union.

3. The Commission may adopt a decision in accordance with the procedure referred to in Article 95 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding requirements which have equivalent effect to the requirements set out in this Directive, in Regulation (EU) No .../... [MiFIR] and in Directive 2006/49/EC [Capital Adequacy Directive] and their implementing measures and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive.

The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions:

- (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body;
- (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions;
- (d) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

4. The third country firm referred to in paragraph 1 shall submit its application to the competent authority of the Member State where it intends to establish a branch after the adoption by the Commission of the decision determining that the legal and supervisory framework of the third country in which the third country firm is authorised is equivalent to the requirements described in paragraph 3.

#### *Article 42*

### **Obligation to provide information**

A third country firm intending to obtain authorisation for the provision of any investment services or activities together with any ancillary services in the territory of a Member State shall provide the competent authority of that Member State with the following:

- (a) the name of the authority responsible for its supervision in the third country concerned. When more than one authority is responsible for supervision, the details of the respective areas of competence shall be provided;
- (b) all relevant details of the firm (name, legal form, registered office and address, members of the management body, relevant shareholders) and a programme of operations setting out the investment services and/or activities as well as the ancillary services to be provided and the organisational structure of the branch, including a description of any outsourcing to third parties of essential operating functions;
- (c) the name of the persons responsible for the management of the branch and the relevant documents to demonstrate compliance with requirements under Article 9 (1);
- (d) information about the initial capital at free disposal of the branch.

#### *Article 43*

### **Granting of the authorisation**

1. The competent authority of the Member State where the third country firm intends to establish its branch shall only grant the authorisation when the following conditions are met:

- (a) the competent authority is satisfied that conditions under Article 41 are fulfilled;
- (b) the competent authority is satisfied that the branch of the third country firm will be able to comply with the provisions under paragraph 3.

The third country firm shall be informed, within six months of the submission of a complete application, whether or not the authorisation has been granted.

2. The branch of the third country firm authorised in accordance with paragraph 1, shall comply with the obligations laid down in Articles 16, 17, 23, 24, 25, 27, 28(1) and 30 of this Directive and in Articles 13 to 23 of Regulation (EU) No .../... [MiFIR] and the measures adopted pursuant thereto and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted.

Member States shall not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by this directive.

### Provision of services in other Member States

1. A third country firm authorised in accordance with Article 43 shall be able to provide the services and activities covered under the authorisation in other Member States of the Union without the establishment of new branches. To this purpose, it shall communicate the following information to the competent authority of the Member State where the branch is established:

- (a) the Member State in which it intends to operate,
- (b) a programme of operations stating in particular the investment services or activities as well as the ancillary services which it intends to perform in that Member State.

The competent authority of the Member State where the branch is established shall, within one month from receipt of the information, forward it to the competent authority of the host Member State designated as contact point in accordance with Article 83(1). The third country firm may then start to provide the service or the services concerned in the host Member States.

In the event of a change in any of the particulars communicated in accordance with the first subparagraph, the third country firm shall give written notice of that change to the competent authority of the Member State where the branch is established at least one month before implementing the change. The competent authority of the Member State where the branch is established shall inform the competent authority of the host Member State of those changes.

The firm shall remain subject to the supervision of the Member State where the branch is established in accordance with Article 43.

2. ESMA shall develop draft regulatory technical standards to determine:

- (a) the minimum content of the cooperation arrangements referred to in Article 41(1)(c), so as to ensure that the competent authorities of the Member State granting an authorisation to a third country firm are able to exercise all their supervisory powers under this directive;
- (b) the detailed content of the programme of operation as required in Article 42, point b);
- (c) the content of the documents concerning the management of the branch as required in Article 42, point c);
- (d) the detailed content of information regarding the initial capital at free disposal of the branch as required under Article 42, point d).

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

3. ESMA shall develop draft implementing technical standards to determine standard forms, template and procedures for the provision of information and for the notification provided for in those paragraphs.

ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to define the conditions for the assessment of the sufficient initial capital at free disposal of the branch taking into account the investment services or activities provided by the branch and the type of clients to whom they should be provided.

## **SECTION 2**

### **Registration and withdrawal of authorisations**

#### *Article 45*

#### **Registration**

Member States shall register the firms authorised in accordance with Articles 41. The register shall be publicly accessible and shall contain information on the services or activities which the third country firms are authorised to provide. It shall be updated on a regular basis. Every authorisation shall be notified to the ESMA.

ESMA shall establish a list of all third country firms authorised to provide services and activities in the Union. The list shall contain information on the services or activities for which the non-EU firm is authorised and it shall be updated on a regular basis. ESMA shall publish that list on its website and update it.

#### *Article 46*

#### **Withdrawal of authorisations**

The competent authority which granted an authorisation under Articles 43 may withdraw the authorisation issued to a third country firm where such a firm:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for the authorisation to lapse in such cases;

- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive governing the operating conditions for investment firms and applicable to third country firms;
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

Every withdrawal of authorisation shall be notified to ESMA.

The withdrawal shall be published on the list established in Article 45 for a period of 5 years.

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↓ 2004/39/EC

### TITLE III

## REGULATED MARKETS

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↓ 2004/39/EC

### *Article ~~47~~<sup>36</sup>*

#### **Authorisation and applicable law**

1. Member States shall reserve authorisation as a regulated market to those systems which comply with the provisions of this Title.

Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in this Title.

In the case of a regulated market that is a legal person and that is managed or operated by a market operator other than the regulated market itself, Member States shall establish how the different obligations imposed on the market operator under this Directive are to be allocated between the regulated market and the market operator.

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

2. Member States shall require the operator of the regulated market to perform tasks relating to the organisation and operation of the regulated market under the supervision of the



competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of regulated markets with the provisions of this Title. They shall also ensure that competent authorities monitor that regulated markets comply at all times with the conditions for initial authorisation established under this Title.

3. Member States shall ensure that the market operator is responsible for ensuring that the regulated market that it manages complies with all requirements under this Title.

Member States shall also ensure that the market operator is entitled to exercise the rights that correspond to the regulated market that it manages by virtue of this Directive.

4. Without prejudice to any relevant provisions of Directive 2003/6/EC, the public law governing the trading conducted under the systems of the regulated market shall be that of the home Member State of the regulated market.

5. The competent authority may withdraw the authorisation issued to a regulated market where it:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has not operated for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive;
- (e) falls within any of the cases where national law provides for withdrawal.

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↓ 2010/78/EU Art. 6.13

6. ESMA shall be notified of any withdrawal of authorisation..

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↓ 2004/39/EC

#### *Article ~~48~~<sup>37</sup>*

### **Requirements for the management of the regulated market**

~~1. Member States shall require the persons who effectively direct the business and the operations of the regulated market to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management and operation of the regulated market. Member States shall also require the operator of the regulated market to inform the competent authority of the identity and any other subsequent changes of the persons who effectively direct the business and the operations of the regulated market.~~

~~The competent authority shall refuse to approve proposed changes where there are objective and demonstrable grounds for believing that they pose a material threat to the sound and prudent management and operation of the regulated market.~~

~~2. Member States shall ensure that, in the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of an already authorised regulated market in accordance with the conditions of this Directive are deemed to comply with the requirements laid down in paragraph 1.~~

↓ new

1. Member States shall require that all members of the management body of any market operator be at all times of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. Member States shall ensure that members of the management body shall, in particular, fulfil the following requirements:

(a) commit sufficient time to perform their functions.

They shall not combine at the same time more than one of the following combinations:

(i) one executive directorship with two non-executive directorships

(ii) four non-executive directorships.

Executive or non-executive directorships held within the same group shall be considered as one single directorship.

Competent authorities may authorise a member of the management body of a market operator to combine more directorships than allowed under the previous subparagraph, taking into account individual circumstances and the nature, scale and complexity of the investment firm's activities.

(b) possess adequate collective knowledge, skills and experience to be able to understand the regulated market's activities, and in particular the main risk involved in those activities.

(c) act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management.

Member States shall require market operators to devote adequate resources to the induction and training of members of the management body.

2. Member States shall require operators of a regulated market to establish a nomination committee to assess compliance with the provisions of the first paragraph and to make recommendations, when needed, on the basis of their assessment. The nomination committee shall be composed of members of the management body who do not perform any executive function in the market operator concerned.

Competent authorities may authorise a market operator not to establish a separate nomination committee taking into account the nature, scale and complexity of the market operator's activities.

Where, under national law, the management body does not have any competence in the process of appointment of its members, this paragraph shall not apply.

3. Member States shall require market operators to take into account diversity as one of the criteria for selection of members of the management body. In particular, taking into account the size of their management body, market operators shall put in place a policy promoting gender, age, educational, professional and geographical diversity on the management body.

4. ESMA shall develop draft regulatory standards to specify the following:

(a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the market operator which competent authorities must take into account when they authorise a member of the management body to combine more directorships than permitted as referred to in paragraph 1(a);

(b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in paragraph 1(b),

(c) to notions of honesty, integrity and independence of mind of a member of the management body as referred to in paragraph 1(c),

(d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body,

(e) the notion of diversity to be taken into account for the selection of members of the management body.

ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2014].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

5. Member States shall require the operator of the regulated market to notify the competent authority of the identity of all members of its management body and of any changes to its membership, along with all information needed to assess whether the firm complies with paragraphs 1, 2 and 3.

6. The management body of a market operator shall be able to ensure that the regulated market is managed in a sound and prudent way and in a manner that promotes the integrity of the market.

The management body shall monitor and periodically assess the effectiveness of the regulated market's organization and take appropriate steps to address any deficiencies.

Members of the management body in its supervisory function shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.

7. The competent authority shall refuse authorisation if it is not satisfied that the persons who are meant to effectively direct the business of the regulated market are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that the management body of the firm may pose a threat to its effective, sound and prudent management and to the adequate consideration of the integrity of the market.

Member States shall ensure that, in the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of an already authorised regulated market in accordance with the provisions of this Directive are deemed to comply with the requirements laid down in paragraph 1.

↓ 2004/39/EC

#### *Article ~~49~~<sup>38</sup>*

### **Requirements relating to persons exercising significant influence over the management of the regulated market**

1. Member States shall require the persons who are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable.
2. Member States shall require the operator of the regulated market:
  - (a) to provide the competent authority with, and to make public, information regarding the ownership of the regulated market and/or the market operator, and in particular, the identity and scale of interests of any parties in a position to exercise significant influence over the management;
  - (b) to inform the competent authority of and to make public any transfer of ownership which gives rise to a change in the identity of the persons exercising significant influence over the operation of the regulated market.
3. The competent authority shall refuse to approve proposed changes to the controlling interests of the regulated market and/or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

#### *Article ~~50~~<sup>39</sup>*

### **Organisational requirements**

Member States shall require the regulated market:

- (a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;

- (b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;
  - (c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;
  - (d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;
  - (e) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems;
  - (f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.
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↓ new

#### *Article 51*

### **Systems resilience, circuit breakers and electronic trading**

1. Member States shall require a regulated market to have in place effective systems, procedures and arrangements to ensure its trading systems are resilient, have sufficient capacity to deal with peak order and message volumes, are able to ensure orderly trading under conditions of market stress, are fully tested to ensure such conditions are met and are subject to effective business continuity arrangements to ensure continuity of its services if there is any unforeseen failure of its trading systems.

2. Member States shall require a regulated market to have in place effective systems, procedures and arrangements to reject orders that exceed pre-determined volume and price thresholds or are clearly erroneous and to be able to temporarily halt trading if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction.

3. Member States shall require a regulated market to have in place effective systems, procedures and arrangements to ensure that algorithmic trading systems cannot create or contribute to disorderly trading conditions on the market including systems to limit the ratio of unexecuted orders to transactions that may be entered into the system by a member or participant, to be able to slow down the flow of orders if there is a risk of its system capacity being reached and to limit the minimum tick size that may be executed on the market.

4. Member States shall require a regulated market that permits direct electronic access to have in place effective systems procedures and arrangements to ensure that members or participants are only permitted to provide such services if they are an authorised investment

firm under this Directive, that appropriate criteria are set and applied regarding the suitability of persons to whom such access may be provided and that the member or participant retains responsibility for orders and trades executed using that service.

Member States shall also require that the regulated market set appropriate standards regarding risk controls and thresholds on trading through such access and is able to distinguish and if necessary to stop orders or trading by a person using direct electronic access separately from orders or trading by the member or participant.

5. Member States shall require a regulated market to ensure that its rules on co-location services and fee structures are transparent, fair and non-discriminatory.

6. Member States shall require that upon request by the competent authority for a regulated market, that regulated market make available to the competent authority data relating to the order book or give the competent authority access to the order book so that it is able to monitor trading.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning the requirements laid down in this Article, and in particular:

(a) to ensure trading systems of regulated markets are resilient and have adequate capacity;

(b) to set out conditions under which trading should be halted if there is a significant price movement in a financial instrument on that market or a related market during a short period;

(c) to set out the maximum and minimum ratio of unexecuted orders to transactions that may be adopted by regulated markets and minimum tick sizes that should be adopted;

(d) to establish controls concerning direct electronic access;

(e) to ensure co-location services and fee structures are fair and non-discriminatory.

↓ 2004/39/EC (adapted)  
→<sub>1</sub> Corrigendum, OJ L 045,  
16.2.2005, p. 18  
→<sub>2</sub> 2008/10/EC Art. 1.15(a)  
⇒ new

#### *Article ~~5240~~*

### **Admission of financial instruments to trading**

1. Member States shall require that regulated markets have clear and transparent rules regarding the admission of financial instruments to trading.

