



VALTIOVARAINMINISTERIÖ

17.6.2005

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Eduskunta
Suuri valiokunta

**LUONNOS KOMISSION DIREKTIIVIKSI RAHOITUSVÄLINEIDEN
MARKKINOISTA ANNETUN DIREKTIIVIN 2004/39/EY 13 JA 18 ARTIKLOJEN
TÄYTÄNTÖÖNPANOSTA**

Valtiovarainministeriö lähettää eduskunnalle perustuslain 97 §:n 1 momentin perusteella eduskunnalle komission edustajan Euroopan arvopaperikomitealle 13 päivänä toukokuuta 2005 jakaman luonnoksen komission asiakirjaksi Euroopan parlamentin ja neuvoston direktiivin 2004/39/EY 13 ja 18 artiklojen täytäntöönpanosta ja luonnoksesta laaditun muistion.

Helsingissä 17 päivänä kesäkuuta 2005

Toinen valtiovarainministeri

Ulla-Maj Wideroos

Vanhempi hallitussihteeri

Irmeli Vuori

LIITTEET: Draft Commission Document on Organisational Requirements and Identification, Management and Disclosure of Conflicts of Interest by Investment Firms.

Perusmuistio 16.6.2005

JULKINEN

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ASIAKOHTA:

EU; Rahoituspalvelut; Rahoitusvälineiden markkinoista annettu direktiivi; Direktiiviä täydentävät säännökset

KOKOUS:

EUTORI-asian nro:

U/E-tunnus:

KÄSITTELYVAIHE JA LUONNE:

Komission sisämarkkinat -pääosaston (*DG Internal Market*) luonnos täytäntöönpanosäädökseksi sijoituspalveluyritysten toiminnan järjestämistä koskevista vaatimuksista sekä eturistiriitojen tunnistamisesta, hallitsemisesta ja ilmoittamisesta. Luonnos ei ole vielä komission virallinen ehdotus, jonka antamisesta alkaisi rahoitusvälineiden markkinoista annetun direktiivin (2004/39/EY) 64 artiklassa tarkoitettu kolmen (3) kuukauden määräaika säännöksen hyväksymiselle. Komissio antanee virallisen ehdotuksensa syyskuussa 2005.

Luonnosta on käsitelty kerran Euroopan arvopaperikomitean varajäsenten kokouksessa (26.-27.5.2005).

Komissio ei ole Euroopan arvopaperikomitean kokouksissa ilmoittanut aikomuksistaan sen suhteen, annetaanko lopullinen ehdotus komission asetuksena vaiko direktiivinä.

ASIAKIRJAVIITTEET:

Komission sisämarkkinat –pääosaston Working document ESC/17/2005: Draft Commission Document on Organisational Requirements and Identification, Management and Disclosure of Conflicts of Interest by Investment Firms, Draft 13/5/05 (saatavana vain englanniksi).

EU:N OIKEUDEN MUKAINEN OIKEUSPERUSTA / PÄÄTÖKSENTEKOMENETTELY:

Rahoitusvälineiden markkinoista annetun direktiivin 13 ja 18 artikla / Neuvoston päätöksen 1999/468/EY 5 ja 7 artiklassa säädetty komiteamenettely ottaen huomioon mainitun säännöksen 8 artiklan säännökset.

KÄSITTELIJÄ(T):

Vanhempi hallitussihteeri Irmeli Vuori VM / RMO, puh. 09 160 33013.

SUOMEN KANTA/OHJE:

Suomi on suhtautunut varauksellisesti luonnoksen sisältöön. Komiteakäsittelyssä pyritään vähentämään ehdotuksen yksityiskohtaisuutta ja lisäämään sääntelyn joustavuutta. Suomi pyrkii rajoittamaan sitovan sääntelyn suhteellisuusperiaate huomioden välttämättömiin asioihin ja korostaa sitä, että toimijoiden koko, toiminnan laajuus ja laatu tulee voida huomioida velvoitteita asetettaessa. Monet ehdotetuista uusista velvoitteista aiheuttavat toimijoille lisää kustannuksia, joten niiden tarpeellisuutta on välttämätöntä punnita tarkoin suhteessa tavoiteltuun sijoittajansuojan parantamiseen.

Samalla pyritään vaikuttamaan siihen, että osa yksityiskohtaisesta asioiden sääntelystä komission direktiiveinä tai asetuksina siirrettäisiin valvontaviranomaisten yhteistyössä tapahtuvaksi joustavammaksi menettelyksi. Suomi on myös vastustanut asetuksen käyttöä tässä asiassa ja ehdottanut asioiden säätämistä komission direktiivillä.

