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NOTE

From:	Presidency
To:	Delegations
Subject:	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) - Presidency compromise

Delegations will find attached a new Presidency compromise on the above proposal.

Latest additions and changes are denoted by bold underlining and deletions by strikethrouhgs.

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the Commission[1],

After transmission of the right legislative act to the national Parliaments,

Having regard to the Opinion of the European Economic and Social Committee[2],

Having regard to the opinion of the European Central Bank[3],

After consulting the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

1 OJ C 71 E, 25.3.2003, p. 62.
2 OJ C 220, 16.9.2003, p. 1.
3 OJ C 144, 20.6.2003, p. 6.

Whereas:

(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[1] has been substantially amended several times. Since further amendments are to be made, it should be recast in the interests of clarity.

(2) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field[2] 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.

(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 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 Union, being a Single Market, on the basis of Home country supervision. In view of the preceding, Directive 93/22/EEC was replaced by Directive 2004/39/EC.

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1 OJ L 145, 30.4.2004, p. 1.

2 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).

(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.

(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.

(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.

(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 and 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.

(8) 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.

(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.

(10) 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.

(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.

(12) All trading venues, namely regulated markets, MTFs and OTFs, should lay down transparent and non-discriminatory rules governing access to the facility.

(12a) [new] Persons having access to regulated markets or MTFs are called members or participants. Both terms may be used interchangeably. These terms do not include users who only access the trading venues via direct electronic access.

(13) Deleted.

(13a) Deleted

(14) Persons administering their own assets and undertakings, who do not provide investment services and/or perform investment activities other than dealing on own account in financial instruments which are not commodity derivatives**, emission allowances or derivatives thereof,** should not be covered by the scope of this Directive unless they are market makers, apply a high frequency algorithmic trading technique or deal on own account by executing client orders. ~~Consequently, market makers, persons dealing on own account by executing client orders or applying a high frequency algorithmic trading technique in financial instruments other than commodity derivatives are covered by the scope of this Directive and cannot benefit from the exemptions covering persons dealing on own account or providing investment services in commodity derivatives.~~

(14a) ~~By way of exception, p~~**P**ersons who deal on own account**, including market makers,** in commodity derivatives**, emission allowances and derivatives thereof,** ~~and persons who are market makers in relation to commodity derivatives, emission allowances, or derivatives thereof~~ should not be covered by the scope of this Directive, provided that this activity is 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**, and the persons do not deal on own account by executing client orders and do not apply a high frequency algorithmic trading technique**. Technical criteria for when an activity is ancillary to such a main business should be clarified in regulatory technical standards, taking into account the criteria specified in Article 2(4). These criteria should ensure that non-financial firms dealing in financial instruments in a disproportionate manner compared with the level of investment in the main business are covered by the scope of this Directive. In doing so, these criteria should take into consideration, inter-alia, the capital employed for carrying out the ancillary activity in absolute terms; the capital employed for carrying out the ancillary activity relative to the capital employed for carrying out the main business; the size of their trading activity in financial instruments in absolute terms; and the size of their trading activity compared to the overall market trading activity in that asset class.

The activities that are deemed to be objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity and intragroup transactions should be considered in a consistent way with the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives transactions, central counterparties and trade repositories.

(14b) ~~By way of exception, p~~**P**ersons providing investment services in commodity derivatives ~~or derivative contracts included in Annex I, Section C 10~~ or emission allowances or derivatives thereof to the customers or suppliers of their main business as an ancillary activity to their main business, should not be covered by the scope of this directive**, provided that the persons do not apply a high frequency algorithmic trading technique**. Such services can only be considered to be ancillary to one's main business when the derivatives involved serve to cover the customer against risk relating to commodity prices resulting from non-financial contracts the person and the customer are both party to.

(14ba) (new) Persons that deal in commodity derivatives, emission allowance and derivatives thereof may also deal in other financial instruments as part of their commercial treasury risk management activities to protect themselves against risks, such as exchange rate risks. Therefore, it is important to clarify that exemptions apply cumulatively. For example, the exemption at Article 2(1)(i) can be used in conjunction with the exemption at Article 2(1)(d).

However, in order to avoid any potential misuse of exemptions, market makers, persons dealing on own account by executing client orders or applying a high frequency algorithmic trading technique in financial instruments other than commodity derivatives, emission allowances or derivatives thereof, are covered by the scope of this Directive and cannot benefit from other exemptions.

(14c) 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.

(14d) 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.

(15) References in the text to persons should be understood as including both natural and legal persons.

(16) Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to 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)[1] should be excluded from the scope of this Directive when carrying on the activities referred to in that Directive.

(17) 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.

[1] [please add OJ reference]

(17a) (new) Some local energy utilities bundle and out-source their trading activities for hedging commercial risks to non-consolidated subsidiaries. These joint venture companies do not provide any other services and perform exactly the same function as persons referred to in Recital 17. In order to ensure a level playing field, joint venture companies jointly held by local energy utilities who do not provide any services other than investment services for those local energy utilities and provided that these local energy utilities will be exempt under Article 2(1)(i) should they carry out these investment services themselves, should also be excluded from the scope of this Directive.

(17b) (new) Some operators of industrial installations covered by the EU Emissions Trading Scheme bundle and outsource their trading activities for hedging commercial risks to non-consolidated subsidiaries. These joint venture companies do not provide any other services and perform exactly the same function as persons referred to in Recital 17. In order to ensure a level playing field, joint venture companies jointly held by operators of industrial installations covered by the EU Emissions Trading Scheme who do not provide any services other than investment services for those operators of industrial installations and provided that these operators of industrial installations will be exempt under Article 2(1)(i) should they carry out these investment services them-selves, should also be excluded from the scope of this Directive.

(18) 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.

(19) 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.

(20) 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.

(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.

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

(22a) [new] It is necessary to exclude from the scope of this Directive 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 to those Regulations. According to the aforementioned legislation, transmission system operators have specific obligations and responsibilities, are subject to specific certification and are supervised by sector specific competent authorities. Transmission system operators should also benefit from such an exemption in cases where they use other persons acting as service providers on their behalf to carry out their task under the afore mentioned Directives or Regulations or network codes or guidelines adopted pursuant to those Regulations. Transmission system operators should not be able to benefit from such an exemption when providing investment services or activities in financial instruments, including when operating a platform for secondary trading in financial transmission rights.

(23) 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.

(24) 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.

(25) Credit institutions that are authorised under 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) [1] 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.

(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.

(26a) [new] The application of this Directive to investment firms when selling or advising clients in relation to structured deposits, should be understood as when acting as intermediaries for these products issued by credit institutions that can take deposits according to 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.

[1] OJ L 177, 30.6.2006, p.1.

(26b) [new] Central Securities Depositaries [CSDs] are systemically important institutions for financial markets that ensure the initial recording of securities, the maintenance of the accounts containing the securities issued and the settlement of virtually all trades of securities. For this reason, CSDs should be specifically regulated under Union legislation and should be subject to that specific legislation. However, CSDs might, in addition to the core services [referred to in Section A of the Annex to the CSDR], provide investment services and activities which are regulated under this Directive. In order to ensure that any entities providing investment services and activities are subject to the same regulatory framework, it is appropriate to ensure that CSDs are subject to the requirements of this Directive concerning their internal organisation and the operating conditions as well as Regulation [MiFIR] when they provide investment services or perform investment activities. However, it is deemed more appropriate that these requirements are defined in the forthcoming CSD legislation, rather than setting them ex-ante in this Directive and Regulation [MiFIR]. Union legislation regulating CSD [CSDR] should thus identify the provisions of this Directive and of Regulation [MiFIR] which should apply to CSDs providing investment services and activities.

(26c) [new] Persons exempted under Articles 2(1)(a), (d), (h) and (i) should comply with the provisions referred to in Articles 17(1) to (5) when they are members or participants of regulated markets and MTFs.

(27) In order to strengthen the protection of investors in the Union, it is appropriate to limit the conditions under which Member States may 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 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. In addition, persons excluded from the application of this Directive should be covered under an investor compensation scheme recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes[1] or professional indemnity insurance ensuring equivalent protection to their clients in the situations covered under Directive 97/9/EC.

(28) 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.

(29) 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.

(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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1 OJ L 84, 26.3.1997, p. 22.

(31) 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.

(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[1] 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.

[1] OJ L 247 , 21/09/2007, p. 1

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 as a result of the proposed acquisition; 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[1] and 2006/49/EC[2]; whether there are reasonable grounds to suspect that money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC[3] is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

(33) An investment firm authorised in its Home Member State should be entitled to provide investment services or perform investment activities throughout the 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.

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1 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)..

2 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).

3 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).

(34) Since certain investment firms are exempted from certain obligations imposed by 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)[1], they should be 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[2]. 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 Union legislation on capital adequacy.

(35) 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 when on an ancillary basis to their main business 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.

(36) 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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1 OJ L 177, 30.6.2006, p. 201.
2 OJ L 9, 15.1.2003, p. 3.

(37) 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 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[1], for the purpose of securing or otherwise covering their obligations.

(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 collective knowledge, skills and experience to be able to understand the investment firm's activities including the main risks.

(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, risk strategy and internal governance of the firm, of the approval of its internal organization, including criteria for selection and training of personnel, of effective oversight of senior management, 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.

[1] OJ L 168, 27.6.2002, p. 43.

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.

(39a) Within Member States different governance structures are used, in most cases a unitary and/or a dual board structure. The definitions used in the Directive intend to embrace all existing structures without advocating any particular structure. They are purely functional for the purpose of setting out rules aimed at a particular outcome irrespective of the national company law applicable to an institution in each Member State. The definitions should therefore not interfere with the general allocation of competencies according to the national company law.

(40) 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. Firms have a duty to take effective steps to identify and manage conflicts of interest and mitigate the potential impact of these risks as far as possible. Where some residual risk of detriment to the client's interests nonetheless remains, clear disclosure to the client of the general nature and/or sources of conflicts of interest to the client and the steps taken to mitigate these risks must be made before undertaking business on its behalf.

(41) Member States are required to 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) 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. This protection should notably extend to any transfer of personal data to third countries and to telephone and electronic recording as required under Article 16.

(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 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. Such records should ensure that there is evidence to prove the terms of any orders given by clients and its correspondence with transactions executed by the investment firms, as well as to detect any behaviour that may have relevance in terms of market abuse, including when firms deal on own account. To this end records are needed for all conversations involving a firm's representatives when dealing, or intending to deal, on own account. Investment firms shall notify new and existing clients that telephone communications or conversations between the investment firms and clients that result or may result in transactions, will be recorded. This notification can be provided once, before the provision of investment services to new and existing clients.

Investment firms shall not provide, by phone, investment services and activities to clients who have not been notified in advance about the recording of their telephone communications or conversations, where such investment services and activities relate to the reception, transmission and execution of client orders.

Orders can be communicated by these clients through other channel's, however such communications must be made in a durable medium such as mails, faxes, emails, documentation of client orders made at meetings. Such orders will be considered equivalent to orders received by telephone.

To provide legal certainty regarding the scope of the obligation, it is appropriate to apply it to all equipment provided by the firm or permitted to be used by the investment firm and to require the investment firms to take reasonable steps to ensure that no privately-owned equipment is used in relation to transactions. These records shall be available to competent authorities in the fulfilment of their supervisory tasks and in the performance of enforcement actions under this Directive, MiFIR, MAD and MAR in order to help competent authorities identify behaviours which are not compliant with the legal framework regulating the activity of investment firms. These records shall also be available to investment firms and to clients to demonstrate the development of their relationship with regard to orders transmitted by clients and transaction carried out by firms. Records of telephone conversations or electronic communications involving client orders shall be kept for a period of five years, which is in line with these objectives and in accordance with the general retention period for any records under Article 51 of Directive 2006/73/EC. Notwithstanding the retention period of five years, investment firms shall retain the records for longer than five but a maximum of seven years when asked to do so by their competent authorities in pursuit of their duties. 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.

(43) Deleted.

(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. An investment firm that engages in algorithmic trading pursuing a market making strategy, or acts in a similar manner should carry out this market making continuously during a specified proportion of the trading venue's trading hours. Regulatory technical standards should clarify what constitutes specified proportion of the trading venue's trading hours by ensuring that such specified proportion is significant in comparison to the total trading hours.