Those rules shall ensure that any financial instruments admitted to trading in a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.

2. In the case of derivatives, the rules shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

3. In addition to the obligations set out in paragraphs 1 and 2, Member States shall require the regulated market to establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under ~~Community~~ ☒ Union ☒ law in respect of initial, ongoing or ad hoc disclosure obligations.

Member States shall ensure that the regulated market establishes arrangements which facilitate its members or participants in obtaining access to information which has been made public under ~~Community~~ ☒ Union ☒ law.

4. Member States shall ensure that regulated markets have established the necessary arrangements to review regularly the compliance with the admission requirements of the financial instruments which they admit to trading.

5. A transferable security that has been admitted to trading on a regulated market can subsequently be admitted to trading on other regulated markets, even without the consent of the issuer and in compliance with the relevant provisions of Directive 2003/71/EC of the European Parliament and of the Council of →<sub>1</sub> 4 November 2003 ← on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC<sup>55</sup>. The issuer shall be informed by the regulated market of the fact that its securities are traded on that regulated market. The issuer shall not be subject to any obligation to provide information required under paragraph 3 directly to any regulated market which has admitted the issuer's securities to trading without its consent.

~~6. In order to ensure the uniform application of paragraphs 1 to 5, the Commission shall →<sub>2</sub> ---~~  
← adopt implementing ⇒ The Commission shall adopt by means of delegated acts in accordance with Article 94 ⇐ measures which:

- (a) specify the characteristics of different classes of instruments to be taken into account by the regulated market when assessing whether an instrument is issued in a manner consistent with the conditions laid down in the second subparagraph of paragraph 1 for admission to trading on the different market segments which it operates;
- (b) clarify the arrangements that the regulated market is to implement so as to be considered to have fulfilled its obligation to verify that the issuer of a transferable security complies with its obligations under ~~Community~~ ☒ Union ☒ law in respect of initial, ongoing or ad hoc disclosure obligations;
- (c) clarify the arrangements that the regulated market has to establish pursuant to paragraph 3 in order to facilitate its members or participants in obtaining access to information which has been made public under the conditions established by ~~Community~~ ☒ Union ☒ law.

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<sup>55</sup> →<sub>1</sub> OJ L 345, 31.12.2003, p. 64. ←

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↓ 2008/10/EC Art. 1.15(b)

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

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↓ 2004/39/EC (adapted)  
⇒ new

*Article ~~53~~*

**Suspension and removal of instruments from trading**

1. Without prejudice to the right of the competent authority under Article ~~72(1)(d)~~~~50(2)(i)~~ and ~~(e)~~~~(k)~~ to demand suspension or removal of an instrument from trading, the operator of the regulated market may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

~~Notwithstanding the possibility for the operators of regulated markets to inform directly the operators of other regulated markets,~~ Member States shall require that an operator of a regulated market that suspends or removes from trading a financial instrument makes public this decision ⇒ , communicates it to other regulated markets, MTFs and OTFs trading the same financial instrument ⇐ and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States ☒ of this ☒ . ⇒ Member States shall require that other regulated markets, MTFs and OTFs trading the same financial instrument also suspend or remove that financial instrument from trading where the suspension or removal is due to the non-disclosure of information about the issuer or financial instrument except for cases where this could cause significant damage to the investors' interests or the orderly functioning of the market. Member States shall require the other regulated markets, MTFs and OTFs to communicate their decision to their competent authority and all regulated markets, MTFs and OTFs trading the same financial instrument, including an explanation where it was decided not to suspend or remove the financial instrument from trading. ⇐

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↓ 2010/78/EU Art. 6.14 (adapted)  
⇒ new

2. A competent authority which requests the suspension or removal of a financial instrument from trading on one or more regulated markets ⇒ MTFs or OTFs ⇐ shall immediately make public its decision and inform ESMA and the competent authorities of the other Member States. Save where it is likely to cause significant damage to the investors' interests or the orderly functioning of the internal market, the competent authorities of the other Member States shall request the suspension or removal of that financial instrument from trading on the regulated markets, ~~and~~ MTFs ⇒ and OTFs ⇐ that operate under their supervision.



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↓ new

3. ESMA shall develop draft implementing technical standards to determine the format and timing of the communications and publications referred to in paragraphs 1 and 2.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft implementing technical standards to the Commission by [XXX].

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to specify the list of circumstances constituting significant damage to the investors' interests and the orderly functioning of the internal market referred to in paragraphs 1 and 2 and to determine issues relating to the non-disclosure of information about the issuer or financial instrument as referred to in paragraph 1.

#### *Article 54*

### **Cooperation and exchange of information for regulated markets**

1. Member States shall require that, in relation to a financial instrument, an operator of a regulated market immediately informs operators of other regulated markets, MTFs and OTFs of:

- (a) disorderly trading conditions;
- (b) conduct that may indicate abusive behaviour within the scope of [add reference MAR]; and
- (c) system disruptions.

2. ESMA shall develop draft regulatory technical standards to determine the specific circumstances that trigger an information requirement as referred to in paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by [ ].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC (adapted)  
⇒ new

#### *Article ~~54~~2*

### **Access to the regulated market**

1. Member States shall require the regulated market to establish and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the regulated market.

2. Those rules shall specify any obligations for the members or participants arising from:

- (a) the constitution and administration of the regulated market;
- (b) rules relating to transactions on the market;
- (c) professional standards imposed on the staff of the investment firms or credit institutions that are operating on the market;
- (d) the conditions established, for members or participants other than investment firms and credit institutions, under paragraph 3;
- (e) the rules and procedures for the clearing and settlement of transactions concluded on the regulated market.

3. Regulated markets may admit as members or participants investment firms, credit institutions authorised under Directive ~~2000/12/EC~~  2006/48/EC  and other persons who:

- (a) are of sufficient good repute ~~fit and proper~~;
- (b) have a sufficient level of trading ability, ~~and~~ competence  and experience  ;
- (c) have, where applicable, adequate organisational arrangements;
- (d) have sufficient resources for the role they are to perform, taking into account the different financial arrangements that the regulated market may have established in order to guarantee the adequate settlement of transactions.

4. Member States shall ensure that, for the transactions concluded on a regulated market, members and participants are not obliged to apply to each other the obligations laid down in Articles ~~2419~~,  25,  ~~2721~~ and ~~2822~~. However, the members or participants of the regulated market shall apply the obligations provided for in Articles ~~2419~~,  25,  ~~2721~~ and ~~2822~~ with respect to their clients when they, acting on behalf of their clients, execute their orders on a regulated market.

5. Member States shall ensure that the rules on access to or membership of the regulated market provide for the direct or remote participation of investment firms and credit institutions.

6. Member States shall, without further legal or administrative requirements, allow regulated markets from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and trading on those markets by remote members or participants established in their territory.

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↓ 2010/78/EU Art. 6.15

The regulated market shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State shall communicate that information to the Member State in which the regulated market intends to provide such arrangements within 1 month. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2008/10/EC Art. 1.16(a)

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

7. Member States shall require the operator of the regulated market to communicate, on a regular basis, the list of the members and participants of the regulated market to the competent authority of the regulated market.

#### *Article ~~5643~~*

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

1. Member States shall require that regulated markets establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. Regulated markets shall monitor the transactions  orders  undertaken by their members or participants under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

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

#### *~~Article 44~~*

### **~~Pre-trade transparency requirements for regulated markets~~**

~~1. Member States shall, at least, require regulated markets to make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares admitted to trading. Member States shall require this information to~~

~~be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours.~~

~~Regulated markets may give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first subparagraph to investment firms which are obliged to publish their quotes in shares pursuant to Article 27.~~

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

~~3. In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall →<sub>1</sub> ← adopt implementing measures as regards:~~

~~(a) the range of bid and offers or designated market maker quotes, and the depth of trading interest at those prices, to be made public;~~

~~(b) the size or type of orders for which pre-trade disclosure may be waived under paragraph 2;~~

~~(c) the market model for which pre-trade disclosure may be waived under paragraph 2, and in particular, the applicability of the obligation to trading methods operated by regulated markets which conclude transactions under their rules by reference to prices established outside the regulated market or by periodic auction.~~

↓ 2008/10/EC Art. 1.16(b)

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

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.17(a)

#### ~~Article 45~~

#### ~~Post-trade transparency requirements for regulated markets~~

~~1. Member States shall, at least, require regulated markets to make public the price, volume and time of the transactions executed in respect of shares admitted to trading. Member States shall require details of all such transactions to be made public, on a reasonable commercial basis and as close to real time as possible.~~

~~Regulated markets may give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information~~

~~under the first subparagraph to investment firms which are obliged to publish the details of their transactions in shares pursuant to Article 28.~~

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

~~3. In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall →<sub>1</sub> ← adopt implementing measures in respect of:~~

~~(a) the scope and content of the information to be made available to the public;~~

~~(b) the conditions under which a regulated market may provide for deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed.~~

↓ 2008/10/EC Art. 1.17(b)

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

↓ 2004/39/EC

#### *Article 5746*

### **Provisions regarding central counterparty and clearing and settlement arrangements**

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

2. The competent authority of a regulated market may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established in Article ~~39(2)~~~~34(2)~~.

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

*Article ~~5847~~*

**List of regulated markets**

Each Member State shall draw up a list of the regulated markets for which it is the home Member State and shall forward that list to the other Member States and ESMA. A similar communication shall be effected in respect of each change to that list. ESMA shall publish and keep up-to-date a list of all regulated markets on its website.

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**TITLE IV**

**POSITION LIMITS AND REPORTING**

*Article 59*

**Position limits**

1. Member States shall ensure that regulated markets, operators of MTFs and OTFs which admit to trading or trade commodity derivatives apply limits on the number of contracts which any given market members or participants can enter into over a specified period of time, or alternative arrangements with equivalent effect such as position management with automatic review thresholds , to be imposed in order to:

- (a) support liquidity;
- (b) prevent market abuse;
- (c) support orderly pricing and settlement conditions.

The limits or arrangements shall be transparent and non-discriminatory, specifying the persons to whom they apply and any exemptions, and taking account of the nature and composition of market participants and of the use they make of the contracts admitted to trading. They shall specify clear quantitative thresholds such as the maximum number of contracts persons can enter, taking account of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market.

2. Regulated markets, MTF and OTFs shall inform their competent authority of the details of the limits or arrangements. The competent authority shall communicate the same information to ESMA which shall publish and maintain on its website a database with summaries of the limits or arrangements in force.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits or alternative arrangements on the number of contracts which any

person can enter into over a specified period of time and the necessary equivalent effects of the alternative arrangements established in accordance with paragraph 1, as well as the conditions for exemptions. The limits or alternative arrangements shall take account of the conditions referred to in paragraph 1 and the limits that have been set by regulated markets, MTFs and OTFs. The limits or alternative arrangements determined in the delegated acts shall also take precedence over any measures imposed by competent authorities pursuant to Article 72(1) paragraph (g) of this Directive.

4. Competent authorities shall not impose limits or alternative arrangements which are more restrictive than those adopted pursuant to paragraph 3 except in exceptional cases where they are objectively justified and proportionate taking into account the liquidity of the specific market and the orderly functioning of the market. The restrictions shall be valid for an initial period not exceeding six months from the date of its publication on the website of the relevant competent authority. Such a restriction may be renewed for further periods not exceeding six months at a time if the grounds for the restriction continue to be applicable. If the restriction is not renewed after that six-month period, it shall automatically expire.

When adopting more restrictive measures than those adopted pursuant to paragraph 3, competent authorities shall notify ESMA. The notification shall include a justification for the more restrictive measures. ESMA shall within 24 hours issue an opinion on whether it considers the measure is necessary to address the exceptional case. The opinion shall be published on ESMA's website.

Where a competent authority takes measures contrary to an ESMA opinion, it shall immediately publish on its website a notice fully explaining its reasons for doing so.

## *Article 60*

### **Position reporting by categories of traders**

1. Member States shall ensure that regulated markets, MTFs, and OTFs which admit to trading or trade commodity derivatives or emission allowances or derivatives thereof:

- (a) make public a weekly report with the aggregate positions held by the different categories of traders for the different financial instruments traded on their platforms in accordance with paragraph 3;
- (b) provide the competent authority with a complete breakdown of the positions of any or all market members or participants, including any positions held on behalf of their clients, upon request

The obligation laid down in point (a) shall only apply when both the number of traders and their open positions in a given financial instrument exceed minimum thresholds.

2. In order to enable the publication mentioned in point (a) of paragraph 1, Member States shall require members and participants of regulated markets, MTFs and OTFs to report to the respective trading venue the details of their positions in real-time, including any positions held on behalf of their clients.

3. The members, participants and their clients shall be classified by the regulated market, MTF or OTF as traders according to the nature of their main business, taking account of any applicable authorisation, as either:

- (a) investment firms as defined in Directive 2004/39/EC or credit institution as defined in Directive 2006/48/EC;
- (b) investment funds, either an undertaking for collective investments in transferable securities (UCITS) as defined in Directive 2009/65/EC, or an alternative investment fund manager as defined in Directive 2011/61/EC;
- (c) other financial institutions, including insurance undertakings and reinsurance undertakings as defined in Directive 2009/138/EC, and institutions for occupational retirement provision as defined in Directive 2003/41/EC;
- (d) commercial undertakings;
- (e) in the case of emission allowances or derivatives thereof, operators with compliance obligations under Directive 2003/87/EC.