Valtioneuvosto ei ole vielä muodostanut kantaa asiaan.

PÄÄASIALLINEN SISÄLTÖ:

Luonnoksessa on 24 artiklaa, yhteensä 17 sivua. Artikla 1 koskee säädösluonnoksen asiasisältöä ja soveltamisalaa. Sen mukaan säädöksessä säädetään:

- toiminnan järjestämistä koskevista vaatimuksista, joita sijoituspalveluyritysten on noudatettava voidakseen tarjota sijoituspalveluja ja harjoittaa sijoitustoimintaa rahoitusvälineiden markkinoista annetun direktiivin 13 artiklan mukaan;
- toiminnan järjestämistä koskevista vaatimuksista liittyen toiminta- ja hallintajärjestelyihin, joita sijoituspalveluyritysten on pidettävä yllä ja käytettävä, rahoitusvälineiden markkinoista annetun direktiivin 13 artiklan 3 kohdan mukaan; ja
- toimenpiteistä, jotka sijoituspalveluyrityksen on toteutettava eturistiriitojen tunnistamiseksi, hallitsemiseksi ja ilmoittamiseksi, rahoitusvälineiden markkinoista annetun direktiivin 18 artiklan mukaan.

Luonnosta sovelletaan sijoituspalveluyrityksiin ja luottolaitoksiin, jotka tarjoavat sijoituspalveluja tai harjoittavat sijoituspalvelutoimintaa. Artikla 2 sisältää keskeiset asetusluonnoksessa käytetyt määritelmät.

Artiklat 3-9 koskevat sijoituspalveluyrityksen toiminnan järjestämistä (*Organisation of Investment Firms*). Artikla 3 sisältää säännökset sijoituspalveluyrityksen toiminnan järjestämisen yleisistä vaatimuksista (*General Organisational Requirements*). Artiklan mukaan sijoituspalveluyrityksellä on oltava muun muassa selkeät päätöksentekomenettelyt, ammattitaitoinen henkilökunta, tehokkaat tietojenkäsittelyjärjestelmät, moitteettomat hallinto- ja kirjanpitoimenettelyt ja sisäiset valvontajärjestelmät, joilla valvotaan ja arvioidaan sijoituspalveluyrityksen järjestelmien tehokkuutta ja riittävyyttä.

Artikla 4 sisältää vaatimuksen siitä, että sijoituspalveluyritysten on luotava asianmukaiset toimintasuunnitelmat ja menettelyt, joilla varmistetaan lain ja sen

nojalla annettujen säännösten ja määräysten noudattaminen (*Compliance*). Sijoituspalveluyritysten on artiklan mukaan järjestettävä pysyvästi tätä noudattamista valvova toiminto (*Compliance Function*), joka jatkuvasti valvoo yrityksen toimintatapoja ja menettelyjä sekä antaa neuvoja yrityksen henkilöstölle säännösten paremmasta noudattamisesta sijoituspalvelutoiminnassa. Artikla 5 sisältää vaatimuksen siitä, että sijoituspalveluyrityksellä on oltava tehokkaat riskienarviointimenettelyt (*Risk Control*), joihin sisältyvät sekä ohjeistukset riittävästä riskien hallinnasta että jatkuva valvonta. Artikla 6 koskee sisäisiä valvontajärjestelmiä. Sen mukaan sijoituspalveluyritysten on järjestettävä sisäisen tarkastuksen toiminto (*Internal Audit Function*), joka laatii suunnitelman yrityksen sisäisten menettelyjen arvioimiseksi ja antaa suosituksia edellisten arvioiden pohjalta toiminnan parantamiseksi. Jos sisäisen tarkastuksen toiminnon järjestäminen ei ole kohtuullista ottaen huomioon yrityksen liiketoiminnan luonne ja monimutkaisuus, toiminnon perustaminen ei ole pakollista. Näiden lisäksi artikla 7 sisältää säännöksen johdon vastuusta huolehtia siitä, että sijoituspalveluyrityksen toiminta täyttää direktiivistä johtuvat velvoitteet (*Responsibility of Senior management*).