(44a) A specific subset of algorithmic trading is high frequency algorithmic 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. In particular, high frequency algorithmic trading may contain elements such as order initiation, generating, routing and execution which are determined by the system without human intervention for each individual trade or order, short time-frame for establishing and liquidating positions, high daily portfolio turnover, high order-to-trade ratio intraday and ending the trading day at or close to a flat position. High frequency algorithmic trading is characterised, among others, by high message intra-day rates which constitute orders, quotes or cancellations. In determining what constitutes high message intra-day rates, the identity of the beneficial owner behind the activity, the length of the observation period, the comparison with the overall market activity during that period and the relative concentration or fragmentation of activity should be taken into account. High frequency algorithmic 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.

(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.

(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 electronic access by their clients to markets through the use of their trading facilities. 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 algorithmic trading technique can lend itself to certain forms of abusive behaviour if misused.

(47) These potential risks from increased use of technology are best mitigated by a combination of measures and specific risk controls directed at firms who engage in algorithmic or high frequency algorithmic trading technique and other measures directed at operators of trading venues that are accessed by such firms. It is desirable to ensure that all high frequency algorithmic trading firms be authorised. This should ensure they are subject to organisational requirements under the Directive and are properly supervised. However, entities which are authorised and supervised under the legislation of the Union regulating the financial sector and are exempted from this Directive, but which engage in algorithmic trading and high frequency algorithmic trading, should not be required to obtain an authorisation under this Directive and should only be subject to the measures and controls aimed at tackling the specific risk arising from these types of trading.

(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 or constrain it if there are sudden unexpected price movements.

(49) In addition to measures relating to algorithmic and high frequency algorithmic trading technique it is appropriate to include controls relating to investment firms which provide direct electronic access to markets for their clients. It is also appropriate that, irrespective of the form of the direct electronic access provided (such as direct market access, sponsored access or other technical forms), firms providing direct electronic access ensure that persons using this service are properly qualified, that risk controls are imposed on the use of the service and that these firms retain responsibility and liability for trading submitted by their clients through the use of their systems or using their trading codes. 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.

(49a) In order to ensure an effective supervision and in order to enable the competent authorities to take appropriate measures against defective or rogue algorithmic strategies in due time it is necessary to flag all orders generated by algorithmic trading. By means of flagging, competent authorities are enabled to identify and distinguish orders originating from different algorithms and to efficiently reconstruct and evaluate the strategies that algorithmic traders employ. This will mitigate the risk that orders are ambiguously attributed to an algorithmic strategy and a trader. The flagging permits the competent authorities to react efficiently and effectively against algorithmic trading strategies that behave in an abusive manner or pose risks to the orderly functioning of the market.

(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 trading venues if an investment firm or a market operator operating a 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 financial instruments from trading, it should be ensured that if an investment firm or a market operator operating a trading venue stops trading due to non-compliance any longer with their rules, the others follow that decision if it is decided so by their competent authorities 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 between the competent authorities in relation to suspension and removal of financial instruments from trading on a trading venue.

(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.

(52) Investment firms providing investment advice to clients should take into account the variety of needs that the investment firms' potential clients may possess, in terms of knowledge and experience, financial situation and investment objectives. These elements may result in differences concerning factors such as complexity, levels of risks and holding periods that the investment firms should consider in recommending an investment to a client in order to comply with the obligation to provide suitable advice. 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 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 or not and whether they provide the clients with the periodic assessment of the suitability of the financial instruments recommended to them. In relation to this it is appropriate to establish the conditions for the provision of investment advice when investment firms inform clients that the service is provided on an independent basis. When advice is provided on an independent basis a sufficient range of different product providers' products shall be assessed prior to making a personal recommendation.

It is not necessary for the advisor, however, to assess investment products available on the market by all product providers or issuers, but the range of financial instruments should not be limited to financial instruments issued or provided by entities having close links with the investment firm or any other strict relationships, such as contractual relationship, potentially able to impair the independent basis of the advice provided. 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 and retain fees, commissions or any monetary and non-monetary benefits from or to 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.

This implies that an investment firm that receives fees, commissions or any monetary and non-monetary benefits from a third party while providing the service of portfolio management or independent investment advice must pass on in full any monetary benefit received by a third party to a client. Only minor non-monetary benefits such as training on the features of the products and, for firms providing portfolio management, services related to research should be allowed subject to the conditions that they are clearly disclosed to the client, that they are capable of enhancing the quality of the service provided and that they do not, or are not likely to, impair the ability of investment firms to act in the best interest of their clients. This Directive provides for conditions and procedures for Member States to comply with when planning to impose additional requirements. Such requirements may include prohibiting or further restricting the offer or acceptance of fees, commissions or any monetary or non-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 service to clients. Member States may retain any requirements additional to this Directive which have been notified under Article 4 of Directive 2006/73/EC at the time this Directive enters into force. To protect consumers further, it is appropriate to ensure investment firms do not remunerate or assess the performance of their staff in a way that conflicts with the firms' duty to act in the best interests of their clients, for example by creating a benefit for staff to favour recommending or selling one particular financial instrument when another product may better meet the client's needs.

(52a) [new] When providing investment advice, the investment firm should specify in a written statement on suitability how the advice given meets the preferences, needs and other characteristics of the retail client. The statement must be provided in a durable medium including electronic form and does not have to be signed in person by the advisor.

(53) In determining what constitutes the provision of information in good time before a time specified in this Directive, an investment firm should take into account, having regard to the urgency of the situation, the client's need for sufficient time to read and understand it before taking an investment decision. A client is likely to require more time to review information given on a complex or unfamiliar product or service, or a product or service a client has no experience with than a client considering a simpler or more familiar product or service, or where the client has relevant prior experience.

(54) Nothing in this Directive obliges investment firms to provide all required information about the investment firm, financial instruments, costs and associated charges, or concerning the safeguarding of client financial instruments or client funds immediately and at the same time, provided that they comply with the general obligation to provide the relevant information in good time before the time specified in this Directive. Provided that the information is communicated to the client in good time before the provision of the service, nothing in this Directive obliges firms to provide it either separately or by incorporating the information in a client agreement.

(54a) [new] When arranging payment for investment advice that it is provided on an independent basis, acceptable payments are limited to those which are paid or provided by or on behalf of the client. While third parties such as banks may be involved in transferring money from clients to advisers, it is important that such firms do so only on the instructions of the client – the amount and frequency of any payments for the services of the firm giving investment advice must not be determined by a third party, but must be agreed between the client and the firm providing investment advice.

(55) A service should be considered to be provided at the own exclusive 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 own exclusive 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.

(56) 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.

(57) By way of derogation from the principle of Home Member State 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.

(58) 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.

(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.

(60) Information provided by investment firms to clients in relation to their execution policy 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 execution policy 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.

(61) 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, MTF, OTF or systematic internaliser.

(62) 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.

(63) 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.

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

(65) 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.

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

(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 funds 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.

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

(69) 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.[1]

[1] OJ L 281, 23.11.1995, p. 31.

(70) Investment firms should all have the same opportunities of joining or having access to regulated markets throughout the 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.

(71) In order to facilitate the finalisation of cross-border transactions, it is appropriate to provide for access to clearing and settlement systems throughout the 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.

(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 it is appropriate to introduce a common regulatory framework at Union level. The regime should provide for a level of financial stability safeguards and protection for investors in regard of third country firms providing services via a branch, comparable to that for EU firms.

(73) The provision of investment services and/or activities as well as ancillary services to retail clients, including retail clients who have requested to be treated as professional clients in a Member State by a third country firm should always require the establishment of a branch in the Member State. The establishment of the branch shall be subject to authorisation and supervision in that Member State. 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.

(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 or engages in activities at the own exclusive initiative of a person established or situated in the Union, the services or activities should not be deemed as provided in the territory of the Union. After a person has, at its own exclusive initiative, initiated the provision of an investment service or activity with a third country firm, the exemption applies for the duration of their entire relationship in respect to that service or activity. The exemption should not apply in relation to the provision of any other services or activities unless initiated by a person at their own exclusive initiative on the same basis. 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.

(75) 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, MTF or OTF are to be considered as concluded within the systems of a regulated market, MTF or OTF. Transactions which members or participants conclude on a bilateral basis and which do not comply with all the obligations established for a regulated market, an MTF or an OTF under this Directive should be considered as transactions concluded outside a regulated market, an MTF or an OTF 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.

(75a) Nothing in this Directive requires competent authorities to approve or examine the content of the written agreement between the regulated market and the investment firm that is required from the participation in a market making scheme. However, neither does it prevent them from doing so, insofar as any such approval or examination is based only on the regulated markets' compliance with their obligations under Article 51.

(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.

(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.

(79) Revision of Directive 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.

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

(81) 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[1]. 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.

(82) 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.

(82a) [new] In order to ensure that the communication between competent authorities of suspensions, removals, disruptions, disorderly trading conditions and circumstances that may indicate market abuse is achieved in an efficient and timely way, an effective communication and co-ordination process between national competent authorities is necessary, which will be achieved via arrangements developed by ESMA.

(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.

[1] 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.).

(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.

(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.

(86) All venues which offer trading in commodity derivatives should have in place appropriate limits and position management controls to manage trading on their markets designed to prevent market abuse and ensure the orderly pricing and settlement conditions. Monitoring their markets on an on-going basis, operators of trading venues should be able to request information from members or participants about their trading and that of their clients to help them to understand fully what lies behind patterns of trading that they observe on their markets. Where operators of venues have concerns that a position is being held with abusive intent or that a position in a contract poses a threat to the orderly pricing or settlement conditions, they should be able to intervene to cap positions or to require that a position is reduced irrespective of whether such a position exceeds or not the position limits. ESMA should maintain and publish a list containing summaries of all such measures in force. These limits and 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 how they apply and to the relevant quantitative thresholds which constitute the limits or which may trigger other obligations.

(87) Venues where the most liquid commodity derivatives are traded should publish an aggregated weekly breakdown of the positions held by different categories of position holders for the different financial instruments traded on their platforms. 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.

(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.

(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.

(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.

(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. An issuer that is a small and medium sized enterprise should not be obliged to apply to have its financial instruments admitted to trading on an SME growth market.

(91a) [new] In order for this new category of markets to benefit SMEs, at least fifty per cent of the issuers whose financial instruments are traded on a SME growth market will have to be SMEs. This assessment will be made on an annual basis. The criterion of at least fifty per cent of the issuers has to be implemented in a flexible way. A temporary failure to meet this criterion does not mean that the trading venue will have to be immediately deregistered or refused to be registered as an SME growth market if it has a reasonable prospect to meet the at least fifty per cent criterion as from the subsequent year. With respect to the assessment to determine whether an issuer is an SME enterprise, it will be made based on the market capitalisation of the previous three calendar years. This should ensure a smoother transition for these issuers from these specialists markets to the main markets.

(92) 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.

(93) 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.

(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.

(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 fines.

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

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

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

(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.

(100) This Directive should refer to both 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.

(101) This Directive should be without prejudice to any provisions in the law of Member States relating to criminal sanctions. In the application of this Directive, Member States should ensure that the imposition of administrative measures and sanctions in accordance with this Directive and of criminal sanctions in accordance with national law does not breach the principle of *ne bis in idem*.

(101a) (new) Member States should not be required to lay down rules for administrative sanctions and measures applicable to the infringements of this Directive or Regulation (EU) No …/… [MiFIR], which are subject to national criminal law. However, the maintenance of criminal sanctions for infringements of this Directive or Regulation (EU) No …/… [MiFIR] should not reduce or otherwise affect the ability of the competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States for the purposes of this Directive or Regulation (EU) No …/… [MiFIR], including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.

(102) 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 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[1] 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).

[1] OJ L 115, 17.4.1998, p. 31.

(103) 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 such data[1]. 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.

(104) 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.

(105) 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.

[1] OJ L 281, 23.11.1995, p. 31.

(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.

(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 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[1].

[1] OJ L 55, 28.2.2011, p. 13.

(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.

(109) The Commission should adopt the draft regulatory technical standards developed by ESMA in Article 2 regarding exemptions that relate to activities considered to be ancillary to the main business,, 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 13 regarding the assessment of a proposed acquisition, Article 16a regarding transactions that do not contribute to the price discovery process, Article 17 regarding algorithmic trading, Article 20 regarding the definition of matched principal trading, Article 27 regarding obligation to execute orders on terms most favourable to clients, Article 31 regarding the monitoring of compliance with the rules of the MTF or the OTF and with other legal obligations, 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 51 regarding systems resilience, circuit breakers and electronic trading, Article 56 regarding the monitoring of compliance with the rules of the regulated market and with other legal obligations, Article 59 regarding the position limits and position management controls in commodity derivatives, Article 63 regarding procedures for granting and refusing requests for authorisation of data reporting services providers, Articles 66 regarding organisational requirements for APAs 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.