The reports mentioned in point (a) of paragraph 1 should specify the number of long and short positions by category of trader, changes thereto since the previous report, percent of total open interest represented by each category, and the number of traders in each category.

4. ESMA shall develop draft implementing technical standards to determine the format of the reports mentioned in point (a) of paragraph 1, and the content of the information to be provided in accordance with paragraph 2.

ESMA shall submit those draft implementing technical standards to the Commission by [XXX].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 15 of Regulation (EU) No 1095/2010.

In the case of emission allowances or derivatives thereof, the reporting shall not prejudice the compliance obligations under Directive 2003/87/EC (Emissions Trading Scheme).

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to specify the thresholds mentioned in the last subparagraph of paragraph 1 and to refine the categories of members, participants or clients mentioned in paragraph 3.

The Commission shall be empowered to adopt implementing acts in accordance with Article 95 concerning measures to require all reports mentioned in point (a) of paragraph 1 to be sent to ESMA at a specified weekly time, for their centralised publication by the latter.



## **Title V**

### **Data reporting services**

#### **Section 1**

##### **Authorisation procedures for data reporting services providers**

###### *Article 61*

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

1. Member States shall require that the provision of data reporting services described in Annex I, Section D as a regular occupation or business be subject to prior authorisation in accordance with the provisions of this section. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 69.

2. By way of derogation from paragraph 1, Member States shall allow any market operator to operate the data reporting services of an APA, a CTP and an ARM, subject to the prior verification of their compliance with the provisions of this Title. Such a service shall be included in their authorisation.

3. Member States shall register all data reporting services providers. The register shall be publicly accessible and shall contain information on the services for which the data reporting services provider is authorised. It shall be updated on a regular basis. Every authorisation shall be notified to ESMA.

ESMA shall establish a list of all data reporting services providers in the Union. The list shall contain information on the services for which the data reporting services provider is authorised and it shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website.

Where a competent authority has withdrawn an authorisation in accordance with Article 64, that withdrawal shall be published on the list for a period of 5 years.

###### *Article 62*

###### **Scope of authorisation**

1. The home Member State shall ensure that the authorisation specifies the data reporting service which the data reporting services provider is authorised to provide. A data reporting services provider seeking to extend its business to additional data reporting services shall submit a request for extension of its authorisation.

2. The authorisation shall be valid for the entire Union and shall allow a data reporting services provider to provide the services, for which it has been authorised, throughout the Union.

## Article 63

### **Procedures for granting and refusing requests for authorisation**

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

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

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

4. ESMA shall develop draft regulatory technical standards to determine:

- (a) the information to be provided to the competent authorities under paragraph 2, including the programme of operations;
- (b) the information included in the notifications under Article 65 paragraph 4.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by [...].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

5. ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the notification or provision of information provided for in paragraph 2 and in Article 65(4).

ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## Article 64

### **Withdrawal of authorisations**

The competent authority may withdraw the authorisation issued to a data reporting services provider where the provider:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no data reporting services for the preceding

six months, unless the Member State concerned has provided for authorisation to lapse in such cases;

- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions of this Directive.

#### *Article 65*

### **Requirements for the management body of a data reporting services provider**

1. Member States shall require that all members of the management body of a data reporting services provider shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties.

The management body shall possess adequate collective knowledge, skills and experience to be able to understand the activities of the data reporting services provider. Member States shall ensure that each member of the management body shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management.

Where a market operator seeks authorisation to operate an APA, a CTP or an ARM and the members of the management body of the APA, the CTP or the ARM are the same as the members of the management body of the regulated market, those persons are deemed to comply with the requirement laid down in the first subparagraph.

2. ESMA shall develop guidelines for the assessment of the suitability of the members of the management body described in paragraph 1, taking into account different roles and functions carried out by them.

3. Member States shall require the data reporting services provider to notify the competent authority of all members of its management body and of any changes to its membership, along with all information needed to assess whether the entity complies with paragraph 1 of this Article.

4. The management body of a data reporting services provider shall be able to ensure that the entity is managed in a sound and prudent way and in a manner that promotes the integrity of the market and the interest of its clients.

5. The competent authority shall refuse authorisation if it is not satisfied that the person or the persons who shall effectively direct the business of the data reporting services provider are of sufficiently good repute, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the provider pose a threat to its sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market.

### **Section 2**

## Conditions for approved publication arrangements (APAs)

### Article 66

#### Organisational requirements

1. The home Member State shall require an APA to have adequate policies and arrangements in place to make public the information required under Articles 19 and 20 of Regulation (EU) No .../... [MiFIR] as close to real time as is technically possible, on a reasonable commercial basis. The information shall be made available free of charge 15 minutes after the publication of a transaction. The home Member State shall require the APA to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in a format that facilitates the consolidation of the information with similar data from other sources.

2. The home Member State shall require the APA to operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients.

3. The home Member State shall require the APA to have sound security mechanisms in place designed to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage before publication. The APA shall maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

4. The home Member State shall require the APA to have systems in place that can effectively check trade reports for completeness, identify omissions and obvious errors and request re-transmission of any such erroneous reports.

5. In order to ensure consistent harmonisation of paragraph 1, ESMA shall develop draft regulatory technical standards to determine common formats, data standards and technical arrangements facilitating the consolidation of information as referred to in paragraph 1.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by [...].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 clarifying what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 specifying:

- (a) the means by which an APA may comply with the information obligation referred to in paragraph 1;
- (b) the content of the information published under paragraph 1.

## Section 3

### Conditions for consolidated tape providers (CTPs)

#### Article 67

#### Organisational requirements

1. The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 5 and 19 of Regulation (EU) No .../... [MiFIR], consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible, on a reasonable commercial basis including, at least, the following details:

- (a) the identifier of the financial instrument;
- (b) the price at which the transaction was concluded;
- (c) the volume of the transaction;
- (d) the time of the transaction;
- (e) the time the transaction was reported;
- (f) the price notation of the transaction;
- (g) the trading venue the transaction was executed on or otherwise the code "OTC";
- (h) if applicable, an indicator that the transaction was subject to specific conditions.

The information shall be made available free of charge 15 minutes after the publication of a transaction. The home Member State shall require the CTP to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in formats that are easily accessible and utilisable for market participants.

2. The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 9 and 20 of Regulation (EU) No .../... [MiFIR], consolidate it into a continuous electronic data stream and make following information available to the public as close to real time as is technically possible, on a reasonable commercial basis including, at least, the following details:

- (a) the identifier or identifying features of the financial instrument;
- (b) the price at which the transaction was concluded;
- (c) the volume of the transaction;
- (d) the time of the transaction;
- (e) the time the transaction was reported;

- (f) the price notation of the transaction;
- (g) the trading venue the transaction was executed on or otherwise the code "OTC";
- (h) if applicable, an indicator that the transaction was subject to specific conditions.

The information shall be made available free of charge 15 minutes after the publication of a transaction. The home Member State shall require the CTP to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in generally accepted formats that are interoperable and easily accessible and utilisable for market participants.

3. The home Member State shall require the CTP to ensure that the data provided is consolidated from at least the regulated markets, MTFs, OTFs and APAs and for the financial instruments specified by delegated acts under paragraph 8(c).

4. The home Member State shall require the CTP to operate and maintain effective administrative arrangements designed to prevent conflicts of interest. In particular, a market operator or an APA, who also operate a consolidated tape, shall treat all information collected in a non-discriminatory fashion and shall operate and maintain appropriate arrangements to separate different business functions.

5. The home Member State shall require the CTP to have sound security mechanisms in place designed to guarantee the security of the means of transfer of information and to minimise the risk of data corruption and unauthorised access. The home Member State shall require the CTP to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

6. In order to ensure consistent harmonisation of paragraphs 1 and 2, ESMA shall develop draft regulatory technical standards to determine data standards and formats for the information to be published in accordance with Articles 5, 9, 19 and 20 of Regulation (EU) No .../... [MiFIR], including instrument identifier, price, quantity, time, price notation, venue identifier and indicators for specific conditions the transactions was subject to as well as technical arrangements promoting an efficient and consistent dissemination of information in a way ensuring for it to be easily accessible and utilisable for market participants as referred to in paragraphs 1 and 2, including identifying additional services the CTP could perform which increase the efficiency of the market.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by [...] in respect of information published in accordance with Articles 5 and 19 of Regulation (EU) No .../... [MiFIR] and by [...] in respect of information published in accordance with Articles 9 and 20 of Regulation (EU) No .../... [MiFIR].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures clarifying what constitutes a reasonable commercial basis to provide access to data streams as referred to in paragraphs 1 and 2.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures specifying:

- (a) the means by which the CTP may comply with the information obligation referred to in paragraphs 1 and 2;
- (b) the content of the information published under paragraphs 1 and 2;
- (c) the trading venues and APAs and the financial instruments data of which must be provided in the data stream;
- (d) other means to ensure that the data published by different CTPs is consistent and allows for comprehensive mapping and cross-referencing against similar data from other sources.

## **Section 4**

### **Conditions for approved reportings mechanisms (ARMs)**

#### **Organisational requirements**

##### *Article 68*

1. The home Member State shall require an ARM to have adequate policies and arrangements in place to report the information required under Article 23 of Regulation (EU) No .../... [MiFIR] as quickly as possible, and no later than the close of the following working day. Such information shall be reported in accordance with the requirements laid down in Article 23 of Regulation (EU) No .../... [MiFIR] on a reasonable commercial basis.

2. The home Member State shall require the ARM to operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients.

3. The home Member State shall require the ARM to have sound security mechanisms in place designed to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage before publication. The home Member State shall require the ARM to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

4. The home Member State shall require the ARM to have systems in place that can effectively check transaction reports for completeness, identify omissions and obvious errors and request re-transmission of any such erroneous reports.

5. The Commission may adopt, by means of delegated acts in accordance with Article 34, measures clarifying what constitutes a reasonable commercial basis to report information as referred to in paragraph 1.

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↓ 2004/39/EC

## TITLE ~~VII~~

### COMPETENT AUTHORITIES

#### CHAPTER I

#### DESIGNATION, POWERS AND REDRESS PROCEDURES

Article ~~69~~<sup>48</sup>

##### Designation of competent authorities

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↓ 2010/78/EU Art. 6.17(a)  
⇒ new

1. Each Member State shall designate the competent authorities which are to carry out each of the duties provided for ~~in~~<sup>in</sup> under the different provisions of Regulation (EU) No .../... (MiFIR) and of ~~this~~ Directive. Member States shall inform the Commission, ESMA 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.

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↓ 2004/39/EC (adapted)

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. ~~Those~~<sup>These</sup> 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~~<sup>The</sup> 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.



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↓ 2010/78/EU Art. 6.17(b)

Member States shall inform the Commission, ESMA 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.

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↓ 2010/78/EU Art. 6.17(c)

3. ESMA shall publish and keep up-to-date a list of the competent authorities referred to in paragraphs 1 and 2 on its website.

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↓ 2004/39/EC (adapted)  
⇒ new

*Article ~~7049~~*

**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 ~~7150~~*

**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 ~~69(2)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  which would be relevant for the performance of the supervisory duties  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  held by investment firms where a reasonable suspicion exists that such records related to the subject-matter of the inspection may be relevant to prove a breach by the investment firm of its obligations under this Directive; these records shall however not concern the content of the communication to which they relate;
- ~~(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;~~
- ~~(e)(g)~~ request temporary prohibition of professional activity;
- ~~(f)(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;~~
- ~~(g)(l)~~ refer matters for criminal prosecution;
- ~~(h)(m)~~ allow auditors or experts to carry out verifications or investigations.
- (i) demand information including all relevant documentation from any person regarding the size and purpose of a position or exposure entered into via a derivative, and any assets or liabilities in the underlying market.

3. If a request for records of telephone or data traffic referred to in point (d) of paragraph 2 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

4. The processing of personal data collected in the exercise of the supervisory and investigatory powers pursuant to this Article shall be carried out in accordance with Directive 95/46/EC.

Article 72

**Remedies to be made available to competent authorities**

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

- (a) require the cessation of any practice or conduct that is contrary to the provisions of Regulation(EU) No .../... [MiFIR] and the provisions adopted in the implementation of this Directive and to desist from a repetition of that practice or conduct;
- (b) request the freezing and/or the sequestration of assets;
- (c) adopt any type of measure to ensure that investment firms and regulated markets continue to comply with legal requirements;
- (d) require the suspension of trading in a financial instrument;
- (e) require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;
- (f) request any person that has provided information in accordance with Article 71(2) (i) to subsequently take steps to reduce the size of the position or exposure;
- (g) limit the ability of any person or class of persons from entering into a commodity derivative , including by introducing non-discriminatory limits on positions or the number of such derivative contracts per underlying which any given class of persons can enter into over a specified period of time, when necessary to ensure the integrity and orderly functioning of the affected markets;
- (h) issue public notices.