Artikla 8 sisältää säännökset asiakasvalitusten käsittelystä (*Complaints Handling*). Sen mukaan sijoituspalveluyrityksen on muun muassa vastattava asiakasvalituksiin 15 päivän kuluessa valituksen vastaanottamisesta. Artikla 9 sisältää säännökset henkilökohtaisista liiketoimista (*Personal Transactions*). Sen mukaan sijoituspalveluyrityksen on varmistettava, ettei esimerkiksi sen johtoon tai henkilökuntaan kuuluva, jolla on pääsy arkaluonteisiin tietoihin tai joka voi altistua eturistiriitatilanteen osapuoleksi, ryhdy sijoituspalveluyrityksen velvoitteiden kanssa ristiriidassa oleviin henkilökohtaisiin liiketoimiin. Sijoituspalveluyrityksen on pidettävä kirjaa henkilökohtaisista liiketoimista.

Artikloissa 10-12 säädetään operatiivisten toimintojen ja sijoituspalvelujen tarjoamisen tai sijoitustoiminnan harjoittamisen ulkoistamisesta (*Outsourcing*). Sijoituspalveluyrityksen on antaessaan kolmannen osapuolen suoritettavaksi toimintoja varmistettava, että tämä voidaan toteuttaa ilman aiheutonta lisäriskiä. Artiklassa 10 määritellään, mitä tarkoitetaan tärkeillä operatiivisilla toiminnoilla (*Critical and Important Operational Functions*). Artiklan 11 mukaan säädetään operatiivisten toimintojen tai sijoituspalvelujen tai -toiminnan ulkoistaminen ei vapauta sijoituspalveluyritystä direktiivin mukaisista velvoitteista. Artiklassa 12 säädetään ulkoistamisen edellytyksistä, joista sijoituspalveluyrityksen tulee varmistua, koskien muun muassa ulkoistetun palvelun tarjoajaa (*Conditions for Outsourcing*).

Artikloissa 13 ja 14 säädetään tarkennuksia sijoituspalveluyrityksen velvollisuuteen huolehtia siitä, että sen suorittamista palveluista ja liiketoimista pidetään kirjaa riittävällä tavalla (*Record Keeping*). Artiklassa 13 säädetään tiedoista, jotka sijoituspalveluyrityksellä on oltava voidakseen toteuttaa toimeksiannon ja näiden tietojen tallentamisesta (*Client Order Handling and Recording Requirements*). Sijoituspalveluyrityksen on pidettävä riittävällä tavalla kirjaa näistä tiedoista ja jos toimeksianto tehdään puhelimen välityksellä, sijoituspalveluyrityksen on huolehdittava puheluiden nauhoituksesta. Nauhat on säilytettävä vähintään vuoden ajan. Artiklassa 14 säädetään tietojen säilyttämisestä (*Retention of Records*). Sen mukaan valvontaviranomainen laatii listan tiedoista, jotka sijoituspalveluyrityksen on säilytettävä toimeksiannoistaan. Näiden tietojen perusteella valvontaviranomainen voi valvoa, onko sijoituspalveluyritys täyttänyt kaikki velvollisuutensa suhteessa asiakkaisiinsa. Nämä tiedot on säilytettävä vähintään viisi vuotta.