(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 in MTFs and OTFs, Articles 32and 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 63 regarding procedures for granting and refusing requests for authorisation, Article 76 regarding the exercise of supervisory and sanctioning powers, 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.

(111) The Commission should submit a report to the European Parliament and the Council assessing the functioning of OTFs, 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.

(112) 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 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 Union level, the 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.

(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.

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

DEFINITIONS AND SCOPE

Article 1

Scope

1. This Directive shall apply to investment firms, regulated markets, data reporting service providers and third country firms providing investment services and/or performing investment activities though the establishment of a branch in the Union.

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.

3. The following provisions shall also apply to credit institutions authorised under Directive 2006/48/EC, when providing one or more investment services and/or performing investment activities:

– Articles 2(2), 9(4), 14, 16, **16a,** 17, 18, 19 and 20,

– Chapter II of Title II excluding second subparagraph of Article 29(2),

– Chapter III of Title II excluding Articles 36(2), (3) and (4) and 37(2), (3), (4), (5), (6), (9) and (10),

– Articles 69 to 80 and Articles 84, 89 and 90.

4. (new) The following provisions shall also apply to credit institutions authorised under Directive 2006/48/EC and investment firms, when selling or advising clients in relation to structured deposits:

- Articles 9(4), 14 and 16 (2), (3) and (6),

- Articles 23, 24(1) to (8), 25(1) to (6), 26, 28, 29 excluding second subparagraph of paragraph (2), 30, and

- Articles 69 to 80.

5. (new) The provisions under Articles 17(1) to 17(5) shall also apply to members or participants of regulated markets and MTFs who are not required to be authorised under this Directive by virtue of the exemptions in Articles 2(1)(a), (d), (h) and (i).

5a. (new) The provisions under Articles 59 and 60 shall also apply to persons exempt under this Directive by virtue of Article 2.

6. All multilateral systems in financial instruments shall operate either according to the provisions of Title II for MTFs or for OTFs or of Title III for regulated markets.

Any investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account by executing client orders outside a regulated market, an MTF or an OTF shall operate according to the provisions of Title III of [MiFIR].

Without prejudice to the provisions of Article 16a of this Directive and to the provisions of Article 24 of [MiFIR], all transactions in financial instruments mentioned in the previous subparagraphs which are not concluded on multilateral systems or systematic internalisers should be in compliance with the relevant provisions of Title III of [MiFIR].

Article 2

Exemptions

1. This Directive shall not apply to:

(a) insurance undertakings or undertakings carrying on the reinsurance and retrocession activities referred to in Directive 2009/138/EC when carrying on the activities referred to in Directive 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 deal on own account in financial instruments other than commodity derivatives, **emission allowances or derivatives thereof,** and who do not provide any other investment services and/or perform any other investment activities**, other than those exempted under Article 2(1)(i)**. This exemption does not apply to persons who:

(i) are market makers~~, excluding market makers in emission allowances, or derivatives thereof provided that their market making is an ancillary activity to their main business, when considered on a group basis, and that their main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC~~; or

(ii) apply a high frequency algorithmic trading technique; or

(iii) deal on own account by executing client orders;

(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 the 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, other public bodies charged with or intervening in the management of the public debt in the Union and international bodies of which one or more Member States are members;

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

(i) persons:

(i) who deal on account**, including market makers,** in commodity derivatives**, emission allowances or derivatives thereof,** excluding persons who deal on own account by executing client orders; or

(ii) providing investment services, other than dealing on own account, in commodity derivatives ~~or derivative contracts included in Annex I, Section C 10~~ or emission allowances or derivatives thereof to the customers or suppliers of their main business; ~~or~~

~~(iii) who are market makers in commodity derivatives, and who do not provide any other investment services and/or perform any other investment activities, excluding persons who deal on own account by executing client orders and persons who apply a high frequency algorithmic trading technique;~~

~~-~~provided that in ~~all~~ **both** cases 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 2006/48/EC**, and the persons do not apply a high frequency algorithmic trading technique**;

(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) Deleted

(l) 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) '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 to those Regulations, any persons acting as service providers on their behalf to carry out their task under the afore mentioned Directives and Regulations or network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks.

This exemption will only apply to persons engaged in the activities set out above where they perform investment activities or provide investment services related to commodity derivatives in order to carry out those activities. This exemption shall not apply with regard to the operation of a secondary market, including a platform for secondary trading in financial transmission rights.

(o) (new) persons providing investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where these clients are exclusively local electricity undertakings falling within Article 2(35) of Directive 2009/72/EC and/or natural gas undertakings falling within Article 2(1) of Directive 2009/73/EC, and provided that these clients jointly hold 100% of the capital or of the voting rights of these persons, exercise joint control and are exempt under Article 2(1)(i) should they carry out these investment services themselves. These persons should comply with the following organisational requirements:

(i) the set-up of a supervisory committee overseeing the trading activity of these persons;

(ii) trading rules and a risk management handbook that govern the trading activity pursued by these persons in order to act in the best interest of the clients and to ensure the orderly functioning and integrity of financial markets;

(iii) the existence of a profit and loss transfer agreement between these persons and the abovementioned clients.

(p) (new) persons providing investment services exclusively in emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where these clients are exclusively operators falling within Article 3(f) of Directive 2003/87/EC, and provided that these clients jointly hold 100% of the capital or voting rights of these persons, exercise joint control and are exempt under Article 2(1)(i) should they carry out these investment services themselves. These persons should comply with the following organisational requirements:

(i) the set-up of a supervisory committee overseeing the trading activity of these persons;

(ii) trading rules and a risk management handbook that govern the trading activity pursued by these persons in order to act in the best interest of the clients and to ensure the orderly functioning and integrity of financial markets;

(iii) the existence of a profit and loss transfer agreement between the joint venture and the abovementioned clients.

(q) Central Securities Depositaries that are regulated under Union legislation.

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 respect of exemption (c) determining when an activity is provided in an incidental manner.

4. ESMA shall develop draft regulatory technical standards in respect of exemption ~~2(1)(d)(i) and~~ 2(1)(i) to specify the criteria for establishing when an activity is to be considered as ancillary to the main business on a group level.

The criteria shall take into account at least the following elements:

(a) the capital employed for carrying out the ancillary activity in absolute terms;

(b) the capital employed for carrying out the ancillary activity relative to the capital employed for carrying out the main business;

(c) the size of their trading activity in financial instruments in absolute terms;

(d) the size of their trading activity compared to the overall market trading activity in that asset class.

The trading activity referred to in subparagraphs (c) and (d) above shall be calculated on a group level.

The abovementioned elements shall exclude:

(a) intra-group transactions as referred to in Article 3 of Regulation (EU) No 648/2012 that serve group-wide liquidity and/or risk management purposes;

(b) transactions in derivatives which are objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity;

(c) transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue.

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

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.

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 and which:

– 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 reception and transmission of orders in transferable securities and units in collective investment undertakings and/or 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 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 2006/48/EC or in Directive 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[1], 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 shall submit those persons to requirements which are at least analogous to the following requirements under this 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) and (6A), Article 25(1), (4) and (5), and, where the national regime allows those persons to appoint tied agents, Article 29, and the respective implementing measures in Directive 2006/73/EC.

[1] OJ L 26, 31.1.1977, p. 1. Directive as last amended by the 1994 Act of Accession.

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

By way of derogation from the previous subparagraph, Member States may require that where the aforementioned persons provide the investment services of the reception and transmission of orders and/or of the provision of investment advice in units in collective investment undertakings and act as an intermediary with a management company as defined in [UCITS Directive} to be jointly and severally liable with the management company for any damages incurred by the client in relation to these services.

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

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.

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

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.

2. The following definitions shall also apply:

1) '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 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 CCPs 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 CCPs or are subject to regular margin calls;

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

3) '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;

4) '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;

5) ‘Dealing on own account’ means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

6) ‘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;

7) ‘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;

8) ‘Client’ means any natural or legal person to whom an investment firm provides investment or ancillary services;

9) ‘Professional client’ means a client meeting the criteria laid down in Annex II;

10) ‘Retail client’ means a client who is not a professional client;

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;

13) ‘Limit order’ means an order to buy or sell a financial instrument at its specified price limit or better and for a specified size;

14) ‘Financial instrument’ means those instruments specified in Section C of Annex I;

15) ‘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;

16) Deleted

17) Deleted

18) ‘Competent authority’ means the authority, designated by each Member State in accordance with Article 69, unless otherwise specified in this Directive;

19) ‘Credit institutions’ means credit institutions as defined under Directive 2006/48/EC;

20) ‘UCITS management company’ means a management company as defined in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [1];

21) ‘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 or provides advice to clients or prospective clients in respect of those financial instruments or services;

22) ‘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 provide 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;

1 OJ L 302, 17.11.2009, p. 32.

23) ‘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;

24) ‘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[1];

25) ‘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;

~~26) ‘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 situation in which they are permanently linked to one and the same person by a control relationship;~~

[1] 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).

27) ‘Management body’ means the body or bodies of an investment firm or of a market operator or of a data reporting services provider, appointed in accordance with the national law, which is empowered to set the entity's strategy objectives and overall direction, and which oversees and monitors management decision-making. This shall include persons who effectively direct the business of the entity.

Where, according to national law, management body comprises different bodies with specific functions, the requirements of this Directive shall apply only to those members of the management body to whom the applicable national law assigns the respective responsibility;

28) Deleted.

29) ‘Senior management’ means those individuals who exercise executive functions within an investment firm or a market operator or a data reporting services provider and who are responsible and accountable to the management body for the day-to-day management of the entity;

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;

30a)[new] ‘High frequency algorithmic trading technique means any algorithmic trading technique characterised by:

(a) infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry: co- location, proximity hosting or high speed direct electronic access;

(b) system determination of order initiation, generating, routing or execution without human intervention for individual trades or orders; and

(c) high message intraday rates which constitute orders, quotes or cancellations.

31) ‘Direct electronic access’ means, in relation to a trading venue, 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;

34) ‘Structured deposit’ means a deposit in accordance with Article 1 (1) of Directive 94/19/EC that is fully repayable at maturity on terms under which any interest or premium will be paid (or is at risk) according to a formula involving factors such as: (i) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as EURIBOR or LIBOR; (ii) a MiFID financial instrument or combination of such financial instruments; (iii) a commodity or combination of commodities; or (iv) a foreign exchange rate or combination of foreign exchange rates;

35) ‘Central Securities Depositories (CSDs)’ means Central Securities Depositories as defined in Regulation [ ] (CSDR).

37) (new) “durable medium” means any instrument which –

(a) enables a client to store information addressed personally to that client in a way accessible for future reference and for a period of time adequate for the purposes of the information, and

(b) allows the unchanged reproduction of the information stored;

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to specify some technical elements of the definitions laid down in paragraph 2, to adjust them to market developments and ensure the uniform application of this Directive.

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 provision of investment services and/or the performance of investment 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 69.

2. By way of derogation from paragraph 1, Member States shall authorise any market operator to operate an MTF or an OTF, subject to the prior verification of their compliance with the provisions of this Chapter.

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 ESMA.

   ESMA shall establish a list of all investment firms in the Union. The list shall contain information on the services or activities for which each investment firm 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 8(b) to (d), that withdrawal shall be published on the list for a period of five years.

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.

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 Union and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Union, either through the right of 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.

4. ESMA 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) the requirements applicable to the management of investment firms under Article 9(6) and the information for the notifications under Article 9(3);

   (d) 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. ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the notification or provision of information provided for in Article 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 first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 8

Withdrawal of authorisations

The competent authority shall 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 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.

Every withdrawal of authorisation shall be notified to ESMA.

Article 9

Management body

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. Members of the management body shall, in particular, fulfil the following requirements:

(a) All members of the management body shall commit sufficient time to perform their functions in the investment firm. The number of directorships a member of the management body can hold, in any legal entity, at the same time, shall take into account individual circumstances and the nature, scale and complexity of the investment firm's activities. Members of the management body of investment firms that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities shall not at the same time hold positions exceeding more than one of the following combinations unless otherwise authorised by the competent authority:

(i) one executive directorship with three non-executive directorships;

(ii) five non-executive directorships.