Article ~~73~~<sup>54</sup>

**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~~ ⇒ their competent authorities may ⇐ take the appropriate administrative ⇒ sanctions and ⇐ measures ~~can be taken or administrative sanctions be imposed against the persons responsible~~ where the provisions ⇒ of Regulation (EU) No .../... (MiFIR) or the national provisions ⇐ adopted in the implementation of this Directive have

not been complied with, ⇒ , and ⇐ shall ensure that ⇒ they are applied. ⇐ 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.~~

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↓ new

2. Member States shall ensure that where obligations apply to investment firms and market operators, in case of a breach, administrative sanctions and measures can be applied to the members of the investment firms' and market operators' management body, and any other natural or legal persons who, under national law, are responsible for a violation.

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↓ 2004/39/EC

~~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.~~

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↓ 2010/78/EU Art. 6.18

34. Member States shall provide ESMA annually with aggregated information about all administrative measures and sanctions imposed in accordance with paragraphs 1 and 2.

45. Where the competent authority has disclosed an administrative measure or sanction to the public, it shall, at the same time contemporaneously, report that fact to ESMA.

56. Where a published sanction relates to an investment firm authorised in accordance with this Directive, ESMA shall add a reference to the published sanction in the register of investment firms established under Article 5(3).

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↓ new

#### Article 74

##### **Publication of sanctions**

Member States shall provide that the competent authority publishes any sanction or measure that has been imposed for breaches of the provisions of Regulation (EU) No .../... (MiFIR) or of the national provisions adopted in the implementation of this Directive without undue delay including information on the type and nature of the breach and the identity of persons responsible for it, unless such disclosure would seriously jeopardise the financial markets. Where the publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis.

#### Article 75

##### **Breach of authorisation requirement and other breaches**

1. This Article shall apply to the following:

- (a) performing investment services or activities as a regular occupation or business on a professional basis without obtaining authorisation in breach of Article 5;
- (b) acquiring, directly or indirectly, a qualifying holding in an investment firm or further increasing, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (hereinafter referred to as the proposed acquisition), without notifying in writing the competent authorities of the investment firm in which the acquirer is seeking to acquire or increase a qualifying holding in breach of the first subparagraph of Article 11(1);
- (c) disposing, directly or indirectly, of a qualifying holding in an investment firm or reducing a qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the investment firm would cease to be a subsidiary, without notifying in writing the competent authorities, in breach of the second subparagraph of Article 11(1);
- (d) an investment firm having obtained an authorisation through false statements or any other irregular means in breach of Article 8(b);
- (e) an investment firm failing to comply with requirements applicable to the management body in accordance with Article 9(1);
- (f) the management body of an investment firm failing to perform its duties in accordance with Article 9(6);
- (g) an investment firm, on becoming aware of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in Article 11(1), failing to inform the competent authorities of those acquisitions or disposals in breach of the first subparagraph of Article 11(3);
- (h) an investment firm failing to, at least once a year, inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings in breach of the second subparagraph of Article 11(3);
- (i) an investment firm failing to have in place an organisational requirement imposed in accordance with the national provisions implementing Article 16 and 17;
- (j) an investment firm failing to identify, prevent, manage and disclose conflicts of interests in accordance with the national provisions implementing Article 23;
- (k) a MTF or an OTF failing to establish rules, procedures and arrangements or failing to comply with instructions in accordance with the national provisions implementing Articles 18, 19 and 20;
- (l) an investment firm repeatedly failing to provide information or reports to clients and to comply with obligations on the assessment of suitability or appropriateness in accordance with the national provisions implementing Articles 24 and 25;

- (m) an investment firm accepting or receiving fees, commissions or any monetary benefit in contravention of the national provisions implementing Article 19 (5) and (6);
- (n) an investment firm repeatedly failing to obtain the best possible result for clients when executing orders and failing to establish arrangements in accordance with national provisions implementing Article 27 and Article 28;
- (o) operating a regulated market without obtaining authorisation in breach of Article 47;
- (p) the management body of a market operator failing to perform its duties in accordance with Article 48(6);
- (q) a regulated market or a market operator failing to have in place arrangements, systems, rules and procedures and to have available sufficient financial resources in accordance with national provisions implementing Article 50;
- (r) a regulated market or a market operator failing to have in place systems, procedures, arrangements and rules or failing to grant access to data in accordance with national rules implementing Article 51;
- (s) a regulated market, a market operator or an investment firm repeatedly failing to make public information in accordance with Articles 3, 5, 7 or 9 of Regulation (EU) No (EU) .../... [MiFIR];
- (t) an investment firm repeatedly failing to make public information in accordance with Articles 13, 17, 19 and 20 of Regulation (EU) No .../... [MiFIR];
- (u) an investment firm repeatedly failing to report transactions to competent authorities in accordance with Article 23 of Regulation (EU) No .../... [MiFIR];
- (v) a financial counterparty and a non financial counterparty failing to trade derivatives on trading venues in accordance with Article 24 of Regulation (EU) No .../... [MiFIR];
- (w) a central counterparty failing to grant access to its clearing services in accordance with Article 28 of Regulation (EU) No .../... [MiFIR];
- (x) a regulated market, a market operator or an investment firm failing to grant access to its trade feeds in accordance with Article 29 of Regulation (EU) No .../... [MiFIR];
- (y) a person with proprietary rights to benchmarks failing to grant access to a benchmark in accordance with Article 30 of Regulation (EU) No .../... [MiFIR];
- (z) an investment firm marketing, distributing or selling financial instruments or performing a type of financial activity or adopting a practice in contravention of prohibitions or restrictions imposed based on Article 32 of Regulation (EU) No .../... [MiFIR].

2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied include at least the following:

- (a) a public statement, which indicates the natural or legal person and the nature of the breach;

- (b) an order requiring the natural or legal person to cease the conduct and to desist from a repetition of that conduct;
- (c) in case of an investment firm, withdrawal of the authorisation of the institution in accordance with Article 8;
- (d) a temporary ban against any member of the investment firm's management body or any other natural person, who is held responsible, to exercise functions in investment firms;
- (e) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of the legal person in the preceding business year; where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;
- (f) in case of a natural person, administrative pecuniary sanctions of up to 5 000 000 EUR, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of entry into force of this Directive;
- (g) administrative pecuniary sanctions of up to twice the amount of the benefit derived from the violation where that benefit can be determined.

Where the benefit derived from the violation can be determined, Member States shall ensure that the maximum level is no lower than twice the amount of that benefit.

#### *Article 76*

### **Effective application of sanctions**

1. Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, including:

- a) the gravity and the duration of the breach;
- b) the degree of responsibility of the responsible natural or legal person;
- c) the financial strength of the responsible natural or legal person, as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;
- d) the importance of profits gained or losses avoided by the responsible natural or legal person, insofar as they can be determined;
- e) the losses for third parties caused by the breach, insofar as they can be determined;
- f) the level of cooperation of the responsible natural or legal person with the competent authority;

g) previous violations by the responsible natural or legal person.

2. ESMA shall issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation No (EU) 1095/2010 on types of administrative measures and sanctions and level of administrative pecuniary sanctions.

#### *Article 77*

### **Reporting of breaches**

1. Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting of breaches of the provisions of Regulation .../... (MiFIR) and of national provisions implementing this Directive to competent authorities.

Those arrangements shall include at least:

(a) specific procedures for the receipt of reports and their follow-up;

(b) appropriate protection for employees of financial institutions who denounce breaches committed within the financial institution;

(c) protection of personal data concerning both the person who reports the breaches and the natural person who is allegedly responsible for a breach, in compliance with the principles laid down in Directive 95/46/EC.

2. Member States shall require financial institutions to have in place appropriate procedures for their employees to report breaches internally through a specific channel.

#### *Article 78*

### **Submitting information to ESMA in relation to sanctions**

1. Member States shall provide ESMA annually with aggregated information regarding all administrative measures or administrative sanctions imposed in accordance with Article 73. ESMA shall publish this information in an annual report.

2. Where the competent authority has disclosed an administrative measure or administrative sanction to the public, it shall contemporaneously report that fact to ESMA. Where a published administrative measure or administrative sanction relates to an investment firm, ESMA shall add a reference to the published sanction in the register of investment firms established under Article 5(3).

3. ESMA shall develop draft implementing technical standards concerning the procedures and forms for submitting information as referred to in this Article.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft implementing technical standards to the Commission by [XX].



*Article ~~79~~<sup>52</sup>*

**Right of appeal**

1. Member States shall ensure that any decision taken ⇒ under the provisions of Regulation (EU) No .../... (MiFIR) or ⇐ under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right ☒ of appeal before a tribunal ☒ ~~to apply to the courts~~. The right ☒ of appeal before a tribunal ☒ ~~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, ☒ also ☒ may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that ⇒ Regulation (EU) No .../... [MiFIR] and ⇐ 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 ~~80~~<sup>53</sup>*

**Extra-judicial mechanism for investors' complaints**

1. Member States shall ~~encourage~~ ⇒ ensure ⇐ 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. ⇒ Member States shall further ensure that all investment firms adhere to one or more such bodies implementing such complaint and redress procedures. ⇐

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~~ ⇒ actively cooperate with their counterparts in other Member States in the resolution of cross-border disputes. ⇐

3. The competent authorities shall notify ESMA of the complaint and redress procedures referred to in paragraph 1 which are available under its jurisdictions.

*Article ~~8154~~*

**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 ~~69(2)48(2)~~, as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. ☒ They shall not divulge any ☒ ~~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 ☒ requirements of national ☒ ~~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 ☒ requirements of national ☒ ~~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 ~~8255~~*

**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<sup>56</sup>, 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<sup>57</sup>, Article 37 of Directive 83/349/EEC or Article ~~7331~~ of Directive ~~85/611/EEC~~  2009/65/EC  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**

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↓ 2010/78/EU Art. 6.20

**COOPERATION BETWEEN THE COMPETENT AUTHORITIES OF  
THE MEMBER STATES AND WITH ESMA**

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↓ 2004/39/EC

*Article ~~8356~~*

**Obligation to cooperate**

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<sup>56</sup> OJ L 126, 12.5.1984, p. 20.

<sup>57</sup> 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).

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.

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↓ 2010/78/EU Art. 6.21(a)

In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate a single competent authority as a contact point for the purposes of this Directive. Member States shall communicate to the Commission, ESMA 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. ESMA shall publish and keep up-to-date a list of those authorities on its website.

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↓ 2004/39/EC  
⇒ new

2. When, taking into account the situation of the securities markets in the host Member State, the operations of a regulated market ⇒ an MTF, or an OTF ⇐ 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.

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.

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↓ 2010/78/EU Art. 6.21(b)

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 the competent authority of the other Member State and ESMA in as specific a manner as possible. The notified competent authority shall take appropriate action. It shall inform the notifying competent authority and ESMA of the outcome of the action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competence of the notifying competent authority.

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↓ new

5. Without prejudice to paragraphs 1 and 4, competent authorities shall notify ESMA and other competent authorities of the details of:

(a) any requests to reduce the size of a position or exposure pursuant to Article 72(1) (f);

(b) any limits on the ability of persons to enter into an instrument pursuant to Article 72(1)(g).

The notification shall include, where relevant, the details of the request pursuant to Article 72(1)(f) including the identity of the person or persons to whom it was addressed and the reasons thereof, as well as the scope of the limits introduced pursuant to Article 72(1)(g) including the person or class of persons concerned, the applicable financial instruments, any quantitative measures or thresholds such as the maximum number of contracts persons can enter into before a limit is reached, any exemptions thereto, and the reasons thereof.

The notifications shall be made not less than 24 hours before the actions or measures are intended to take effect. In exceptional circumstances, a competent authority may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours notice.

A competent authority of a Member State that receives notification under this paragraph may take measures in accordance with Article 72(1)(f) or (g) where it is satisfied that the measure is necessary to achieve the objective of the other competent authority. The competent authority shall also give notice in accordance with this paragraph where it proposes to take measures.

When an action under (a) or (b) relates to wholesale energy products, the competent authority shall also notify the Agency for the Cooperation of Energy Regulators established under Regulation (EC) No 713/2009.

6. In relation to emission allowances, competent authorities should cooperate with public bodies competent for the oversight of spot and auction markets and competent authorities, registry administrators and other public bodies charged with the supervision of compliance under Directive 2003/87/EC in order to ensure that they can acquire a consolidated overview of emission allowances markets.

↓ 2004/39/EC  
→<sub>1</sub> 2008/10/EC Art. 1.18(a)  
→<sub>2</sub> 2008/10/EC Art. 1.18(b)  
⇒ new

~~75. In order to ensure the uniform application of paragraph 2 the Commission may adopt~~ →<sub>1</sub> -  
-- ← implementing ⇒ The Commission shall be empowered to adopt delegated acts in  
accordance with Article 94 concerning ⇐ 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. →<sub>2</sub> ~~Those measures, designed to amend non-essential elements of  
this Directive by supplementing it, shall be adopted in accordance with the regulatory  
procedure with scrutiny referred to in Article 64(2).~~ ←

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↓ 2010/78/EU Art. 6.21(c)  
(adapted)  
⇒ new

~~76. In order to ensure uniform conditions of application of this Article, ESMA may~~ ⇒ shall ⇐ develop draft implementing technical standards to establish standard forms, templates and procedures for the cooperation arrangements referred to in paragraph 2.