Artiklat 15-19 koskevat asiakasvarojen suojaamista (*Safeguarding of Client Assets*). Direktiivin mukaan sijoituspalveluyrityksen, jolla on hallussaan asiakkaalle kuuluvia rahoitusvälineitä, on riittävin järjestelyin suojattava asiakkaiden omistusoikeus erityisesti sijoituspalveluyrityksen maksukyvyttömyystilanteen varalta ja sen estämiseksi, että asiakkaan rahoitusvälineitä käytetään yrityksen omaan lukuun. Sijoituspalveluyrityksen, jolla on hallussaan asiakkaille kuuluvia varoja, on turvattava asiakkaiden oikeudet ja estettävä asiakkaiden varojen käyttö yrityksen omaan lukuun. Artiklassa 15 säädetään tarkemmin toimenpiteistä, jotka sijoituspalveluyrityksen on tehtävä asiakasvarojen turvaamiseksi. Sen mukaan yrityksen on mm. pidettävä sellaisia luetteloja ja tilejä, jotka mahdollistavat asiakkaiden varojen erottamisen toisistaan ja yrityksen varojen erottamisen asiakkaiden varoista. Yrityksen on myös tarkistettava säännöllisesti, että yrityksen sisäinen kirjanpito rahoitusvälineiden ja varojen osalta vastaa mahdollisia kolmansien osapuolten pitämiä tilejä. Yrityksen on myös tehtävä riittävät toiminnalliset järjestelyt vähentääkseen riskiä varojen häviämisestä tai vähenemisestä varojen väärinkäytön, petoksen, huonon hallinnon, riittämättömän tietojen tallentamisen tai huolimattomuuden johdosta. Artiklassa 16 säädetään asiakasvarojen tallettamisesta, kun sijoituspalveluyritys ei ole luottolaitos (*Depositing Client Funds*) ja artiklassa 17 säädetään asiakkaiden rahoitusvälineiden säilyttämisestä (*Depositing Client Financial Instruments*). Artiklassa 18 säädetään asiakkaiden rahoitusvälineiden käytöstä (*Use of Client Financial Instrument*). Sen mukaan sijoituspalveluyritys voi käyttää asiakkaan rahoitusvälineitä omaan lukuunsa tai muiden asiakkaiden lukuun ainoastaan silloin, kun asiakkaalle on kerrottu tähän liittyvistä velvoitteista, vastuista ja riskeistä, ja asiakas on antanut erillisen etukäteisen suostumuksen rahoitusvälineiden käyttöön kyseisellä tavalla ja rahoitusvälineitä käytetään ainoastaan ehdoin, joihin asiakas on suostunut. Artiklan 19 mukaan sijoituspalveluyrityksen on varmistettava, että sen tilintarkastajat raportoivat vuosittain valvontaviranomaiselle siitä, miten yritys on noudattanut asiakasvarojen suojaamista koskevia määräyksiä (*Reports by External Auditors*).

Artiklat 20-23 koskevat eturistiriitoja (*Conflicts of Interest*). Direktiivin mukaan jäsenvaltioiden on edellytettävä, että sijoituspalveluyritykset toteuttavat kaikki kohtuulliset toimet havaitakseen sijoituspalveluyrityksen, mukaan lukien yrityksen johto, työntekijät ja sidonnaisasiamiehet, ja sen asiakkaiden väliset eturistiriidat. Artiklassa 20 säädetään tilanteista, joissa on vaara eturistiriitatilanteen syntymisestä (*Conflicts of Interest Potentially Detrimental to a Client*). Luettelo ei ole tyhjentävä. Artiklassa 21 säädetään sijoituspalveluyritysten velvollisuudesta laatia eturistiriitoja koskeva ohjeistus (*Conflicts of Interest Policy*). Ohjeistuksessa tulee yksilöidä tilanteet, jotka yrityksessä voivat aiheuttaa eturistiriitatilanteen ja määritellä menettelyt ja toimenpiteet, jotka tilanteessa otetaan käyttöön. Artiklassa 22 säädetään velvollisuudesta kirjata ylös tilanteet, joissa eturistiriitatilanne on syntynyt tai voisi syntyä (*Record of Services or Activities Giving Rise to Detrimental Conflict of Interest*). Artiklassa 23 säädetään eturistiriitatilanteiden ilmoittamisesta asiakkaalle (*Disclosure of Conflicts of Interest*). Asiakkaille on direktiivin mukaan ilmoitettava eturistiriitojen yleinen luonne ja/tai lähteet ennen kuin sijoituspalveluyritys alkaa suorittamaan liiketoimia asiakkaan lukuun, jos ei ole pystytty varmistamaan, että asiakkaan etuihin kohdistuvilta riskeiltä vältytään. Artiklan mukaan, jos asiakkaalle on ilmoitettu eturistiriidasta, sijoituspalveluyritys ei saa jatkaa toimeksiannon toteuttamista ilman asiakkaan suostumusta.

Artikla 24 koskee asetuksen voimaantuloa.

KANSALLINEN KÄSITTELY:

Euroopan Arvopaperikomitean kokousten valmistelusta vastaa valtiovarainministeriön rahoitusmarkkinaosasto. Kantoja on valmisteltu Rahoitustarkastuksen Markkinavalvontaosaston kanssa käydyissä keskusteluissa sekä rahoitusvälineistä annetun direktiivin implementointia valmisteleavassa valtiovarainministeriön työryhmässä. Kantoja on yhteensovitettu valmistelujaosto 10:n (rahoituspalvelut ja pääomaliikkeet) kirjallisessa menettelyssä 3.6.2005-10.6.2005.

EDUSKUNTAKÄSITTELY:

Tämä muistio ja komission sisämarkkinat –pääosaston luonnos lähetetään E-kirjeellä eduskuntaan (PL 97 § 1 momentti).