Executive or non-executive directorships held within (i) the same group or (ii) undertakings where the institution owns a qualifying holding shall be considered as one single directorship.

(b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the investment firm's activities, including the main risks.

(c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making.

Investment firms shall devote adequate human and financial 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 ensure that investment firms which are significant in terms of their size, internal organisation and the nature, scope and complexity of their activities, establish a nomination committee composed of members of the management body.

The nomination committee shall carry out the following:

(a) identify and recommend, for the approval of the management body or for approval of the general meeting candidates to fill management body vacancies. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body. Further, the committee shall prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected;

(b) periodically assess the structure, size, composition and performance of the management body, and make recommendations to the management body with regard to any changes;

(c) periodically assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report this to the management body;

(d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body.

In performing its duties, the nomination committee shall be able to use any forms of resources it deems appropriate, including external advice.

Where, under national law, the management body does not have any competence in the process of selection and appointment of any of its members, this paragraph shall not apply.

3. 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, along with all information needed to assess whether the firm complies with paragraphs 1 and 2 of this Article.

4. Member States shall ensure that the management body of an investment firm defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an organisation including the segregation of duties in the organisation and the prevention of conflicts of interest.

Those arrangements shall comply with the following principles:

(a) the management body shall approve and oversee the implementation of the investment firm's strategic objectives, risk strategy and internal governance;

(b) the management body shall 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) the management body shall 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) the management body shall define, approve and oversee a remuneration policy aimed at encouraging fair treatment of clients as well as avoiding conflict of interest in the relationships with clients;

(e) the management body shall carry out effective oversight of senior management;

(f) the chairman of the management body which is responsible for the supervisory function of an investment firm shall not exercise simultaneously the functions of a chief executive officer within the same investment firm, unless justified by the investment firm and authorised by competent authorities.

The management body shall monitor and periodically assess the effectiveness of the investment firm's governance arrangements 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 shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.

5. 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 posses sufficient knowledge, skills and experience, 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 interest of its clients and the integrity of the market.

6. 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 provision 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.

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 include 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.

Article 11

Notification of proposed acquisitions

1. 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).

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.

2. The relevant competent authorities shall work in full consultation with each other when carrying out the assessment provided for in Article 13(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.

3. 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 1, that investment firm is to inform the competent authority without undue 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.

4. Member States shall require that competent authorities take measures similar to those referred to in paragraph 3 of Article 10 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.

Article 12

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), 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(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 Union;

(b) a natural or legal person not subject to supervision under this Directive or Directives 2009/65/EC, 2009/138/EC or 2006/48/EC[1].

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.

[1] 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), as last amended by Directive 2007/44/EC.

8. ESMA shall develop draft regulatory technical standards to establish an exhaustive list of information, referred to in Article 13(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. 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(2).

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.

Article 13

Assessment

1. In assessing the notification provided for in Article 11(1) and the information referred to in Article 12(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 ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards which adjust the criteria set out in subparagraphs (a) to (d) of this paragraph.

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.

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 subparagraph (e) 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). 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), (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.

Article 14

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[1] at the time of authorisation.

In relation to structured deposits, the above obligation will be met provided they are issued by credit institutions which are members of a deposit guarantee scheme recognised under Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes[2].

Article 15

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 2006/49/EC having regard to the nature of the investment service or activity in question.

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1 OJ L 84, 26.3.1997, p. 22.
2 OJL135, 31.5.1994, p.5

Article 16

Organisational requirements

1. The Home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 10 and in Article 17.

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 23 from adversely affecting the interests of its clients.

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

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

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

6. An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive, Regulation [ ] (MiFIR), Directive [ ] (MAD) and Regulation [ ] (MAR), and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market.

7. Records shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders.

Relevant conversations shall also include conversations and communications which are intended to result in transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders, even if those conversations or communications do not lead to the conclusion of such transactions or to the provision of client order services.

For these purposes, an investment firm shall take all reasonable steps to record relevant conversations and communications, made with, sent from or received by equipment provided by the investment firm to an employee or contractor or the use of which by an employee or contractor has been sanctioned or permitted by the investment firm.

Investment firms shall notify new and existing clients that telephone communications or conversations between the investment firms and clients that result or may result in transactions, will be recorded.

This notification can be provided once, before the provision of investment services to new and existing clients.

Investment firms shall not provide, by phone, investment services and activities to clients who have not been notified in advance about the recording of their telephone communications or conversations, where such investment services and activities relate to the reception, transmission and execution of client orders.

Orders can be placed by clients through other channels, however such communications must be made in a durable medium such as mails, faxes, emails, documentation of client orders made at meetings. Such orders will be considered equivalent to orders received by telephone.

An investment firm shall take all reasonable steps to prevent an employee or contractor from making, sending or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the investment firm is unable to record or copy.

Records of telephone conversation or electronic communications recorded in accordance with the previous subparagraph shall be provided to the clients involved upon request and shall be kept for a period of five years.

An investment firm shall retain the records for more than five years up to a maximum of seven years, when asked to do so by its competent authority in pursuit of its duties.

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.

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

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.

11A (new) Member States may, in exceptional circumstances, impose requirements on investment firms additional to those mentioned in paragraphs 8, 9 and 10, in delegated acts under paragraph 12 and in delegated acts under Article 24(9) relating to the safeguarding of client assets. Such requirements must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity where investment firms safeguard client assets and client funds.

Member States shall notify, without undue delay, the Commission of any requirement which they intend to impose in accordance with this paragraph at least one month before the date appointed for that requirement to come into force. The notification shall include a justification for that requirement.

The Commission shall within one month from the notification referred to in the previous subparagraph provide its opinion on the proportionality of and justification for the additional requirements.

The Commission shall communicate to Member States and make public on its website the additional requirements imposed in accordance with this paragraph.

12. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to 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.

Article 16a (new)

Trading Obligation for Investment Firms

1. An investment firm shall ensure the trades it undertakes in shares admitted to trading **on a regulated market** or traded on a ~~regulated market, MTF or OTF~~**trading venue** –shall take place on a regulated market, MTF, OTF or systematic internaliser, as appropriate, unless their characteristics include that they:

   - are non-systematic, ad-hoc, irregular and infrequent, or

   - are carried out between eligible **and/**or professional counterparties and do not contribute to the price discovery process.

2. An investment firm that operates an internal ~~automatic electronic~~ matching system which executes client orders **in shares** on a multilateral basis must ensure it is authorised as either an MTF or OTF under this Directive and comply with all relevant provisions pertaining to such authorisations.

3.

3. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the particular characteristics of those transactions in shares that do not contribute to the price discovery process as referred to in paragraph 1, taking into consideration cases such as:

a) Non-addressable liquidity trades; or

b) Where the exchange of shares is determined by factors other than the current market valuation of the share.

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.

Article 17

Algorithmic trading, market making and direct electronic access

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 business continuity arrangements to deal with any 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 in a Member State shall notify this to the competent authorities of its Home Member State and of the trading venue at which the investment firm as a member or participant of the trading venue is engaged in algorithmic trading.

   The competent authority of the Home Member State of the investment firm may require the investment firm to provide, on a regular or ad-hoc basis, 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. The competent authority of the Home Member State of the investment firm may, at any time, request further information from the investment firm about its algorithmic trading and the systems used for that trading.

The competent authority of the Home Member State of the investment firm shall, on the request of a competent authority of a trading venue at which the investment firm as a member of the venue is engaged in algorithmic trading and without undue delay, communicate the information referred to in the previous subparagraph that it receives from the investment firm that engages in algorithmic trading.

The investment firm shall arrange for records to be kept in relation to the matters above and shall ensure that these records be sufficient to enable its competent authority to monitor compliance with the requirements of this Directive.

3. An investment firm that engages in algorithmic trading pursuing a market making strategy ,as defined in paragraph 4, shall carry out this market making continuously during a specified proportion of the trading venue's trading hours, except under exceptional circumstances, with the result of providing liquidity on a regular and predictable basis to the trading venue.

When engaging in algorithmic trading pursuing a market making strategy, the investment firm shall take into account sound operational, commercial and risk management practices, as well as the liquidity, scale and nature of the specific market and the characteristics of the instruments traded.

4. An investment firm that engages in algorithmic trading is pursuing a market making strategy when, as a member or participant of one or more trading venues, its strategy, when dealing on own account, involves posting firm, simultaneous two-way quotes of comparable size and at competitive prices relating to one or more financial instruments on a single trading venue or across different trading venues, with the result of providing liquidity on a regular and frequent basis to the overall market.

5. An investment firm that engages in algorithmic trading to pursue a market making strategy ,as defined in paragraph 4, shall have in place effective systems and risk controls to ensure that it can at all times fulfil its obligations under the market making scheme, as referred to in Article 51(1a).

6. 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 clients using the service, that clients using the service are prevented from exceeding appropriate pre set trading and credit thresholds, that trading by clients 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 be responsible for ensuring that clients using that service comply with the requirements of this Directive and the rules of the trading venue. The investment firm shall monitor the transactions in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse and that should be reported to the competent authority. The investment firm shall ensure that there is a binding written agreement between the firm and the client regarding the essential rights and obligations arising from the provision of the service and that under the agreement the firm retains responsibility under this Directive.

An investment firm that provides direct electronic access to a trading venue shall notify this to the competent authorities of its Home Member State and of the trading venue at which the investment firm provides direct electronic access.

The competent authority of the Home Member State of the investment firm may require the investment firm to provide, on a regular or ad-hoc basis, a description of the systems and controls referred to in first subparagraph.

The competent authority of the Home Member State of the investment firm shall, on the request of a competent authority of a trading venue that the investment firm provides direct electronic access and without undue delay, communicate the information referred to in the previous subparagraph that it receives from the investment firm.

The investment firm shall arrange for records to be kept in relation to the matters above and shall ensure that these records be sufficient to enable its competent authority to monitor compliance with the requirements of this Directive.

7. 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.

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

(a) detailed organisational requirements laid down in paragraphs 1 to 7 to be imposed on investment firms providing different investment services and/or activities and ancillary services or combinations thereof;

(b) the proportion of the trading venue's trading hours laid down in paragraph 3;

(c) the situations constituting exceptional circumstances referred to in paragraph 3, including circumstances of extreme volatility, political and macroeconomic issues, system and operational matters, and circumstances which contradict the investment firm's ability to maintain prudent risk management practices as laid down in Article 17(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.

Article 18

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 16, establish transparent 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 require that investment firms or market operators operating an MTF or an OTF establish, publish and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to its facility.

3a. (new) Member States shall require that investment firms or market operators operating an MTF or an OTF have arrangements to identify clearly and manage the potential adverse consequences for the operation of the MTF or OTF, or for the members or participants and users, of any conflict of interest between the interest of the MTF, the OTF, their owners or the investment firm or market operator operating the MTF or OTF and the sound functioning of the MTF or OTF.

3b. Member States shall require that investment firms or market operators operating an MTF or OTF to have in place all the necessary effective systems, procedures and arrangements to fully comply with all the conditions in Article 51.

4. Member States shall require that investment firms or market operators operating an MTF or an OTF clearly inform its members or participants or 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 that MTF or 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 71(1) to suspend or remove a financial instrument from trading.

7. 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 to operate an MTF or an OTF shall be notified to ESMA. ESMA shall establish a list of all MTFs and OTFs in the Union. The list shall contain 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.

8. ESMA shall develop draft implementing technical standards to determine the content and format of the description and notification referred to in paragraph 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 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(3) governing access to an MTF comply with the conditions established in Article 55(3).

3. Deleted.

4. Deleted

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.

6. (new)Member States shall not allow investment firms or market operators operating an MTF to execute client orders against proprietary capital, or to engage in matched principal trading.

Article 20

Specific requirements for OTFs

1. Member States shall require that an investment firm or a market operator operating an OTF establishes arrangements preventing the execution of client orders in an OTF against the proprietary capital of the investment firm or market operator operating the OTF.

1a. Member States shall only permit an investment firm or market operator operating an OTF to engage in matched principal trading in bonds, structured finance products, emission allowances and certain derivatives, and only in cases where the client has been informed of the process.

An investment firm or market operator operating the OTF shall not use matched principal trading to execute client orders in an OTF in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 26 [MiFIR].

An investment firm or market operator operating an OTF shall establish arrangements ensuring adherence to the definition of 'matched principal' trading in [MiFIR].

1b. Member States shall not allow the operation of an OTF and systematic internalization to take place within the same legal entity.