⇐ ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC (adapted)  
→<sub>1</sub> 2010/78/EU Art. 6.22(a)

#### Article ~~8457~~

→<sub>1</sub> 1. ⇐ 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; ~~⇐~~
  - (b) allow the requesting authority to carry out the verification or investigation; ~~⇐~~
  - (c) allow auditors or experts to carry out the verification or investigation.
- 

↓ 2010/78/EU Art. 6.22(b)  
(adapted)  
⇒ new

2. With the objective of converging supervisory practices, ESMA shall be able to participate in the activities of the colleges of supervisors, including on-site verifications or investigations, carried out jointly by two or more competent authorities in accordance with Article 21 of Regulation (EU) No 1095/2010.

3. ~~In order to ensure consistent application of paragraph 1, ESMA may~~ ⇒ shall ⇐ develop draft regulatory technical standards to specify the information to be exchanged between competent authorities when cooperating in supervisory activities, on-the-spot-verifications, and investigations.

⇒ ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2016]. ⇐

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation. (EU) No 1095/2010.

~~In order to ensure uniform conditions of application of paragraph 1,~~ ⇐ 4. ⇐ ESMA ~~may~~ ⇐ shall ⇐ develop draft implementing technical standards to establish standard forms, templates and procedures for competent authorities to cooperate in supervisory activities, on-site verifications, and investigations.

⇒ ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred to in the ~~first~~<sup>third</sup> subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

↓ 2004/39/EC (adapted)

#### Article ~~8558~~

### 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 ~~83(1)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 ~~69(1)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 ~~8255~~ and ~~9263~~ to the authorities referred to in Article ~~7449~~. 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 ~~7449~~ as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles ~~8255~~ and ~~9263~~ 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 ~~7952~~; ~~oe~~
- (f) in the extra-judicial mechanism for investors' complaints provided for in Article ~~8053~~.

↓ 2010/78/EU Art. 6.23(a)  
(adapted)  
⇒ new

~~4. In order to ensure uniform conditions of application of paragraphs 1 and 2, ESMA may~~  
⇒ shall ⇐ develop draft implementing technical standards to establish standard forms, templates and procedures for the exchange of information.

⇒ ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

↓ 2010/78/EU Art. 6.23(b)

5. Neither this Article nor Articles ~~8154~~ or ~~9263~~ shall prevent a competent authority from transmitting to ESMA, the European Systemic Risk Board (hereinafter the 'ESRB'), 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.

↓ 2010/78/EU Art. 6.24 (adapted)

## Article 86

### Binding mediation

⊗ 1. ⊗ The competent authorities may refer to ESMA situations where a request relating to one of the following has been rejected or has not been acted upon within a reasonable time:



- (a) to carry out a supervisory activity, an on-the-spot verification, or an investigation, as provided for in Article ~~8457~~; ~~or~~
- (b) to exchange information as provided for in Article ~~8558~~.

2. In the situations referred to in ~~the first~~ paragraph 1, ESMA may act in accordance with Article 19 of Regulation (EU) No 1095/2010, without prejudice to the possibilities for refusing to act on a request for information foreseen in Article ~~8759a~~ and to the possibility of ESMA acting in accordance with Article 17 of Regulation (EU) No 1095/2010.

↓ 2004/39/EC

#### Article ~~8759~~

### 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 ~~8857~~ or to exchange information as provided for in Article ~~8558~~ 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;~~
- (ab) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
- (be) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

↓ 2010/78/EU Art. 6.25

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

↓ 2004/39/EC (adapted)

#### Article ~~8860~~

### ~~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 one of the following :

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

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.

↓ 2010/78/EU Art. 6.26 (adapted)  
⇒ new

4. ~~In order to ensure uniform conditions of application of paragraphs 1 and 2, ESMA may~~ ⇒ shall ⇐ develop draft implementing technical standards to establish standard forms, templates and procedures for the consultation of other competent authorities prior to granting an authorisation.

⇒ ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2016]. ⇐

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

↓ 2004/39/EC  
⇒ new

*Article ~~896~~*

### **Powers for host Member States**

1. Host Member States  $\Rightarrow$  shall provide that the competent authority  $\Leftarrow$  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  $\Rightarrow$  shall provide that the competent authority  $\Leftarrow$  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 ~~37(8)~~~~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 ~~9062~~*

**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.

$\Downarrow$  2010/78/EU Art. 6.27(a)

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 following shall apply:

- (a) after informing the competent authority of the home Member State, the competent authority of the host Member State shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets, which shall include the possibility of preventing offending investment firms from initiating any further transactions within their territories. The Commission and ESMA shall be informed of such measures without delay;
- (b) in addition, the competent authority of the host Member State may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

$\Downarrow$  2004/39/EC

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.

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↓ 2010/78/EU Art. 6.27(b)  
(adapted)

~~Where~~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 ~~following shall apply~~.  competent authority of the host Member State shall,  ~~(a)~~ after informing the competent authority of the home Member State, ~~the competent authority of the host Member State shall~~ take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. The Commission and ESMA shall be informed of such measures without delay.<sup>5</sup>

~~In (b) in~~ addition, the competent authority of the host Member State may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC  
⇒ new

3. Where the competent authority of the host Member State of a regulated market, ~~or~~ an MTF  or OTF  has clear and demonstrable grounds for believing that such regulated market, ~~or~~ MTF  or OTF  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  or OTF .

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↓ 2010/78/EU Art. 6.27(c)  
(adapted)

~~Where~~If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, that 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 following shall apply~~.  the competent authority of the host Member State shall,  ~~(a)~~ after informing the competent authority of the home Member State, ~~the competent authority of the host Member State shall~~ take all the appropriate measures needed in order to protect investors and the proper functioning of the markets, which shall include the possibility of preventing that regulated market or the MTF from making their arrangements available to remote members or participants established in the host Member State. The Commission and ESMA shall be informed of such measures without delay.<sup>5</sup>

~~In (b) in~~ addition, the competent authority of the host Member State may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC

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.

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↓ 2010/78/EU Art. 6.28

Article ~~916~~<sup>2a</sup>

### Cooperation and exchange of information with ESMA

1. The competent authorities shall cooperate with ESMA for the purposes of this Directive, in accordance with Regulation (EU) No 1095/2010.

2. The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties under this Directive and in accordance with Article 35 of Regulation (EU) No 1095/2010.

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↓ 2004/39/EC

## CHAPTER III

### COOPERATION WITH THIRD COUNTRIES

Article ~~926~~<sup>3</sup>

#### Exchange of information with third countries

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↓ 2010/78/EU Art. 6.29 (adapted)  
⇒ new

1. Member States and in accordance with Article 33 of Regulation (EU) No 1095/2010, ESMA ~~may~~, ~~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 ~~81~~<sup>54</sup>. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

~~Member States and ESMA may transfer~~ ⇒ Transfer ⇐ personal data to a third country ⇒ by a Member State shall be ⇐ in accordance with Chapter IV of Directive 95/46/EC.

⇒ Transfers of personal data to a thrid country by ESMA shall be in accordance with Article 9 of Regulation (EU) No 45/2001. ⇐

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

- (a) the supervision of credit institutions, other financial institutions, insurance undertakings and the supervision of financial markets;
- (b) the liquidation and bankruptcy of investment firms and other similar procedures;
- (c) the carrying out of 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;
- (d) oversight of the bodies involved in the liquidation and bankruptcy of investment firms and other similar procedures;
- (e) oversight of persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions;
- (f) oversight of persons active on emission allowances markets for the purpose of ensuring a consolidated overview of financial and spot markets.

The cooperation agreements referred to in the third subparagraph may be concluded only where the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article ~~81~~<sup>54</sup>. Such exchange of information shall be intended for the performance of the tasks of those authorities or bodies or natural or legal persons. ⇒ Where a cooperation agreement involves the transfer of personal data by a Member State, it shall comply with Chapter IV of Directive 95/46/EC and with Regulation (EC) N° 45/2001 in the case ESMA is involved in the transfer. ⇐

↓ 2004/39/EC

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

## TITLE ~~VII~~VII

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↓ new

### CHAPTER 1

#### DELEGATED ACTS

##### *Article 93*

##### **Delegated acts**

The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning Articles 2(3), 4(1), 4(2), 13(1), 16(12), 17(6), 23(3), 24(8), 25(6), 27(7), 28(3), 30(5), 32(3), 35(8), 44(4), 51(7), 52(6), 53(4), 59(3), 60(5), 66(6), 66(7), 67(3), 67(7), 67(8), 68(5), 83(7) and 99(2).

##### *Article 94*

##### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 93 shall be conferred for an indeterminate period of time from the date of entry into force of this Directive.
3. The delegation of powers referred to in Article 93 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 93 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

## CHAPTER 2

### IMPLEMENTING ACTS

#### Article 95

#### Committee procedure

1. For the adoption of implementing acts under Article 41 and 60, the Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>58</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011<sup>59</sup>.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply, having regard to the provisions of Article 8 thereof.

## CHAPTER 3

↓ 2004/39/EC

### FINAL PROVISIONS

#### Article 64

#### Committee procedure

~~1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>60</sup> (hereinafter referred to as ‘the Committee’).~~

↓ 2008/10/EC Art. 1.20(a)

~~2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.~~

↓ 2006/31/EC Art. 1.2(a)

~~2a. None of the implementing measures enacted may change the essential provisions of this Directive.~~

<sup>58</sup> OJ L 191, 13.7.2001, p.45.

<sup>59</sup> OJ L 55, 28.2.2011, p.13.

<sup>60</sup> OJ L 191, 13.7.2001, p. 45.



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↓ 2008/10/EC Art. 1.20(b)

~~3. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.~~

~~The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.~~

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↓ 2008/10/EC Art. 1.20(c)

~~4. By 31 December 2010, and, thereafter, at least every three years, the Commission shall review the provisions concerning its implementing powers and present a report to the European Parliament and to the Council on the functioning of those powers. The report shall examine, in particular, the need for the Commission to propose amendments to this Directive in order to ensure the appropriate scope of the implementing powers conferred on the Commission. The conclusion as to whether or not amendment is necessary shall be accompanied by a detailed statement of reasons. If necessary, the report shall be accompanied by a legislative proposal to amend the provisions conferring implementing powers on the Commission.~~

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↓ 2010/78/EU Art. 6.30

~~Article 64a~~

~~Sunset clause~~

~~By 1 December 2011 the Commission shall review Articles 2, 4, 10b, 13, 15, 18, 19, 21, 22, 24 and 25, Articles 27 to 30, and Articles 40, 44, 45, 56 and 58 and present any appropriate legislative proposal in order to allow the full application of the delegated acts under Article 290 TFEU and implementing acts under Article 291 TFEU in respect of this Directive. Without prejudice to implementing measures already adopted, the powers conferred on the Commission in Article 64 to adopt implementing measures that remain after the entry into force of the Lisbon Treaty on 1 December 2009 shall cease to apply on 1 December 2012.~~

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↓ 2006/31/EC Art. 1.3

~~Article 9665~~

~~Reports and review~~

~~1. By 31 October 2007, the Commission shall, on the basis of public consultation and in the light of discussions with competent authorities, report to the European Parliament and to the Council on the possible extension of the scope of the provisions of this Directive concerning pre and post-trade transparency obligations to transactions in classes of financial instruments other than shares.~~

~~2. By 31 October 2008, the Commission shall present the European Parliament and the Council with a report on the application of Article 27.~~

~~3. By 30 April 2008, the Commission shall, on the basis of public consultations and in the light of discussions with competent authorities, report to the European Parliament and to the Council on:~~

~~(a) the continued appropriateness of the exemption provided for in Article 2(1)(k) for undertakings whose main business is dealing on own account in commodity derivatives;~~

~~(b) the content and form of proportionate requirements for the authorisation and supervision of such undertakings as investment firms within the meaning of this Directive;~~

~~(c) the appropriateness of rules concerning the appointment of tied agents in performing investment services and/or activities, in particular with respect to the supervision of them;~~

~~(d) the continued appropriateness of the exemption provided for in Article 2(1)(i).~~

~~4. By 30 April 2008, the Commission shall present the European Parliament and the Council with a report on the state of the removal of the obstacles which may prevent the consolidation at European level of the information that trading venues are required to publish.~~

~~5. On the basis of the reports referred to in paragraphs 1 to 4, the Commission may submit proposals for related amendments to this Directive.~~

~~6. By 31 October 2006, the Commission shall, in the light of discussions with competent authorities, report to the European Parliament and to the Council on the continued appropriateness of the requirements for professional indemnity insurance imposed on intermediaries under Community law.~~

↓ new

1. Before [2 years following application of MiFID as specified in Article 97] the Commission after consulting ESMA shall present a report to the European Parliament and the Council on:

(a) the functioning of organised trading facilities, taking into account supervisory experiences acquired by competent authorities, the number of OTFs authorised in the EU and their market share;

(b) the functioning of the regime for SME growth markets, taking into account the number of MTFs registered as SME growth markets, numbers of issuers present on these, and relevant trading volumes;

(c) the impact of requirements regarding automated and high-frequency trading;

(d) the experience with the mechanism for banning certain products or practices, taking into account the number of times the mechanisms have been triggered and their effects;

(e) the impact of the application or limits or alternative arrangements on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets;

(f) the functioning of the consolidated tape established in accordance with Title V, in particular the availability of post-trade information of a high quality in a consolidated

format capturing the entire market in accordance with user-friendly standards at a reasonable cost. In order to ensure the quality and the accessibility of consolidated post-trade information, the Commission shall submit its report accompanied, if appropriate, by a legislative proposal for the establishment of a single entity operating a consolidated tape