1c. Member States shall not prevent an investment firms or market operator operating an OTF from engaging another investment firm to carry out market making on an OTF on an independent basis.

2. Member States shall require that the execution of orders on an OTF is carried out on a discretionary basis. This obligation shall be without prejudice to the provisions of Articles 18 and 27.

3. The competent authority may require, either when an investment firm or market operator requests to be authorised for the operation of an OTF or on ad-hoc basis, detailed description as to how discretion will be exercised, in particular when an order to the OTF may be retracted and when and how two or more client orders will be matched within the OTF. In addition, the investment firm or market operator of an OTF shall provide the competent authority with information explaining its use of matched principal trading.

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

CHAPTER II

OPERATING CONDITIONS FOR INVESTMENT FIRMS

Section 1

General provisions

Article 21

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.

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

Article 22

General obligation in respect of on-going supervision

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.

Article 23

Conflicts of interest

1. Member States shall require investment firms to take all appropriate steps to identify and manage 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) 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 to the client the general nature and/or sources of conflicts of interest and the steps taken to mitigate those risks before undertaking business on its behalf.

2A. The disclosure must:

(a) be made in a durable medium; and

(b) include sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the service in the context of which the conflict of interest arises.

2B. Deleted

3. The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to:

(a) define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and 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.

Section 2

Provisions to ensure investor protection

Article 24

General principles and information to clients

1. Member States shall require that, when providing investment services 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 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 to clients or potential clients about:

(a) the investment firm and its services; when investment advice is provided, the investment firm shall, in good time before investment advice is provided, inform the client:

- ? whether the advice is provided on an independent basis or not;
- ? whether it is based on a broad or more restricted analysis of different types of instruments; and
- ? whether it will provide the client with a periodic assessment of the suitability of the financial instruments recommended to clients;

(b) 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;

(c) execution venues;

(d) all costs and associated charges which must include the cost of advice, the cost of the financial instrument recommended to the client and how the client may pay for it, also encompassing any third party payments.

The information referred to in the first subparagraph shall be provided in a comprehensible form in such a manner that 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.

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

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

(i) shall assess a range of financial instruments available on the market, which should be sufficiently diverse with regard to their type and issuers or product providers and should not be limited to financial instruments issued or provided by the investment firm itself or by entities having close links or any other strict relationships, such as contractual relationships, with the investment firm which impair the independent basis of the advice provided,

(ii) shall not accept and retain fees, commissions or any monetary and non-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. Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client should be clearly disclosed and are excluded from this provision.

6. When providing portfolio management the investment firm shall not accept and retain fees, commissions or any monetary and non-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. Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client should be clearly disclosed and are excluded from this provision.

6A. (new)An investment firm which provides investment services to clients shall ensure that it does not remunerate or assess the performance of its staff in a way that conflicts with its duty to act in the best interests of its clients. In particular, it should not make any arrangement by way of remuneration or otherwise that could incentivise its staff to recommend a particular financial instrument to a retail client when the firm could offer a different financial instrument which would better meet that client's needs.

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.

Where the risks resulting from such agreement or package are likely to be different from the risks associated with the components taken separately, the investment firm shall provide an adequate description of the different components of the agreement or package and the way in which its interaction modifies the risks.

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.

8. Member States may, in exceptional cases, impose requirements on investment firms additional to those provisions set out in this Article. Such requirements must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity.

Member States shall notify, without undue delay, the Commission of any requirement which they intend to impose in accordance with this paragraph at least one month before the date appointed for that requirement to come into force. The notification shall include a justification for that requirement.

The Commission shall within one month from the notification referred to in the previous subparagraph provide its opinion on the proportionality of and justification for the additional requirements.

The Commission shall communicate to Member States and make public on its website the additional requirements imposed in accordance with this paragraph.

9. 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, including the conditions with which the information must comply in order to be fair, clear and not misleading, the details about content and format of information to clients in relation to client categorisation, investment firms and their services, financial instruments, safeguarding of client assets and costs and charges, the criteria for the assessment of a range of financial instruments available on the market, the criteria to assess compliance of firms receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the best interest of the client. 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 and range of products being offered or considered including different types of financial instruments and structured deposits;

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

Article 25

Assessment of suitability and appropriateness and reporting to clients

1. 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.

2. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 1, 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.

   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.

   Where clients or potential clients do not provide the information referred to under the first subparagraph, or where they provide insufficient information regarding their knowledge and experience, the investment firm shall warn them that the firm is not in a position to determine whether the service or product envisaged is appropriate for them. 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 or reception and transmission of client orders with or without ancillary services, excluding the granting of credits or loans as specified in Section B (1) of Annex 1 that do not comprise of existing credit limits of loans, current accounts and overdraft facilities of clients, to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 2 where all the following conditions are met:

(a) The services refer to any of the following financial instruments:

(i) shares admitted to trading on a regulated market or on 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, 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, excluding structured UCITS as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010*;*

(v) structured deposits, excluding those that incorporate a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term;

(vi) 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 2 of Article 4 of Directive 2003/71/EC [Prospectus Directive] are fulfilled, a third-country market shall be considered as equivalent to a regulated market.

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 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 warning may be provided in a standardised format;

d) The investment firm complies with its obligations under Article 23.

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 investment firm shall provide the client with adequate reports on the service provided. 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, before the transaction is made, provide the client with a written statement on suitability specifying how the advice given meets the preferences, needs and other characteristics of the retail client. In case the agreement to buy or sell a financial instrument is concluded using a means of distance communication which prevents the prior delivery of the suitability statement, the investment firm can provide the written statement on suitability in a durable medium immediately after the client is bound by any agreement.

6. If a mortgage credit agreement, which is subject to the provisions concerning risk assessment of clients set forth in Directive on Credit Agreements for Consumers Relating to Immovable Property [to be inserted by OP], has as a prerequisite the provision of a mortgage bond specifically issued to secure the financing of and having identical terms as the mortgage credit, in order for the loan to be payable, refinanced or redeemed, this service shall not be subject to the obligations set out in this article.

7. 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, including information to obtain when assessing the suitability or appropriateness of the services and financial instruments for their clients, criteria to assess non-complex financial instruments for the purposes of paragraph 3(a)(vi), the content and the format of records and agreements for the provision of services to clients and of periodic reports to clients on the services provided. 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 structured deposits;

(c) the retail or professional nature of the client or potential clients or, in the case of paragraph 5, their classification as eligible counterparties.

8. ESMA shall develop by [ ] at the latest and update periodically, guidelines for the assessment of:

(a) financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved in accordance with paragraph 3 (a) (ii) and (iii);

(b) financial instruments incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term, in accordance with paragraph 3 (a) (v);

(c) financial instruments being classified as non complex for the purpose of paragraph 3 (a) (vi).

Article 26

Provision of services through the medium of another investment firm

Member States shall allow an investment firm receiving an instruction to provide 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 suitability 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

Obligation to execute orders on terms most favourable to the client

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

2. Member States shall require that each trading venue and systematic internaliser 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, costs, speed and likelihood of execution for individual financial instruments.

3. 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 execution policy to allow them to obtain, for their client orders, the best possible result in accordance with paragraph 1.

4. The 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 trading venue, 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 trading venue. Investment firms may obtain this consent either in the form of a general agreement or in respect of individual transactions.

5. Member States shall require investment firms who execute client orders 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 with whom they have an ongoing client relationship of any material changes to their order execution arrangements or execution policy.

Member States shall require investment firms who execute client orders 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.

6. 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.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 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 4.

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.

Article 28

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 or traded on a** trading venue 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 trading venue. 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 4 of Regulation (EU) No …/… [MiFIR].

3. 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.

Article 29

Obligations of investment firms when appointing tied agents

1. Member States shall 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 16 (6), (8) and (9), tied agents registered in their territory to hold 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 hold client's money.

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

3. 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.

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 second 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

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 (with the exception of paragraph 3), 25 (with the exception of paragraph 5), 27 and 28(1) 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 Union legislation or the national law of a Member State, 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 24, 25, 27 and 28.

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. 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 pre-determined proportionate requirements, including quantitative thresholds that would allow an undertaking to be considered as an eligible counterparty under paragraph 3.

Section 3

Market transparency and integrity

Article 31

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 members or participants or users with their rules. Investment firms and market operators operating an MTF or an OTF shall monitor the transactions undertaken by their members or participants or users under their systems in order to identify breaches of those rules, disorderly trading conditions, conduct that may indicate abusive behaviour within the scope of [add reference MAR] or system disruptions in relation to a financial instrument.

2. Member States shall require investment firms and market operators operating an MTF or an OTF to immediately inform its competent authority of significant breaches of its rules or disorderly trading conditions or conduct that may indicate abusive behaviour within the scope of [add reference MAR] or system disruptions in relation to a financial instrument.

The competent authorities of the investment firms and market operators operating an MTF or an OTF shall inform ESMA and the competent authorities of the other Member States.

In relation to conduct that may indicate abusive behaviour within the scope [add reference to MAR], a competent authority must be convinced that market abuse is being or has been carried out before it notifies the competent authorities of the other Member states and ESMA.

3. Member States shall also require investment firms and market operators operating an MTF or an OTF to also supply without undue delay the information referred to in paragraph 2 to the competent authority 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.

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

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.

Article 32

Suspension and removal of financial instruments from trading on an MTF or an OTF

1. (new) Without prejudice to the right of the competent authority under Article 71(1)(m) and (n) to demand suspension or removal of a financial instrument from trading, an investment firm or a market operator operating an MTF or an OTF may suspend or remove from trading a financial instrument which no longer complies with the rules of the MTF or an OTF unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

2. Member States shall require that an investment firm or a market operator operating an MTF or an OTF that suspends or removes from trading a financial instrument also suspends or removes derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument and makes public its decision and communicates relevant information to its competent authority.

The competent authority, in whose jurisdiction the suspension or removal originated, shall require that regulated markets, other MTFs, other OTFs and SIs, which fall under its jurisdiction and trade the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument in breach of [Article 6 & 12 MAR] except where this could cause significant damage to the investors' interests or the orderly functioning of the market.

The competent authority shall immediately make public and communicate to ESMA and the competent authorities of the other Member States such a decision.

The notified competent authorities of the other Member States shall require that regulated markets, other MTFs, other OTFs and SIs, which fall under their jurisdiction and trade the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument in breach of [Article 6 & 12 MAR] except where this could cause significant damage to the investors' interests or the orderly functioning of the market.

Each notified competent authority shall communicate its decision to ESMA and other competent authorities, including an explanation if the decision was not to suspend or remove from trading the financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument.

This paragraph also applies when the suspension from trading of a financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I of this Directive that relate or are referenced to that financial instrument is lifted.

The notification procedure referred to in this paragraph shall also apply in the case where the decision to suspend or remove from trading a financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument is taken by the competent authority pursuant to Article 71(1)(m) and (n).

3. ESMA shall develop draft implementing technical standards to determine the format and timing of the communications and the publication referred to in paragraph 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 list the situations constituting significant damage to the investors' interests and the orderly functioning of the market referred to in paragraph 1.

Article 33

Suspension and removal of financial instruments from trading on an OTF

Deleted

Article 34

Cooperation and exchange of information for MTFs and OTFs

Deleted

Section 4

SME markets

Article 35

SME growth markets

1. Member States shall provide that an investment firm or a market operator operating 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) at least fifty per cent of the issuers whose financial instruments are admitted to trading on the MTF registered as an SME growth market are small and medium-sized enterprises at the time when the MTF is registered as an SME growth market and in any calendar year thereafter;

(b) appropriate criteria are set for initial and on-going 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 initial admission to trading of the financial instrument of the MTF;

(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 investment firm or market operator operating the MTF with other obligations under this Directive relevant to the operation of MTFs. They also do not prevent the investment firm or market operator operating 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 investment firm or market operator operating the market applies for it's deregistration;

(b) the requirements in paragraph 3 are no longer complied with in relation to the MTF.

6. Members 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 or deregistration. 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 and that deregistrations do not occur nor shall registrations be refused as a result of a merely temporary failure to meet the conditions in paragraph 3(a).

CHAPTER III

RIGHTS OF INVESTMENT FIRMS

Article 36

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 2006/48/EC, may freely provide 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 provide in the territory of that Member State and whether it intends to do so through the use of tied agents, established in its Home Member State. 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.

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

Where an investment firm intends to use tied agents established in its Home Member State, in the territory of the Member States in which it intends to provide services, the competent authority of the Home Member State of the investment firm shall, within one month from receipt of all 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 to provide services in that Member State. The Host Member State shall publish 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.