↓ 2004/39/EC  
→<sub>1</sub> Corrigendum, OJ L 045,  
16.2.2005, p. 18

#### ~~Article 66~~

#### ~~Amendment of Directive 85/611/EEC~~

~~In Article 5 of Directive 85/611/EEC, paragraph 4 shall be replaced by the following:~~

~~‘4. Articles 2(2), 12, 13 and 19 of →<sub>1</sub> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ←<sup>61</sup>, shall apply to the provision of the services referred to in paragraph 3 of this Article by management companies’».~~

#### ~~Article 67~~

#### ~~Amendment of Directive 93/6/EEC~~

~~Directive 93/6/EEC shall be amended as follows:~~

~~1) Article 2(2) shall be replaced by the following:~~

~~‘2. Investment firms shall mean all institutions that satisfy the definition in Article 4(1) of →<sub>1</sub> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ←<sup>62</sup>, which are subject to the requirements imposed by the same Directive, excluding:~~

~~(a) credit institutions;~~

~~(b) local firms as defined in 20, and~~

~~(c) firms which are only authorised to provide the service of investment advice and/or receive and transmit orders from investors without in both cases holding money or securities belonging to their clients and which for that reason may not at any time place themselves in debit with their clients.’»~~

~~2) Article 3(4) shall be replaced by the following:~~

<sup>61</sup> →<sub>1</sub> OJ L 145, 30.4.2004, p. 1. ←

<sup>62</sup> →<sub>1</sub> OJ L 145, 30.4.2004, p. 1. ←

~~‘4. The firms referred to in point (b) of Article 2(2) shall have initial capital of EUR 50000 in so far as they benefit from the freedom of establishment or to provide services under Articles 31 or 32 of Directive 2004/39/EC.’»;~~

~~3) In Article 3 the following paragraphs shall be inserted:~~

~~‘(4a) Pending revision of Directive 93/6/EC, the firms referred to in point (c) of Article 2(2) shall have:~~

~~(a) initial capital of EUR 50000; or~~

~~(b) professional indemnity insurance covering the whole territory of the Community or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 1000000 applying to each claim and in aggregate EUR 1500000 per year for all claims; or~~

~~(c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b).~~

~~The amounts referred to in this paragraph shall be periodically reviewed by the Commission in order to take account of changes in the European Index of Consumer Prices as published by Eurostat, in line with and at the same time as the adjustments made under Article 4(7) of Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation<sup>62</sup>.~~

~~(4b) When an investment firm referred to in Article 2(2)(c), is also registered under Directive 2002/92/EC it has to comply with the requirement established by Article 4(3), of that Directive and in addition it has to have:~~

~~(a) initial capital of EUR 25000; or~~

~~(b) professional indemnity insurance covering the whole territory of the Community or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 500000 applying to each claim and in aggregate EUR 750000 per year for all claims; or~~

~~(c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b).’»~~

#### *Article 68*

#### **Amendment of Directive 2000/12/EC**

~~Annex I of Directive 2000/12/EC shall be amended as follows:~~

~~At the end of the Annex I the following sentence is added:~~

~~‘The services and activities provided for in Section A and B of Annex I of →<sub>1</sub> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in~~

<sup>63</sup> OJ L 9, 15.1.2003, p. 3.

financial instruments ←<sup>64</sup> when referring to the financial instruments provided for in Section C of Annex I of that Directive are subject to mutual recognition according to this Directive.»

↓ 2006/31/EC Art. 1.4

~~Article 69~~

### **~~Repeal of Directive 93/22/EEC~~**

~~Directive 93/22/EEC shall be repealed with effect from 1 November 2007. References to Directive 93/22/EEC shall be construed as references to this Directive. References to terms defined in, or Articles of, Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive.~~

↓ 2004/39/EC

~~Article 97~~<sup>70</sup>

### **Transposition**

↓ new

1. Member States shall adopt and publish, by [...] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directives repealed by this directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

Members States shall apply these measures from [...] except for the provisions transposing Article 67(2) which shall apply from [2 years after the application date for the rest of the Directive].

2. Member States shall communicate to the Commission and ESMA the text of the main provisions of national law which they adopt in the field covered by this Directive.

↓ 2006/31/EC Art. 1.5

~~Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 31 January 2007. They shall forthwith inform the Commission thereof.~~

<sup>64</sup> →<sub>1</sub> OJ L 145, 30.4.2004, p. 1. ←

~~They shall apply these measures from 1 November 2007.~~

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↓ 2004/39/EC

~~When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.~~

#### ~~Article 71~~

#### ~~Transitional provisions~~

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↓ 2006/31/EC Art. 1.6

~~1. Investment firms already authorised in their home Member State to provide investment services before 1 November 2007 shall be deemed to be so authorised for the purposes of this Directive if the laws of that Member State provide that to take up such activities they must comply with conditions comparable to those provided for in Articles 9 to 14.~~

~~2. A regulated market or a market operator already authorised in its home Member State before 1 November 2007 shall be deemed to be so authorised for the purposes of this Directive if the laws of that Member State provide that the regulated market or market operator, as the case may be, must comply with conditions comparable to those provided for in Title III.~~

~~3. Tied agents already entered in a public register before 1 November 2007 shall be deemed to be so registered for the purposes of this Directive if the laws of Member States concerned provide that tied agents must comply with conditions comparable to those provided for in Article 23.~~

~~4. Information communicated before 1 November 2007 for the purposes of Articles 17, 18 or 30 of Directive 93/22/EEC shall be deemed to have been communicated for the purposes of Articles 31 and 32 of this Directive.~~

~~5. Any existing system falling under the definition of an MTF operated by a market operator of a regulated market shall, at the request of the market operator of the regulated market, be authorised as an MTF, provided that it complies with rules equivalent to those required by this Directive for the authorisation and operation of MTFs and that the request concerned is made within eighteen months following 1 November 2007.~~

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↓ 2004/39/EC

~~6. Investment firms shall be authorised to continue considering existing professional clients as such provided that this categorisation has been granted by the investment firm on the basis of an adequate assessment of the expertise, experience and knowledge of the client which gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understands the risks involved. Those investment firms shall inform their clients about the conditions established in the Directive for the categorisation of clients.~~

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↓ new

*Article 98*

**Repeal**

Directive 2004/39/EC together with its successive amendments are repealed with effect from [...]. References to the Directive 2004/39/EC or to Directive 93/22/EEC shall be construed as references to this Directive. References to terms defined in, or Articles of, Directive 2004/39/EC or Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive.

*Article 99*

**Transitional provisions**

1. Existing third country firms shall be able to continue to provide services and activities in Member States, in accordance with national regimes until [4 years after the entry into force of this directive].

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to extend the period of application of paragraph 1, taking into account the equivalence decisions already adopted by the Commission in accordance with Article 41 (3) and expected developments in the regulatory and supervisory framework of third countries.

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↓ 2004/39/EC (adapted)

*Article ~~100~~<sup>72</sup>*

**Entry into force**

This Directive shall enter into force on the ~~day of~~ ☒ twentieth day following that of ☒ its publication in the *Official Journal of the European Union*.

*Article ~~101~~<sup>73</sup>*

**Addressees**

This Directive is addressed to the Member States.

## ANNEX I

### LIST OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS

#### SECTION A

##### Investment services and activities

- (1) Reception and transmission of orders in relation to one or more financial instruments;☒
  - (2) Execution of orders on behalf of clients;☒
  - (3) Dealing on own account;☒
  - (4) Portfolio management;☒
  - (5) Investment advice;☒
  - (6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;☒
  - (7) Placing of financial instruments without a firm commitment basis;☒
  - (8) Operation of Multilateral Trading Facilities;☒
- 

↓ new

(9) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;☒

(10) Operation of Organised Trading Facilities.☒

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↓ 2004/39/EC (adapted)

⇒ new

#### SECTION B

##### Ancillary services

~~(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;☒~~

~~(1)~~(2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;

~~(2)~~(3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;



~~(3)~~(4) Foreign exchange services where these are connected to the provision of investment services;

~~(4)~~(5) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;

~~(5)~~(6) Services related to underwriting.

~~(6)~~(7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under Section C – 5, 6, 7 and 10 - where these are connected to the provision of investment or ancillary services.

## SECTION C

### Financial Instruments

(1) Transferable securities;

(2) Money-market instruments;

(3) Units in collective investment undertakings;

(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, ⇒ emission allowances ⇐ or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market ⇒, OTF, ⇐ and/or an MTF;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences.

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, ~~emission allowances~~ or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures

not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market ⇨, OTF, ⇐ or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

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⇩ new

(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme)

## **SECTION D**

### List of Data Reporting Services

- (1) Operating an approved publication arrangement;
  - (2) Operating a consolidated tape provider;
  - (3) Operating an approved reporting mechanism.
- 

⇩ 2004/39/EC (adapted)  
⇨ new

## ANNEX II

### **PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS DIRECTIVE**

Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered a professional client, the client must comply with the following criteria:

#### **I. CATEGORIES OF CLIENT WHO ARE CONSIDERED TO BE PROFESSIONALS**

The following should all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the Directive.

- (1) Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a non-Member State:
  - (a) Credit institutions;
  - (b) Investment firms;
  - (c) Other authorised or regulated financial institutions;
  - (d) Insurance companies;
  - (e) Collective investment schemes and management companies of such schemes;
  - (f) Pension funds and management companies of such funds;
  - (g) Commodity and commodity derivatives dealers;
  - (h) Locals;
  - (i) Other institutional investors;
- (2) Large undertakings meeting two of the following size requirements on a company basis:

— balance sheet total:	EUR 20000000
— net turnover:	EUR 40000000
— own funds:	EUR 2000000

- (3) National and regional governments,  including  public bodies that manage public debt  at national or regional level  , Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.
- (4) Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

The entities mentioned above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is an undertaking referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the firm, the client is deemed to be a professional client, and will be treated as such unless the firm and the client agree otherwise. The firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.

It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.

This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such agreement should specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.

## **II. CLIENTS WHO MAY BE TREATED AS PROFESSIONALS ON REQUEST**

### **II.1. Identification criteria**

Clients other than those mentioned in section I, including public sector bodies  local public authorities, municipalities  and private individual investors, may also be allowed to waive some of the protections afforded by the conduct of business rules.

Investment firms should therefore be allowed to treat any of the above clients as professionals provided the relevant criteria and procedure mentioned below are fulfilled. These clients should not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in Section I.

Any such waiver of the protection afforded by the standard conduct of business regime shall be considered valid only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved.

The fitness test applied to managers and directors of entities licensed under Directives in the financial field could be regarded as an example of the assessment of expertise and knowledge. In the case of small entities, the person subject to the above assessment should be the person authorised to carry out transactions on behalf of the entity.

In the course of the above assessment, as a minimum, two of the following criteria should be satisfied:

- the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters,
- the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500000,
- the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

⇒ Member States may adopt specific criteria for the assessment of the expertise and knowledge of municipalities and local public authorities requesting to be treated as professional clients. These criteria can be alternative or additional to the ones listed in the previous paragraph. ⇐

## **II.2. Procedure**

The clients defined above may waive the benefit of the detailed rules of conduct only where the following procedure is followed:

- they must state in writing to the investment firm that they wish to be treated as a professional client, either generally or in respect of a particular investment service or transaction, or type of transaction or product,
- the investment firm must give them a clear written warning of the protections and investor compensation rights they may lose,
- they must state in writing, in a separate document from the contract, that they are aware of the consequences of losing such protections.

Before deciding to accept any request for waiver, investment firms must be required to take all reasonable steps to ensure that the client requesting to be treated as a professional client meets the relevant requirements stated in Section II.1 above.

However, if clients have already been categorised as professionals under parameters and procedures similar to those above, it is not intended that their relationships with investment firms should be affected by any new rules adopted pursuant to this Annex.

Firms must implement appropriate written internal policies and procedures to categorise clients. Professional clients are responsible for keeping the firm informed about any change, which could affect their current categorisation. Should the investment firm become aware however that the client no longer fulfils the initial conditions, which made him eligible for a professional treatment, the investment firm must take appropriate action.

## **LEGISLATIVE FINANCIAL STATEMENT**

to be used for any proposal or initiative submitted to the legislative authority

(Articles 28 of the Financial Regulation and 22 of the implementing rules)

### **1. FRAMEWORK OF THE PROPOSAL/INITIATIVE**

- 1.1. Title of the proposal/initiative
- 1.2. Policy area(s) concerned in the ABM/ABB structure
- 1.3. Nature of the proposal/initiative
- 1.4. Objective(s)
- 1.5. Grounds for the proposal/initiative
- 1.6. Duration and financial impact
- 1.7. Management method(s) envisaged

### **2. MANAGEMENT MEASURES**

- 2.1. Monitoring and reporting rules
- 2.2. Management and control system
- 2.3. Measures to prevent fraud and irregularities

### **3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE**

- 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected
- 3.2. Estimated impact on expenditure
  - 3.2.1. Summary of estimated impact on expenditure
  - 3.2.2. Estimated impact on operational appropriations
  - 3.2.3. Estimated impact on appropriations of an administrative nature
  - 3.2.4. Compatibility with the current multiannual financial framework
  - 3.2.5. Third-party participation in financing
- 3.3. Estimated impact on revenue

## LEGISLATIVE FINANCIAL STATEMENT FOR PROPOSALS

### 1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

#### 1.1. Title of the proposal/initiative

Directive of the European Parliament and of the Council amending Directive 2004/39/EC on the Markets in Financial Instruments Directive (MiFID)

Regulation of the European Parliament and of the Council on the Markets in Financial Instruments

#### 1.2. Policy area(s) concerned in the ABM/ABB structure<sup>65</sup>

Internal Market – Financial markets

#### 1.3. Nature of the proposal/initiative

The proposal/initiative relates to **a new action**

The proposal/initiative relates to **a new action following a pilot project/preparatory action**<sup>66</sup>

The proposal/initiative relates to **the extension of an existing action**

The proposal/initiative relates to **an action redirected towards a new action**

#### 1.4. Objectives

##### 1.4.1 *The Commission's multiannual strategic objective(s) targeted by the proposal/initiative*

Strengthen investor confidence; reduce the risks of market disorder; reduce systemic risks; and increase efficiency of financial markets and reduce unnecessary costs for participants.

##### 1.4.2 *Specific objective(s) and ABM/ABB activity(ies) concerned*

Specific objective No..

In the light of the general objectives above, the following specific objectives are relevant:

- Ensure a level playing field between market participants;

- Increase market transparency for market participants;

<sup>65</sup> ABM: Activity-Based Management – ABB: Activity-Based Budgeting.

<sup>66</sup> As referred to in Article 49(6)(a) or (b) of the Financial Regulation.

- Reinforce transparency towards and powers of regulators in key areas and increase coordination at European level;
- Raise investor protection
- Address organisational deficiencies and excessive risk taking or lack of control by investment firms and other market participants

ABM/ABB activity(ies) concerned

#### 1.4.3. *Expected result(s) and impact*

*Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.*

The proposal aims at:

- regulating appropriately all market and trading structures taking into account the needs of smaller participants, especially SMEs
- setting up relevant framework around new trading practices
- improving trade transparency for market participants on equities and increase it for non equities market
- reinforcing transparency towards and powers of regulators
- improving consistency in the implementation of rules and coordination in supervision by national regulators
- improving transparency and oversight of commodities derivatives markets
- reinforcing regulation on products, services and services providers when needed
- strengthening the rules of business conducts of investment firms
- making organizational requirements for investment firms more strict

#### 1.4.4. *Indicators of results and impact*

*Specify the indicators for monitoring implementation of the proposal/initiative.*

- A report assessing the impact on the market of the new Organised Trading Facilities and the supervisory experiences acquired by regulators; impact indicators should be the number of Organised Trading Facilities licensed in the EU; the trading volume generated by them per financial instrument as opposed to other venues and particular over the counter trading;
- a report on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms; impact indicators should be the number of facilities engaging in OTC derivatives trading; and the trading volume of exchanges and platforms in OTC derivatives as opposed to volume remaining over the counter;



- a report on the functioning in practice of the tailor-made regime for SME markets; impact indicators should be the number of MTFs which have registered as SME growth market, the number of issuers choosing to have their financial instruments traded on the new designated SME growth market; and the change in trading volume in SME issuers following implementation of the MiFID Review;
- a report on the impact in practice of the newly introduced requirements regarding automated and high-frequency trading; impact indicators should be the number of high-frequency firms newly authorised; and the number of cases of disorderly trading (if any) perceived to be related to high-frequency trading;
- a report on the impact in practice of the newly designed transparency rules in equities trading; impact indicators should be the percentage of trading volume being executed following pre-trade transparent rules as opposed to dark orders; and the development in trading volume and transparency levels in equity like instruments other than shares;
- a report on the impact in practice of the newly designed transparency rules in bonds, structured products and derivatives trading; impact indicators for these two reports should be the size of spreads designated market-makers offer following implementation of the new transparency rules; and associated with that the development in costs of trading for instruments of various liquidity levels across the different asset classes;
- a report on the functioning of the consolidated tape in practice; impact indicators should be the number of providers offering the service of a consolidated tape; and the percentage of trading volume they cover and the reasonableness of the prices they charge;
- a report on the experience with the mechanism for banning certain products or practices; impact indicators should be the number of times the banning mechanisms have been utilised; and the effectiveness of such bans in practice;
- a report on the impact of the proposed measures in the commodity derivatives markets; impact indicator should be the change in price volatility on commodity derivatives markets following implementation of the MiFID Review;
- a report on the experience with the third country regime and a stock-taking of number and type of third country participants granted access; impact indicators should be the uptake of third country firms of the new regime; and the supervisory experiences in practice with such firms; and
- a report on experiences regarding the measures designed to strengthen investor protection; impact indicators should be the development of retail participation in trading of financial instruments following implementation of the MiFID Review; and the number and severity of cases where investors, in general, and retail investor, in particular, have suffered losses.

## 1.5. Grounds for the proposal/initiative

### 1.5.1. Requirement(s) to be met in the short or long term

Short term, as a result of the implementation of the directive/regulation in Member States:

- All market and trading structures taking into account the needs of smaller participants, especially SMEs, would be properly regulated
- New trading practices such as high frequency trading would be properly regulated
- Improved trade transparency for market participants on equities and increased transparency for non equities market
- Reinforced transparency towards and powers of regulators
- Improved consistency in the implementation of rules and coordination in supervision by national regulators
- Improved transparency and oversight of commodities derivatives markets
- Reinforced regulation on products, services and services providers when needed
- Strengthened conduct of business rules of investment firms
- Strengthened organizational requirements of investment firms

### 1.5.2. Added value of EU involvement

Most of the issues covered by the revision are already covered by the acquis and MiFID today. Further, financial markets are inherently cross-border in nature and are becoming more so. International markets require international rules to the furthest extent possible. The conditions according to which firms and operators can compete in this context, whether it concerns rules on pre and post-trade transparency, investor protection or the assessment and control of risks by market participants need to be common across borders and are all at the core of MiFID today. Action is now required at European level in order to update and modify the regulatory framework laid out by MiFID in order to take into account developments in financial markets since its implementation.

### 1.5.3. Lessons learned from similar experiences in the past

The Markets in Financial Instruments Directive (MiFID), applied since November 2007, is a core pillar in EU financial market integration. The result after 3.5 years in force is more competition between venues in the trading of financial instruments, and more choice for investors in terms of service providers and available financial instruments, progress which has been compounded by technological advances.

However, some problems have surfaced. First, the more competitive landscape has given rise to new challenges. The benefits from this increased competition have not flowed equally to all market participants and have not always been passed on to the end investors, retail or

wholesale. The market fragmentation implied by competition has also made the trading environment more complex, especially in terms of collection of trade data. Second, market and technological developments have outpaced various provisions in MiFID. The common interest in a transparent level playing-field between trading venues and investment firms risks being undermined. Third, the financial crisis has exposed weaknesses in the regulation of instruments other than shares, traded mostly between professional investors. Previously held assumptions that minimal transparency, oversight and investor protection in relation to this trading is more conducive to market efficiency no longer hold. Eventually, rapid innovation and growing complexity in financial instruments underline the importance of up-to-date, high levels of investor protection. While largely vindicated amid the experience of the financial crisis, the comprehensive rules of MiFID nonetheless exhibit the need for targeted but ambitious improvements.

#### 1.5.4. *Coherence and possible synergy with other relevant instruments*

The identified objectives are coherent with the EU's fundamental goals of promoting a harmonised and sustainable development of economic activities, a high degree of competitiveness, and a high level of consumer protection, which includes safety and economic interests of citizens (Article 169 TFEU).

These objectives are also consistent with the reform programme proposed by the European Commission in its Communication Driving European Recovery. More recently in the Commission Communication of 2 June 2010 on "Regulating Financial Services for Sustainable Growth" the Commission indicated that it would propose appropriate revision of the MiFID.

In addition, other legislative proposals already or shortly to be, adopted by the Commission complement the revision of MiFID in terms of increasing market transparency and integrity as well as containing market disorder and reinforce investor protection. The proposal for a Regulation on short selling and certain aspects of Credit Default Swaps includes a short selling disclosure regime which would make it easier for regulators to detect possible cases of market manipulation. The proposal for a regulation on derivatives, central counterparties and trade repositories will also increase transparency of significant positions in derivatives for regulators as well as reducing systemic risks for market participants. The revision of the MAD that should be presented together with the review of MiFID will aim at enlarging the scope and increasing the efficiency of the directive and contribute to better and sounder financial markets. The issues of transparency requirements specific to physical energy markets, as well as transaction reporting to ensure the integrity of energy markets, are the subject of the Commission proposal for a Regulation on energy market integrity and transparency .

#### 1.6. **Duration and financial impact**

Proposal/initiative of **limited duration**

1.  Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

2.  Financial impact from YYYY to YYYY

Proposal/initiative of **unlimited duration**

## 1.7. Management mode(s) envisaged<sup>67</sup>

- Centralised direct management** by the Commission
- Centralised indirect management** with the delegation of implementation tasks to:
3.  executive agencies
  4.  bodies set up by the Communities<sup>68</sup>
  5.  national public-sector bodies/bodies with public-service mission
  6.  persons entrusted with the implementation of specific actions pursuant to Title V of the Treaty on European Union and identified in the relevant basic act within the meaning of Article 49 of the Financial Regulation
- Shared management** with the Member States
- Decentralised management** with third countries
- Joint management** with international organisations (*to be specified*)

*If more than one management mode is indicated, please provide details in the "Comments" section.*

Comments

## 2. MANAGEMENT MEASURES

### 2.1. Monitoring and reporting rules

*Specify frequency and conditions.*

Article 81 of the draft Regulation establishing the European Securities and Markets Authority provides for evaluation of the experience acquired as a result of the operation of the Authority within three years from the effective start of its operation. To this end, the Commission shall publish a general report that shall be forwarded to the European Parliament and to the Council.

### 2.2. Management and control system

#### 2.2.1. Risk(s) identified

An impact assessment has been carried out for the proposal to reform the financial supervision system in the EU to accompany the draft Regulations establishing the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities Markets Authority.

<sup>67</sup> Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: [http://www.cc.cec/budg/man/budgmanag/budgmanag\\_en.html](http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html)

<sup>68</sup> As referred to in Article 185 of the Financial Regulation.

The additional resource to ESMA foreseen as a result of the current proposal is needed in order to allow ESMA to carry out its competences and notably its role in:

- Ensuring harmonisation and coordination of rules applying to the trading venues, and increasing the transparency of the derivatives markets by specifying which classes of derivative should be traded on organised trading venues.
- Ensuring a harmonised and improved level of transparency in both the equities and non-equities markets by ensuring compatibility and consistency of the exemptions to the pre trade transparency requirements and by specifying standards for data reporting in order to increase data quality and facilitate data consolidation.
- Reinforcing and ensuring consistent application of national regulatory powers by: Ensuring coordination of national powers relating to product bans and position management in derivatives markets. In addition ESMA would have direct powers in these fields to address threats to investor protection and/or orderly markets in emergency situations; Ensuring minimum harmonisation of administrative sanctions at EU level by issuing guidance; Ensuring coordination and harmonisation of conditions of access granted to third country firms.
- Ensuring harmonisation and coordination of rules relating to the disclosure of positions by categories of traders in the commodity derivatives markets which will improve the oversight and transparency of these markets.
- Ensuring harmonisation and coordination of rules specifying the data relating to trading execution which would have to be disclosed by trading venues in order to facilitate the best execution duties of investment firms.
- Reinforcing the corporate governance framework by specifying the tasks of the nomination committee in charge of the nomination of the members of the management body as well as drafting guidance on how to assess the suitability of the management body's members.

The lack of this resource could not ensure a timely and efficient fulfilment of the role of the Authority.

#### 2.2.2. *Control method(s) envisaged*

Management and control systems as provided for in the ESMA Regulation will apply also with regard to the role of ESMA according to the present proposal.

The final set of indicators to assess the performance of the European Securities and Markets Authority will be decided by the Commission at the time of conducting the first required evaluation. For the final assessment, the quantitative indicators will be as important as the qualitative evidence gathered in the consultations. The evaluation shall be repeated every three years.

#### 2.3. **Measures to prevent fraud and irregularities**

*Specify existing or envisaged prevention and protection measures.*

For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) shall apply to the ESMA without any restriction.

The Authority shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) and shall immediately adopt appropriate provisions for all staff of the Authority.

The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Authority as well as on the staff responsible for allocating these monies.

### 3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

#### 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing expenditure budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Description.....]	Diff./non-diff ( <sup>69</sup> )	from EFTA <sup>70</sup> countries	from candidate countries <sup>71</sup>	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
	[12.040401.01]  ESMA – Subsidy under Titles 1 and 2 (Staff and administrative expenditure	Diff.	YES	NO	NO	NO

- New budget lines requested

In order of multiannual financial framework headings and budget lines.

<sup>69</sup> Diff. = Differentiated appropriations / Non-Diff. = Non-differentiated appropriations

<sup>70</sup> EFTA: European Free Trade Association.

<sup>71</sup> Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

### 3.2. Estimated impact on expenditure

#### 3.2.1. Summary of estimated impact on expenditure

EUR million (to 3 decimal places)

<b>Heading of multiannual financial framework:</b>	1A	Competitiveness for Growth and Employment
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DG: <MARKT>			Year 2013 <sup>72</sup>	Year 2014	Year 2015	... enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
• Operational appropriations									
12.0404.01	Commitments	(1)	0.394	0.675	0.675				<b>1.744</b>
	Payments	(2)	0.394	0.675	0.675				<b>1.744</b>
Number of budget line	Commitments	(1a)							
	Payments	(2a)							
Appropriations of an administrative nature financed from the envelope for specific programmes <sup>73</sup>									
Number of budget line		(3)	0	0	0				
<b>TOTAL appropriations for DG &lt;MARKT&gt;</b>	Commitments	=1+1a+3	0.394	0.675	0.675				<b>1.744</b>
	Payments	=2+2a+3	0.394	0.675	0.675				<b>1.744</b>

<sup>72</sup> Year N is the year in which implementation of the proposal/initiative starts.