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

5. 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, established in its Home Member State in the territory of the Member States in which it intends to provide services, the competent authority of the Home Member State of the credit institution shall, within one month from receipt of all 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.

6. 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 trading on those markets by remote members or participants or users established in their territory.

7. The investment firm or the market operator operating an MTF or an OTF 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, within one month, this information to the competent authority of the Member State in which the MTF or the OTF 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 without undue delay, communicate the identity of the remote members or participants of the MTF established in that Member State.

8. ESMA 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 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 subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 37

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 2006/48/EC through the right of establishment, whether by the establishment of a branch or use of a tied agent established in a Member State outside its Home Member State, 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 8, 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 or to use tied agents established in another Member State in which it has not established a branch, 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 or the Member States in which it has not established a branch but plans to use tied agents established there;

(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,

(a) where established, the organisational structure of the branch and indicating whether the branch intends to use tied agents and the identity of those tied agents,

(b)where tied agents used in a Member State in which an investment firm has not established a branch, a description of the intended use of the tied agent(s) and an organisational structure, including reporting lines, indicating how the agent(s) fit into the corporate structure of the firm;

(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 or of the tied agent.

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, where one has been established, and shall in any event 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) 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 and provide it with the information referred to in paragraph 2.

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, 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) 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.

8. 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 24, 25, 27, 28, of this Directive and Articles 13 to 23 of Regulation (EU) No …/… [MiFIR] and the measures adopted pursuant thereto by the Host Member State.

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 24, 25, 27, 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.

9. 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.

10. 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.

11. ESMA shall develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2, 4 and 10.

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.

12. ESMA 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 10.

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 38

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 39

Access to CCP, clearing and settlement facilities and right to designate settlement system

1. Without prejudice to Titles III, IV or V of of Regulation (EU) N0 648/2012, Member States shall require that investment firms from other Member States have the right of direct and indirect access to CCP, 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 direct and indirect access of those investment firms to such facilities be subject to the same non-discriminatory, transparent and objective criteria as apply to local members. Member States shall not restrict the use of those facilities to the clearing and settlement of transactions in financial instruments undertaken on a trading venue 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;

(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 with competence in relation to 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.

Article 40

Provisions regarding CCP, 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 CCP 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 the members or participants under their systems.

2. The competent authority of investment firms and market operators operating an MTF may not oppose the use of CCP, clearing house and/or settlement system 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).

   In order to avoid undue duplication of control, the competent authority shall take into account the oversight and 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.

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 and/or activities as well as ancillary services in their territory through the establishment of a branch to a person established or situated in their territory acquire a prior authorisation by the competent authorities of those Member States in accordance with at least the following provisions:

   (a) deleted

   (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) all 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 and/or activities as well as ancillary services to retail clients, including retail clients who have requested to be treated as professionals, shall establish a branch in the territory of that Member State where the retail client is established or situated.

3. Deleted

4. Deleted.

Article 42

Obligation to provide information

A third country firm intending to obtain authorisation for the provision of any investment services and/or activities as well as 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 2.

   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, 18, 19, 20, 23, 24, 25, 27, 28(1), 30, 31 and 32 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 and equally should not treat any branch of third country firms more favourably than Community firms.

Article 44

Common standards for third country arrangements

1. Deleted.

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, templates and procedures for the provision of information and for the notification provided for in Article 42.

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.

Article 44a (new)

Provision of services at the exclusive initiative of the client

Member States shall ensure that where a person established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third country firm, the requirement for authorisation under Article 41 shall not apply to the provision of that service or activity by the third country firm to that person including a relationship specifically related to the provision of that service or activity.

Section 2

Registration and withdrawal of authorisations

Article 45

Registration

Member States shall register the firms authorised in accordance with Article 43. 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 Article 43 shall 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.

TITLE III

REGULATED MARKETS

Article 47

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 market operator 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 market operator 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 shall 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.

6. ESMA shall be notified of any withdrawal of authorisation.

Article 48

Requirements for the management body of a market operator

1. Member States shall require that all members of the management body of any market operator shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience. Members of the management body shall, in particular, fulfil the following requirements:

   (a) All members of the management body shall commit sufficient time to perform their functions in the market operator. The number of directorships a member of the management body can hold, in any legal entity, at the same time shall take into account individual circumstances and the nature, scale and complexity of the investment firm's activities. Members of the management body of investment firms that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities shall not at the same time hold positions exceeding more than one of the following combinations unless otherwise authorised by the competent authority:

   (i) one executive directorship with three non-executive directorships;

   (ii) five non-executive directorships.

   Executive or non-executive directorships held (i) within the same group or (ii) undertakings where the market operator owns a qualifying holding shall be considered as one single directorship.

   (b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the market operator's activities, including the main risks.

   (c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary and to effectively oversee and monitor decision-making.

Market operators shall devote adequate human and financial resources to the induction and training of members of the management body.

2. Member States shall ensure that market operators establish a nomination committee composed of members of the management body.

The nomination committee shall carry out the following:

(a) identify and recommend, for the approval of the management body or for approval of the general meeting candidates to fill management body vacancies. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body. Further, the committee shall prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected;

(b) periodically assess the structure, size, composition and performance of the management body, and make recommendations to the management body with regard to any changes;

(c) periodically assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report this to the management body;

(d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body.

In performing its duties, the nomination committee shall be able to use any forms of resources it deems appropriate, including external advice.

Where, under national law, the management body does not have any competence in the process of selection and appointment of any of its members, this paragraph shall not apply.

3. Member States shall require the market operator 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 and 2.

4. Member States shall ensure that the management body of a market operator defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an organisation including the segregation of duties in the organisation and the prevention of conflicts of interest.

Member states shall ensure that the management body monitors and periodically assesses the effectiveness of the market operator's governance arrangements and takes appropriate steps to address any deficiencies.

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

5. The competent authority shall refuse authorisation if it is not satisfied that the persons who 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.

Article 49

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 market 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

Organisational requirements

1. 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 members or participants, of any conflict of interest between the interest of the regulated market, its owners or its market 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.

2. (new)Member States shall not allow market operators of a regulated market to execute client orders against proprietary capital, or to engage in matched principal trading.

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 failure of its trading systems.

1a. Member States shall require a regulated market to have in place market making schemes that provide suitable incentives in terms of rewards and/or rebates to investment firms who take part in any such scheme to post firm quotes at competitive prices with the result of providing liquidity to the market on a regular and predictable basis, unless such a requirement is not appropriate to the nature and scale of the trading on that regulated market.

Member States shall require a regulated market to enter into a binding written agreement between the regulated market and the investment firm regarding the essential rights and obligations arising from the participation in such a scheme and to ensure that those firms adhere to the terms and conditions of that scheme, including but not limited to liquidity provision.

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 or constrain it 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. At least Member States shall require regulated markets to have 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 service if they are investment firms authorised under this Directive and credit institutions authorised under Directive 2006/48/EC that comply with the provisions specified in Article 1(3) of 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 retains responsibility for orders and trades executed using that service in relation to the requirements of this Directive.

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 by a person using direct electronic access separately from other orders 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 a regulated market to be able to identify, by means of flagging from members or participants, orders generated by algorithmic trading, the different algorithms used for the creation of orders and the relevant persons initiating these orders. This information shall be available to competent authorities upon request.

7. Member States shall require that upon request by the competent authority of the Home Member State of 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.

8.

ESMA shall develop draft regulatory technical standards on the following :

(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 or constrained 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 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.

(f) to ensure market making schemes are fair and non-discriminatory and to establish minimum market making obligations that regulated markets must adhere to when designing a market making scheme and the conditions under which the requirement to have in place a market making scheme is not appropriate, taking into account the nature and scale of the trading on that regulated market, including whether the regulated market allows for or enables algorithmic trading to take place through its systems.

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 this subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 52

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 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 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 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[1]. 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. ESMA shall develop draft regulatory technical standards 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;

[1] OJ L 345, 31.12.2003, p. 64.

(b) clarify the arrangements that the regulated market has 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 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 Union law.

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.

Article 53

Suspension and removal of financial instruments from trading on a regulated market

1. Without prejudice to the right of the competent authority under Article 71(1)(m) and (n) to demand suspension or removal of a financial instrument from trading, the market operator 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.

2. Member States shall require that a market operator that suspends or removes from trading a financial instrument also suspends or removes the derivatives referred to in points (4) to (10) of Section C of Annex I of this Directive that relate or are referenced to that financial instrument and makes public this decision and communicates relevant information to its competent authority.

The competent authority, in whose jurisdiction the suspension or removal originated, shall require that other regulated markets, MTFs, OTFs and SIs, which fall under its jurisdiction and trade the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument in breach of [Article 6 & 12 MAR] except where this could cause significant damage to the investors' interests or the orderly functioning of the market.

The competent authority shall immediately make public and communicate to ESMA and the competent authorities of the other Member States of such a decision. The notified competent authorities of the other Member States shall require that other regulated markets, MTFs, OTFs and SIs which fall under their jurisdiction and trading the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument also suspend or remove that financial instrument or derivatives from trading where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument in breach of [Article 6 & 12 MAR] except where this could cause significant damage to the investors' interests or the orderly functioning of the market.

Each notified competent authority shall communicate its decision to ESMA and other competent authorities, including an explanation if the decision was not to suspend or remove from trading the financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument.

This paragraph applies also when the suspension from trading of a financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I of this Directive that relate or are referenced to that financial instrument is lifted.

The notification procedure referred to in this paragraph shall also apply in the case where the decision to suspend or remove from trading a financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument is taken by the competent authority pursuant to Article 71(1)(m) and (n).

3. ESMA shall develop draft implementing technical standards to determine the format and timing of the communications and publications referred to in paragraph2.

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 market referred to in paragraphs 1 and 2..

Article 55

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 2006/48/EC and other persons who:

   (a) are of sufficient good repute;

   (b) have a sufficient level of trading ability, 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 or participants are not obliged to apply to each other the obligations laid down in Articles 24, 25, 27 and 28. However, the members or participants of the regulated market shall apply the obligations provided for in Articles 24, 25, 27 and 28 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.

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 one 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.

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 without undue delay, communicate the identity of the members or participants of the regulated market established in that Member State.

7. Member States shall require the market operator to communicate, on a regular basis, the list of the members or participants of the regulated market to the competent authority of the regulated market.

Article 56

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 undertaken and orders sent by their members or participants under their systems in order to identify breaches of those rules, disorderly trading conditions, conduct that may indicate abusive behaviour within the scope of [add reference MAR] or system disruptions in relation to a financial instrument.

2. Member States shall require the market operators of the regulated markets to immediately inform their competent authorities of significant breaches of their rules or disorderly trading conditions or conduct that may indicate abusive behaviour within the scope of [add reference MAR] or system disruptions in relation to a financial instrument.

The competent authorities of the regulated markets shall inform ESMA and the competent authorities of the other Member States.

In relation to conduct that may indicate abusive behaviour within the scope [add reference to MAR], a competent authority must be convinced that market abuse is being or has been carried out before it notifies the competent authorities of the other Member States and ESMA.

3. Member States shall also require the market operator to supply the relevant information without undue 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.

4. 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.

Article 57

Provisions regarding CCP and clearing and settlement arrangements

1. Without prejudice to Titles III, IV or V of Regulation (EU) N0 648/2012, Member States shall not prevent regulated markets from entering into appropriate arrangements with a CCP 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. Without prejudice to Titles III, IV or V of Regulation (EU) N0 648/2012, the competent authority of a regulated market may not oppose the use of CCP, 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).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight and 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 58

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. The list shall contain the unique code established by ESMA identifying the regulated markets for use in reports in accordance with Article 23 and Articles 5 and 9 of Regulation (EU) No …/… [MiFIR].

TITLE IV

POSITION LIMITS AND POSITION MANAGEMENT CONTROLS IN COMMODITY DERIVATIVES AND REPORTING

Article 59

Position limits and position management controls in commodity derivatives

1. Member States shall ensure that competent authorities establish and apply position limits on the size of a position in a commodity derivative which a person can have over a specified period of time, in order to:

   (a) deleted.

(b) prevent market abuse;

(c) support orderly pricing and settlement conditions.

Position limits shall not apply to positions objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of a non-financial entity or of a person who acts on behalf of that non-financial entity.

2. Position limits shall specify clear quantitative thresholds for the maximum size of a position in a commodity derivative that persons can have.

3. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives apply position management controls. These controls shall include at least, the powers for the trading venue to:

(a) monitor the open interest positions of persons;

(b) access information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market;

(c) require a person to terminate or reduce a position, on a temporary or permanent basis as the specific case may require and to unilaterally take appropriate action to ensure the termination or reduction if the person does not comply; and

(d) where appropriate, require a person to provide liquidity back into the market at an agreed price and volume on a temporary basis with the express intent of mitigating the effects of a large or dominant position.

4. The position limits and position management controls shall be transparent and non-discriminatory, specifying how they apply to persons and taking account of the nature and composition of market participants and of the use they make of the contracts submitted to trading.

5. The investment firm or market operator operating the trading venue shall inform the competent authority of the details of position management controls.

The competent authority shall communicate the same information as well as the details of the position limits it has established to ESMA, which shall publish and maintain on its website a database with summaries of the position limits and position management controls.

6. The position limits of the paragraph 1 shall take precedence over any measures imposed by competent authorities pursuant to Article 71(1)(p), unless these measures are more restrictive than those adopted in accordance with paragraph 8.

7. ESMA shall develop draft regulatory technical standards to determine the criteria that competent authorities will apply in establishing the position limits on the size of a position in a commodity derivative which a person can have over a specified period of time in accordance with paragraphs 2 and 4.

In developing the regulatory technical standards, ESMA shall take account of, at least, the following:

(a) whether the financial instruments can be physically settled or are cash settled;

(b) the maturity of the commodity derivative contracts;

(c) the deliverable supply in the underlying commodity;

(d) the overall open interest in the respective commodity derivative contracts;

(e) the overall open interest in other financial instruments with the same underlying commodity;

(f) the level of volatility in the relevant markets, including substitutable derivatives and the underlying commodity markets;

(g) the number and size of the market participants;

(h) the characteristics of the underlining commodity market, including patterns of production, consumption and transportation to market;

(i) the experiences with the position limits that have been employed by investment firms or market operators operating a trading venue.

ESMA shall submit those draft regulatory technical standards referred to in the first subparagraph 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.

8. Competent authorities may impose more restrictive position limits than those established in accordance with paragraph 1 only, in exceptional cases, where they are objectively justified and proportionate taking into account the liquidity of the specific market and the orderly functioning of that market. Competent authorities shall publish on their website the details of the restrictive position limits they decide to impose, which shall be valid for an initial period not exceeding six months from the date of their publication on the website. The restrictive position limits may be renewed for further periods not exceeding six months at a time if the grounds for the restriction continue to be applicable. If not renewed after that six-month period, they shall automatically expire.

Once competent authorities decide to impose more restrictive position limits, they shall notify ESMA. The notification shall include a justification for the more restrictive position limits. ESMA shall, within 24 hours, issue an opinion on whether it considers that the restrictive position limits are necessary to address the exceptional case. The opinion shall be published on ESMA's website.

Where a competent authority acts 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 position holders

1. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission allowances or derivatives thereof:

   (a) make public a weekly report with the aggregate positions held by the different categories of position holders for the different financial instruments traded on their platforms specifying the number of long and short positions by category of position holder, changes thereto since the previous report, the percentage of the total open interest represented by each category and the number of position holders in each category in accordance with paragraph 3;

   (b) provide the competent authority with a complete breakdown of the positions of any or all position holders, including the members or participants and the clients thereof, on that trading venue, upon request.

   The obligation laid down in point (a) shall only apply when both the number of position holders and their open positions in a given financial instrument exceed minimum thresholds.

2. In order to enable monitoring of compliance with paragraph 1 of Article 59, Member States shall require members or participants of regulated markets and MTFs to report to the market operator of the respective regulated market or to the investment firm or market operator operating the respective MTF, the details of their own positions on a daily basis, as well as those of their clients, the clients of those clients and so on until the end client is reached.

3. Holders of a position in a commodity derivative or emission allowance or derivative thereof, including members or participants of regulated markets and the clients thereof, shall be classified by the investment firm or market operator operating that trading venue 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;

(f) other trading participants.

The reports mentioned in point (a) of paragraph 1 should specify the number of long and short positions by category of position holders, any changes thereto since the previous report, the percent of total open interest represented by each category, and the number of position holders 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 position holders 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 investment firm or a market operator operating a trading venue 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 five years.

4. Member States shall require data reporting service providers to provide its services under the supervision of the competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of data reporting service providers with the provisions of this Title. They shall also ensure that competent authorities monitor that data reporting service providers comply at all times with the conditions for initial authorisation established under this Title.

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 throughout the Union the services, for which it has been authorised.

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 3.

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 shall withdraw the authorisation issued to a data reporting services provider where the provider:

(a) does not make use of the authorisation within twelve 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. 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.

   The management body shall possess adequate collective knowledge, skills and experience to be able to understand the activities of the data reporting services provider. Each member of the management body shall act with honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making.

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. Deleted.

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. Member States shall ensure that the management body of a data reporting services provider defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an organisation including the segregation of duties in the organisation and the prevention of conflicts of interest.

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 APA has published it. 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 or operate with redundant set-up including fail-over procedures 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. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards 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;

(c) the concrete organisational requirements laid down in paragraphs 2, 3 and 4.

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.

Section 4

Conditions for approved reporting mechanisms (ARMs)

Article 68

Organisational requirements

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 working day following the day upon which the transaction took place. Such information shall be reported in accordance with the requirements laid down in Article 23 of Regulation (EU) No …/… [MiFIR]

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 and authentication of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage maintaining the confidentiality of the data at all times. 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 caused by the investment firm and where such error or omission occurs, to communicate details of the error or omission to the investment firm.

The Home Member State shall also require the ARM to have systems in place to enable the ARM to detect errors or omissions caused by the ARM itself and to enable the ARM to correct and transmit (or re-transmit as the case may be) correct and complete transaction reports to the competent authority.

5. .

6. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying:

(a) The means by which the ARM may comply with the information obligation referred to in paragraph 1; and

(b) the concrete organisational requirements laid down in paragraphs 2, 3 and 4…

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.

TITLE VI

COMPETENT AUTHORITIES

CHAPTER I

DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 69

Designation of competent authorities

1. Each Member State shall designate the competent authorities which are to carry out each of the duties provided for under the different provisions of 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.

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 Article 29(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 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. The final responsibility for supervising compliance with this Directive and with its implementing measures shall lie with the competent authority or authorities designated in accordance with paragraph 1.

Member States shall inform the Commission, 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.

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.

Article 70

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 71

Supervisory powers including investigatory powers

1. Competent authorities shall have, in conformity with national law, all supervisory powers, including investigatory powers, necessary to fulfil their duties under this Directive and Regulation [MIFIR], including at least the following:

   (a) have access to any document and other data in any form and receive or take a copy of it;

   (b) require or demand information from any person and if necessary, to summon and question a person with a view to obtain information;

   (c) carry out on-site inspections or investigations;

   (d) require existing recordings of telephone conversations or electronic communications held by an investment firm or credit institutions or other financial institutions;

   (e) request temporary prohibition of professional activity;

   (f) require authorised investment firms' and regulated markets' auditors to provide information;

   (g) refer matters for criminal prosecution;

   (h) allow auditors or experts to carry out verifications or investigations;

   (i) require or demand information including all relevant documentation from any person regarding the size and purpose of a position or exposure entered into via a commodity derivative, and any assets or liabilities in the underlying market;

(j) require the temporary 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 prevent repetition of that practice or conduct;

(k) require the freezing or the sequestration of assets;

(l) adopt any type of measure to ensure that investment firms, regulated markets and other persons to whom this Directive or Regulation [MiFIR] applies, continue to comply with legal requirements;

(m) require the suspension of trading in a financial instrument;

(n) require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;

(o) request any person to take steps to reduce the size of a position or exposure;

(p) limit the ability of any person or class of persons from entering into a commodity derivative, including by introducing non-discriminatory position limits on the size of a position in a commodity derivative which a person can have over a specified period of time, when necessary to ensure the integrity and orderly functioning of the affected markets;

(q) issue public notices;

(r) require, in so far as permitted by national law, existing data traffic records held by a telecommunication operator, where such records may be relevant to an investigation into violations of this Directive or Regulation (EU) No …/… [MiFIR].

2. Competent authorities shall exercise the supervisoryincluding investigatory powers referred to in paragraph 1 in accordance with Article 76 of this Directive where relevant and with national law, either:

(a) directly;

(b) in collaboration with other authorities;

(c) under their responsibility by delegation to entities to which tasks have been delegated according to Article 69(2); or

(d) by application to the competent judicial authorities if the exercise of the powers referred to in paragraph 1 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for before their exercise; such authorisation may also be requested as a precautionary measure.

3. Member States shall lay down the necessary rules and shall take all measures necessary to ensure that those rules are implemented, so that competent authorities have all the supervisory powers including investigatory powers referred to in paragraph 1. The measures provided for shall be effective, proportionate and dissuasive.

By [xx] months after entry into force of this Directive, the Member States shall notify the rules referred to in the first subparagraph to the Commission and ESMA. They shall notify the Commission and ESMA without undue delay of any subsequent amendment thereto.

Article 72

Remedies to be made available to competent authorities

Deleted.

Article 73

Administrative sanctions

Deleted.

Article 74

Publication of sanctions

Deleted.

Article 75

Infringements

1. At least a breach of one or more of the following provisions shall be regarded as an infringement of the requirements of this Directive or Regulation (EU) No.../... [MIFIR]:

Articles 8(b), Articles 9 paragraph 1-4 and 6, 11 paragraph 1 and 3, 16 paragraph 1-11, 17 paragraph 1-5, 18 paragraph 1-7 and paragraph 8, 1st sentence, 19, 20, 21 paragraph 1, 23 paragraph 1 and 2, 24 paragraph 1-3 and 5-7, 25 paragraph 1-5, 27 paragraph 1-6, 28 paragraph 1 and 2, 29 paragraph 2, 2nd sentence, paragraph 2, last sub-paragraph, paragraph 4, 1st sentence and paragraph 5, 30, paragraph 1, sub-paragraph 2 and paragraph 3, sub-paragraph 2, 1st sentence, 31, 32, paragraph 1, 1st and 3rd-4th sentence, 33, paragraph 1. 1st sentence, 34, paragraph 1, 39, paragraph 1, sub-paragraph 2, 1st sentence and paragraph 2, 47, 48, paragraph 1-4 and paragraph 6, 49, paragraph 2, litra a and b, 50, 51 paragraph 1-6, 52, paragraph 1, 3-4 and paragraph 5, 2nd sentence, 53 paragraph 1, sub-paragraph 2, 1st and 3rd-4th sentence, 54, paragraph 1, 55, paragraph 1 and paragraph 6, sub-paragraph 2, 1st sentence, 55, paragraph 7, 56, 59, paragraph 1 and paragraph 2, 1st sentence, 60, paragraph 1-3, 65, paragraph 1 and 3-4, 66 paragraph 1-4, 67, paragraph 1-5, or 68 paragraph 1-4 in this Directive and articles 3, 5, 7, 9, 11 paragraph 1, 12 paragraph 1, 13 paragraph 1, 14 paragraph 1-2 and paragraph 4, 2nd sentence, 17 paragraph 1-3 and 5-6, 19 paragraph 1 and paragraph 2, 1st sentence, 20 paragraph 1 and 2, 22 paragraph 1 and 2, 23 paragraph 1, 1st sentence, paragraph 4, 1st sentence, paragraph 5, paragraph 6, 1st sentence and paragraph 7, 24 paragraph 1, 25, 28 paragraph 1-3, 29 paragraph 1-3, or 30, paragraph 1-2 in Regulation (EU) No.../... [MIFIR].

2. Providing services and/or performing activities without the required authorisation or approval according to the following provisions in this Directive or Regulation (EU) No.../... [MIFIR] shall also be considered an infringement of:

Articles 5, 6, paragraph 2, 36, 37, 41, or 61 in this Directive and/or Articles 6, paragraph 1, 2nd sentence, or 10, paragraph 1, sub-paragraph 2 in Regulation (EU) No.../... [MIFIR].