<sup>73</sup> Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former "BA" lines), indirect research, direct research.

• TOTAL operational appropriations	Commitments	(4)	0	0	0					
	Payments	(5)	0	0	0					
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)	0	0	0					
<b>TOTAL appropriations under HEADING &lt;1A&gt;</b> of the multiannual financial framework	Commitments	=4+ 6	0.394	0.675	0.675					<b>1.744</b>
	Payments	=5+ 6	0.394	0.675	0.675					<b>1.744</b>

Comments:

1) Tasks in relation to all market and trading structures

Trading venues

ESMA will have to draft a certain 4 binding technical standards (BTS) regarding the notification process of trading venues to competent authorities, the publication and the circumstances under which trading of financial instruments have to be suspended, as well as the cooperation and exchange of information between trading venues.

Trading of derivatives

ESMA will have to draft 2 BTS stating which classes of derivatives or a subset thereof should only be traded on organised trading venues as well as specifying the criteria to determine whether a class of derivative or a subset thereof is deemed to be sufficiently liquid to be traded on organised trading venues.

2) Trade transparency in equities and non equities market

Equities markets

ESMA will be required to publish an opinion assessing the compatibility of each pre-trade transparency waiver with the pre-trade transparency requirements for Regulated Markets, MTFs and OTFs and shall submit an annual report to the Commission on how they are used in practice.

ESMA will be required to monitor the application of the arrangements for deferred post-trade publication by trading venues and shall submit an annual report to the Commission on how they are used in practice.



## Non equities

ESMA will be required to publish an opinion assessing the compatibility of each pre-trade transparency waiver with the pre-trade transparency requirements for Regulated Markets, MTFs and OTFs and shall submit an annual report to the Commission on how they are used in practice. ESMA will also have to monitor the pre-trade transparency obligations in bonds, structured finance products, and clearing-eligible derivatives investment firms have when trading OTC and report to the Commission on the application of this obligation within 2 years of entry into force.

ESMA will be required to monitor the application of the arrangements for deferred post-trade publication by trading venues and shall submit an annual report to the Commission on how they are used in practice.

## Data reporting services

ESMA will have to develop 3 BTS specifying data formats and standards to be used by trading venues, investment firms and by Approved Publication Arrangements (APAs) in order to facilitate the consolidation of post-trade information for both equities and non-equities markets, as well as the information to be provided to the competent authorities by data reporting service providers applying for an authorisation.

3) Reinforced transparency towards and powers of regulators; Improved consistency in the implementation of rules and coordination in supervision by national regulators

## Product bans

ESMA will have to coordinate the actions taken by national competent authorities to permanently ban a financial product or practice. In addition ESMA will have direct powers to temporarily ban products or services in emergency situations.

## Coordination of national position management measures and position limits by ESMA

ESMA will perform a facilitation and coordination role in relation to position management and position limit powers exercised by national competent authorities. In addition ESMA will have direct powers to request information from any person on positions held in any type of derivatives, request any person to reduce the size of a position held, and limit the ability of persons to enter into a commodity derivative contract.

## Sanctions

ESMA will have to issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation No (EU) 1095/2010 on types of administrative measures and sanctions and level of administrative pecuniary sanctions to be applied in individual cases within the national legal framework.

ESMA shall develop 1 BTS concerning the procedures and forms for submitting information on administrative measures, sanctions, pecuniary and criminal penalties by national competent authorities to ESMA.

#### Conditions of access of third country firms

ESMA will have a registration role in relation to non-EU firms intending to provide investment services and activities in the Union without the establishment of a branch in one of the Member States. In addition ESMA will have to develop draft regulatory technical standards to determine the information that the applicant third country firm shall provide to ESMA in its application and will have to conclude cooperation arrangements with the competent authority of the third countries whose legal and supervisory frameworks have been recognised as equivalent to the ones in the Union.<sup>4</sup>) Improved transparency and oversight of commodities derivatives markets

#### Position reporting by categories of traders

ESMA shall develop 1 BTS specifying the thresholds beyond which positions by categories of traders should be made public, the format of the weekly reports making public the open positions by categories of traders, and the content of the information to be provided by members and market participants of RMs, MTFs and OTFs.

#### 5) Strengthened conduct of business rules of investment firms

##### Best execution

ESMA will have to develop 2 BTS specifying the content, the format and the periodicity of data related to the quality of execution to be published by trading venues, as well as taking determining the content and the format of information to be published by investment firms regarding the top five execution venues where they executed client orders.

ESMA will have to issue guidelines for the assessment of financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved.

#### 6) Strengthened organizational requirements of investment firms

##### Corporate governance

ESMA shall ensure the existence of guidelines for the assessment of the suitability of the members of the management body, taking into account different roles and functions carried out by them.

ESMA will be required to develop 1 BTS specifying the tasks of the nomination committee dealing in charge of the nomination of the members of the management body.

**If more than one heading is affected by the proposal / initiative:**

• TOTAL operational appropriations	Commitments	(4)								
	Payments	(5)								
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)								
<b>TOTAL appropriations under HEADINGS 1 to 4</b> of the multiannual financial framework (Reference amount)	Commitments	=4+ 6	0.394	0.675	0.675					<b>1.744</b>
	Payments	=5+ 6	0.394	0.675	0.675					<b>1.744</b>

<b>Heading of multiannual financial framework:</b>	<b>5</b>	" Administrative expenditure "
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EUR million (to 3 decimal places)

		Year 2012	Year 2013	Year 2014	... enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
DG: <MARKT>								
• Human resources		0	0	0				
• Other administrative expenditure		0	0	0				
<b>TOTAL DG &lt;.....&gt;</b>	Appropriations							

<b>TOTAL appropriations under HEADING 5 of the multiannual financial framework</b>	(Total commitments = Total payments)	0	0	0				
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EUR million (to 3 decimal places)

		Year 2012 <sup>74</sup>	Year 2013	Year 2014	... enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
<b>TOTAL appropriations under HEADINGS 1 to 5 of the multiannual financial framework</b>	Commitments	0.394	0.675	0.675				<b>1.744</b>
	Payments	0.394	0.675	0.675				<b>1.744</b>

<sup>74</sup> Year N is the year in which implementation of the proposal/initiative starts.

### 3.2.2. *Estimated impact on operational appropriations*

7.  The proposal/initiative does not require the use of operational appropriations

8.  The proposal/initiative requires the use of operational appropriations, as explained below:

The specific objectives of the proposal are set out under 1.4.2. They will be reached through the legislative measures proposed, to be implemented at national level, and through the involvement of the European Securities and Markets Authority.

In particular, although it is not possible to attribute concrete numerical outputs to each operational objective, ESMA role should contribute to improving the confidence of investors and derivative markets users, large reduction in systemic risks and substantial improvement in market efficiency. First, the improved transparency rules on equities and the new transparency rules on bonds and derivatives combined with the new reporting obligations and systems will greatly increase the level of transparency of financial markets, including commodities markets, towards regulators and market participants. Coupled with new powers for regulators, this should result in more orderly functioning of financial markets across the board. Second, the new obligations imposed on investment firms in terms of organisation, process and risk controls will strongly reinforce investor protection and therefore raise investor confidence. Third, the new trading framework and obligations imposed on some market participants will at the same time decrease systemic risk and lead to more efficient markets.

3.2.3. *Estimated impact on appropriations of an administrative nature*

3.2.3.1. Summary

9.  The proposal/initiative does not require the use of administrative appropriations
10.  The proposal/initiative requires the use of administrative appropriations, as explained below:

### 3.2.3.2. Estimated requirements of human resources

11.  The proposal/initiative does not require the use of human resources

12.  The proposal/initiative requires the use of human resources, as explained below:

Comment:

No additional human and administrative resources will be needed in DG MARKT as a result of the proposal. Resources currently deployed to follow directive 1997/9/EC will continue to do so.

### 3.2.4. Compatibility with the current multiannual financial framework

13.  Proposal/initiative is compatible the current multiannual financial framework.

14.  Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

The proposal provides for extra tasks to be carried out by ESMA. This will require additional resources under budget line 12.0404.01

15.  Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework<sup>75</sup>.

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

### 3.2.5. Third-party contributions

16.  The Proposal/initiative does not provide for co-financing by third parties

17.  The Proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	Year	Year	Year	... enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
	2012	2012	2014				
Specify the co-financing body							
MEMBER STATES via EU national supervisors(*)	0.591	1.013	1.013				2.617
TOTAL appropriations cofinanced	0.591	1.013	1.013				2.617

(\*) Estimation based on current financing mechanism in draft ESMA regulation (Member States 60% - Community 40%).

<sup>75</sup> See points 19 and 24 of the Interinstitutional Agreement.



### 3.3. Estimated impact on revenue

18.  Proposal/initiative has no financial impact on revenue.

19.  Proposal/initiative has the following financial impact:

20.  on own resources

21.  on miscellaneous revenue

## ANNEX

Annex to Legislative Financial Statement for proposal for a Directive of the European Parliament and of the Council amending Directive 2004/39/EC on the Markets in Financial Instruments Directive (MiFID) and for a Regulation of the European Parliament and of the Council on the Markets in Financial Instruments

### **Applied methodology and main underlying assumptions**

The costs related to tasks to be carried out by ESMA stemming from the two proposals have been estimated for staff expenditure (Title 1), in conformity with the cost classification in the ESMA draft budget for 2012 submitted to the Commission.

The two proposals of the Commission include provisions for ESMA to develop some 14 sets of new binding technical standards (BTS) that should ensure that provisions of highly technical nature are consistently implemented across the EU. According to the proposals, ESMA is expected to deliver some 50% of the new BTS in 2013. To meet this goal, increase in staffing level is required already starting with 2013. As regards the nature of positions, the successful and timely delivery of new BTS will require, in particular, additional policy, legal and impact assessment officers.

Based on the estimates of the Commission services and ESMA, the following assumptions were applied to assess the impact on number of FTEs required to develop BTS related to the two proposals:

- One policy officer drafts 2 BTS of average complexity per year; this implies that 4 policy officers are needed for 2013;
- One impact assessment officer is needed for 8 BTS processes; this implies that 1 impact assessment officers is needed for 2013;
- One legal officer is needed to draft 5 BTS; this implies that 1 legal officer is needed for 2013;
- One additional support FTEs are needed to provide support to the above positions on a daily basis.

Hence, delivery of BTS that are falling due in 2013 requires 7 FTEs.

In addition to BTS, ESMA would have to draft 3 sets of guidelines (sanctions, complexity of financial instruments, corporate governance) and one report on the application of pre-trade obligation for non-equities when traded OTC. These tasks would require 2 additional policy officers.

Lastly ESMA would be entrusted with some permanent tasks in the field of pre-trade transparency waivers and post-trade deferred publication for equities and non-equities markets, product bans, and position management. These tasks would require 2 additional policy officers.

Overall this means an additional 11 FTEs are needed.

Other assumptions:

- based on the distribution of FTEs in 2012 draft budget, additional 11 FTEs are assumed to be comprised of 8 temporary agents (74%), 2 seconded national expert (16%) and 1 contractual agent (10%);
- average annual salary costs for different categories of personnel are based on DG BUDG guidance;
- salary weighting coefficient for Paris of 1.27;
- training costs assumed at €1,000 per FTE per year;
- mission costs of €10,000, estimated based on 2012 draft budget for missions per headcount;
- recruiting-related costs (travel, hotel, medical examinations, installation and other allowances, removal costs, etc) of €12,700, estimated based on 2012 draft budget for recruiting per new headcount.

It was assumed that the workload behind the above increase in FTEs will be maintained in 2014 onwards, and is linked, in part, to amending the already developed BTS and, in part, to preparing the remaining 50% of BTS under the two legislative proposals.

The method of calculating the increase in the required budget for the next three years is presented in more detail in table below. The calculation reflects the fact that that the Community budget funds 40% of the costs.

Cost type	Calculation	Amount (in thousands)			
		2013	2014	2015	Total
Title 1: Staff expenditure					
<i>11 Salaries and allowances</i>					
- of which temporary agents	=8*127*1,27	658	1.317	1.317	3.293
- of which SNEs	=2*73*1,27	81	162	162	405
- of which contract agents	=1*64*1,27	45	89	89	223
<i>12 Expenditure related to recruitment</i>					
	=11*12,7	140			140
<i>13 Mission expenses</i>					
	=11*10	55	110	110	275
<i>15 Training</i>					
	=11*1	6	11	11	28
Total Title 1: Staff expenditure		985	1.689	1.689	4.363
Of which Community contribution (40%)		394	676	676	1.746
Of which Member State contribution (60%)		591	1.013	1.013	2.617

The following table presents the proposed establishment plan for the nine temporary agent positions:

Function group and grade	Temporary posts
AD 16	
AD 15	
AD 14	
AD 13	
AD 12	
AD 11	
AD 10	
AD 9	2
AD 8	3
AD 7	3
AD 6	
AD 5	
AD total	8