Article 75a

Sanctioning powers

1. Without prejudice to the supervisory powers including investigatory powers of competent authorities in accordance with Article 71 and the right for Member States to provide for and impose criminal sanctions, Member States shall lay down rules on administrative sanctions and measures applicable to the infringements of this Directive or Regulation [MiFIR] and the national provisions adopted in the implementation of this Directive and Regulation [MiFIR], and shall take all measures necessary to ensure that they are implemented. The administrative sanctions and measures shall be effective, proportionate and dissuasive.

Member States may decide not to lay down rules for administrative sanctions on breaches which are subject to criminal sanctions under their national law. In this case, Member States shall communicate to the Commission the relevant criminal law provisions.

By [24 months after the entry into force of this Directive] Member States shall notify the rules referred to in the first subparagraph to the Commission and ESMA. Member States shall notify the Commission and ESMA without undue delay of any subsequent amendments thereto.

2. Member States shall ensure that where the obligations referred to in paragraph 1 apply to investment firms and market operators, in case of a breach, sanctions and measures can be applied, subject to the conditions laid down in national law, 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 breach.

3. 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 warning which indicates the natural or legal person responsible and the nature of the breach, unless this would seriously jeopardise the financial markets or would cause a disproportionate damage to the parties involved;

(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, a regulated market, an APA, a CTP and an ARM, withdrawal or suspension of the authorisation of the institution in accordance with Articles 8, 47 and 67;

(d) a ban or a temporary ban against any member of the investment firm's management body or any other natural person, who is held responsible, to exercise management functions in investment firms;

(e) in case of a legal person, maximum administrative pecuniary fines of at least EUR [5 000 000] or of at least 10% of the total annual turnover of the legal person according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts according to Directive 83/349/EC, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant Accounting Directives according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;

(f) in case of a natural person, maximum administrative pecuniary fines of at least EUR [5 000 000], 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) maximum administrative pecuniary fines of at least twice the amount of the benefit derived from the infringement where that benefit can be determined, even if that exceeds the maximum amounts in (e) and (f).

Article 75b

Publication of sanctions and measures

1. Member States shall provide that competent authorities publish every decision imposing a sanction or measure for breach of this Directive and of Regulation [MiFIR] and the national provisions adopted in the implementation of this Directive or Regulation [MiFIR] on their official websites immediately after the person sanctioned is informed of that decision. This obligation does not apply to decisions imposing measures that are of an investigatory nature. The publication shall include at least information on the type and nature of the breach and the identity of the persons responsible.

However, where the publication of the identity of the legal persons or of the personal data of the natural persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises the stability of financial markets or an on-going investigation, Member States shall ensure that competent authorities shall either:

(a) delay the publication of the decision to impose the sanction or measure until the moment where the reasons for non-publication cease to exist;

(b) publish the decision to impose the sanction or measure on an anonymous basis in a manner which is in conformity with national law, if such anonymous publication ensures an effective protection of the personal data concerned;

(c) not publish the decision to impose the sanction or measure at all.

In the case of a decision to publish a sanction or measure on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is foreseen that within that period the reasons for anonymous publication shall cease to exist.

2. Where the decision to impose a sanction or measure is subject to an appeal before the relevant judicial or other authorities, competent authorities shall also publish, immediately, on their official website such information and any subsequent information on the outcome of such appeal. Moreover, any decision annulling a previous decision to impose a sanction or a measure shall also be published.

3. Competent authorities shall ensure that any publication in accordance with this Article shall remain on their official website for a period of at least five years after its publication. Personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.

Article 76

Exercise of sanctioning powers

1. Competent authorities shall exercise the sanctioning powers referred to in Article 75a(1) in accordance with Article 71of this Directive where relevant and with national law, either:

(a) directly;

(b) in collaboration with other authorities;

(c) under their responsibility by delegation to entities to which tasks have been delegated according to Article 69(2); or

(d) by application to the competent judicial authorities: if the exercise of the powers referred to in Article 75a (1) requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for before their exercise; such authorisation may also be requested as a precautionary measure.

2. Member States may provide competent authorities under national law to have other sanctioning powers in addition to those referred to in Article 75a (3) and may provide for higher levels of sanctions than those established in that paragraph.

3. Member States shall ensure that competent authorities, when determining the type and level of an administrative sanction or measure take into account all relevant circumstances, including, where appropriate:

a) the gravity and duration of the breach;

b) the degree of responsibility of the responsible person;

c) the financial strength of the responsible person, as indicated by the total turnover of the responsible legal person or the annual income and net assets of the responsible natural person;

d) the importance of the profits gained or losses avoided by the responsible person, insofar as they can be determined;

e) the level of cooperation of the responsible person with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

f) previous breaches by the responsible person.

Competent authorities may take into account additional factors to those referred to in the previous subparagraph when determining the type and level of administrative sanctions and measures.

4. Member States shall provide ESMA annually with aggregated information regarding all sanctions and measures imposed in accordance with this Directive. This obligation does not apply to sanctions or measures of an investigatory nature. ESMA shall publish this information in an annual report. Where the competent authority has disclosed a sanction or measure to the public, it shall contemporaneously report that fact to ESMA. Where a published sanction or measure 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).

ESMA shall develop draft implementing technical standards concerning the procedures and forms for submitting information as referred to in this paragraph.

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].

5. The processing of personal data collected in or for the exercise of the supervisory including investigatory powers in accordance with this Directive shall be carried out in accordance with national legislation implementing Directive 95/46/EC, and with Regulation 45/2001 where relevant.

Article 77

Reporting of breaches

1. Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting of actual or potential breaches of the provisions of Regulation …/… (MiFIR) and of the national provisions implementing this Directive to competent authorities.

   The mechanisms referred to in paragraph 1 shall include at least:

   (a) specific procedures for the receipt of reports on breaches and their follow-up;

   (b) appropriate protection for employees of financial institutions who report breaches committed within the financial institution against retaliation, discrimination or other types of unfair treatment at a minimum;

   (c) protection of the identity of both the person who reports the breaches and the natural person who is allegedly responsible for a breach, at all stages of the procedures unless such disclosure is required by national law in the context of further investigation or subsequent judicial proceedings.

2. Member States shall require financial institutions to have in place appropriate procedures for their employees to report breaches internally trough a specific, independent and autonomous channel.

Article 78

Submitting information to ESMA in relation to sanctions

Deleted.

Article 79

Right of appeal

Deleted.

Article 80

Extra-judicial mechanism for consumers' complaints

1. Member States shall 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, unless their national law provides otherwise, 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 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.

   ESMA shall publish and keep up-to-date a list of all extra-judicial mechanisms on its website.

Article 81

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), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. They shall not divulge any confidential information which they may receive in the course of their duties, 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 criminal or taxation 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 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 82

Relations with auditors

1. Member States shall provide, at least, that any person authorised within the meaning of Eighth Council Directive 84/253/EEC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents[1], performing in an investment firm the task described in Article 51 of Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies[2], Article 37 of Directive 83/349/EEC or Article 73 of Directive 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;

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1 OJ L 126, 12.5.1984, p. 20.

2 OJ L 222, 14.8.1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

(b) affect the continuous functioning of the investment firm;

(c) lead to refusal to certify the accounts or to the expression of reservations.

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

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

CHAPTER II

COOPERATION BETWEEN THE COMPETENT AUTHORITIES OF THE MEMBER STATES AND WITH ESMA

Article 83

Obligation to cooperate

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

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

   In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate 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.

2. When, taking into account the situation of the securities markets in the Host Member State, the operations of a trading venue 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 trading venue 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.

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.

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 71(1)(o);

(b) any limits on the ability of persons to enter into an instrument pursuant to Article 71(1)(p).

The notification shall include, where relevant, the details of the request pursuant to Article 71(1)(o) 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 71(1)(p) including the person or class of persons concerned, the applicable financial instruments, any quantitative measures or thresholds such as the maximum size of a position 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 71(1)(o) or (p) 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.

7. (new) In relation to agricultural commodity derivatives, competent authorities should report to and cooperate with public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation 1234/2007/EC.

8. 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 trading venue 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.

ESMA 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.

Article 84

Cooperation between the competent authorities

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 or participants 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 or participant 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.

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. ESMA 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.

4. ESMA 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 subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 85

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) 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), 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 in accordance with Article 83(1) may transmit the information received under paragraph 1 and Articles 82 and 92 to the authorities referred to in Article 69(1). 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 74 as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles 82 and 92 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;

(f) in the extra-judicial mechanism for investors' complaints provided for in Article 80.

4. ESMA 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.

5. Neither this Article nor Articles 81 or 92 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.

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 84; or

   (b) to exchange information as provided for in Article 85.

2. In the situations referred to in 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 87 and to the possibility of ESMA acting in accordance with Article 17 of Regulation (EU) No 1095/2010.

Article 87

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 88 or to exchange information as provided for in Article 85 only where:

(a) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;

(b) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

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

Article 88

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 any one of the following:

   (a) a subsidiary of an investment firm or market operator or credit institution authorised in another Member State;

   (b) a subsidiary of the parent undertaking of an investment firm or credit institution authorised in another Member State;

   (c) controlled by the same natural or legal persons who 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 or market operator which is any of the following:

   (a) a subsidiary of a credit institution or insurance undertaking authorised in the Union;

   (b) a subsidiary of the parent undertaking of a credit institution or insurance undertaking authorised in the Union;

   (c) controlled by the same person, whether natural or legal, who controls a credit institution or insurance undertaking authorised in the 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.

4. ESMA 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.

Article 89

Powers for Host Member States

1. Host Member States shall provide that the competent authority 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 shall provide that the competent authority 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). 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 90

Precautionary measures to be taken by Host Member States

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

   If, despite the measures taken by the competent authority of the Home Member State or because such measures prove inadequate, the investment firm persists in acting in a manner that is clearly prejudicial to the interests of Host Member State investors or the orderly functioning of markets, the 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 undue 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.

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 Member 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.

Where, 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 competent authority of the Host Member State shall, after informing the competent authority of the Home Member State, 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 undue delay.

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.

3. Where the competent authority of the Host Member State of a regulated market, an MTF or OTF has clear and demonstrable grounds for believing that such regulated market, 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.

Where, 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 or OTF persists in acting in a manner that is clearly prejudicial to the interests of Host Member State investors or the orderly functioning of markets, the competent authority of the Host Member State shall, after informing the competent authority of the Home Member State, 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 or OTF 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 undue delay.

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.

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.

Article 91

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 undue 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.

CHAPTER III

COOPERATION WITH THIRD COUNTRIES

Article 92

Exchange of information with third countries

1. Member States and in accordance with Article 33 of Regulation (EU) No 1095/2010, ESMA, 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. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

   Transfer of 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 third 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;

(g) oversight of persons active on agricultural commodity derivatives 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. 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.

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

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(2), 4(3), 13(1), 16(12), 23(3), 24(9) 25(7), 27(7), 28(3), 30(5), 32(4), 35(8), 44(4), 53(4), 60(5) , 66(6), 68(5), and 83(8).

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 60, the Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC[1]. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011[2].

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.

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1 OJ L 191, 13.7.2001, p.45.
2 OJ L 55, 28.2.2011, p.13.

CHAPTER 3

FINAL PROVISIONS

Article 96

Reports and review

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, including their specific use of matched principal trading, 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.

   In particular, the report shall assess whether the threshold in Article 35(3)(a) remains an appropriate minimum to pursue the objectives for SME growth markets as stated in this Directive;

   (c) the impact of requirements regarding algorithmic 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 development in prices for pre and post trade transparency data from regulated markets, MTFs, OTFs and APA.

Article 97

Transposition

1. Member States shall adopt and publish, by two years after the publication of this Directive in the Official Journal of the Union] 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 thirty two months after the publication of this Directive in the Official Journal of the Union except for the provisions transposing Article 67(2) which shall apply two years after the application date for the rest of the Directive, provided that the delegated acts referred to in this Directive are adopted.

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.

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. Deleted.

Article 100

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 101

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;

(9) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier level ('central maintenance service') referred to in point (2) of Section A of the Annex of the [CSD Regulation];

(10) Operation of Organised Trading Facilities.

Section B

Ancillary services

(1) 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) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;

(3) Foreign exchange services where these are connected to the provision of investment services;

(4) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;

(5) Services related to underwriting.

(6) 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**s** ~~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 other than by reason of default or other termination event;

(6) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a regulated market or an MTF or an OTF, except for such contracts **traded on an OTF** ~~that are entered into for commercial purposes and~~ that can only be physically settled **and are not used for speculative purposes**;

(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 CCPs 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 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 other than by reason of 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 CCPs or are subject to regular margin calls.

(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.

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 third country:

(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.