KANSALLINEN LAINSÄÄDÄNTÖ:

Kansallisessa lainsäädännössä ei tällä hetkellä säädetä ehdotetuista asioista joko lainkaan taikka ei ainakaan vastaavalla tarkkuudella.

Sijoituspalveluyrityksistä annetun lain (579/1996) mukaan sijoituspalveluyrityksen toimilupa myönnetään suomalaiselle osakeyhtiölle. Lain mukaan toimiluvan edellytyksenä muun ohella on luotettava hallinto (10 §). Luotettavan hallinnon järjestämisestä on esitettävä selvitys toimilupaa haettaessa. Vaadittavista selvityksistä säädetään valtiovarainministeriön asetuksella (658/2003).

Sijoituspalveluyritys voi harjoittaa liiketoimintaa myös asiamiehen välityksellä, jos asiamiehen käyttäminen ei haittaa sijoituspalveluyrityksen riskien hallintaa ja sisäistä valvontaa eikä sijoituspalveluyrityksen liiketoiminnan muuta hoitamista (16 b §). Sisäisestä valvonnasta ja riskienhallinnasta on yleissäännös lain 29 §:ssä.

Sijoituspalveluyrityksen hallussa olevien asiakasvarojen säilyttämisestä ja erillään pidosta sijoituspalveluyrityksen varoista säädetään lain 52 §:ssä. Säilyttämiseen sovelletaan arvopaperimarkkinalain 4 luvun 5a §:n säännöksiä. Arvopaperimarkkinalain mukaan asiakasvarojen säilytys, käsittely ja selvitys on järjestettävä niin, ettei ole vaaraa niiden sekoittumisesta välittäjän omiin varoihin ja omaisuuteen. Arvopaperinvälittäjä ei saa pantata tai omaan lukuun luovuttaa asiakkaalle kuuluvaa arvopaperia ilman asiakkaan antamaa erillistä kirjallista suostumusta (4 luku 5 § 1 momentti).

Arvopaperimarkkinalaissa säädetään arvopaperivälittäjän velvollisuudesta välttää eturistiriitatilanteita. Eturistiriitatilanteen syntyessä asiakasta on kohdeltava hyvän tavan mukaisesti (4 luku 4 § 2 momentti).

TALOUDELLISET VAIKUTUKSET:

Luonnoksen ehdotukset lisäävät sijoituspalveluyritysten velvoitteita, mikä merkinnee toimijoille ja varsinkin pienikokoisille toimijoille sitä, että sääntelyn noudattaminen aiheuttaa aiempaa enemmän työtä ja huolellisuutta. Tämä voi merkitä lisäresurssitarvetta ja siten kustannusten kasvua. Luonnos pitää sisällään kuitenkin eräiltä osin mahdollisuuden siihen, että toiminnan laatu ja laajuus voidaan ottaa huomioon velvoitteita asetettaessa.

Asetusluonnos asettaa myös valvontaviranomaisille uusia velvoitteita.

**AVOIMET KYSYMYKSET JA MUIDEN JÄSENVALTIOIDEN/EU-TOIMIELINTEN
KANNAT NIIHIN:**

Muiden jäsenvaltioiden kannat eivät ole vielä lopullisesti tiedossa. Asetusluonnos ei ole vielä komission virallinen ehdotus, jonka antamisesta alkaisi rahoitusvälineiden markkinoista annetun direktiivin 64 artiklassa tarkoitettu kolmen kuukauden aika säännöksen hyväksymiselle. Komissio antanee virallisen ehdotuksensa syyskuussa 2005.

MUUT MAHDOLLISET ASIAAN VAIKUTTAVAT TEKIJÄT:

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**Draft Commission Document on
Organisational Requirements and identification,
management and disclosure of conflicts of interest by investment firms**

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Virhe. Tuntematon asiakirjan ominaisuuden nimi.

EN

**Draft Commission Document on
Organisational Requirements and identification,
management and disclosure of conflicts of interest by investment firms**

Article 1

Subject Matter and Scope

This Regulation lays down:

- the organisational requirements with which Investment Firms have to comply, in accordance with article 13 of the Directive, in order to be authorised to provide Investment Services or activities.
- the organisational requirements relating to the arrangements which firms are required to maintain and operate in accordance with article 13(3) of the Directive; and
- measures relating to the identification, management and disclosure by firms of conflicts of interest, in accordance with article 18 of the Directive.

This Regulation shall apply to credit institutions authorised under Directive 2000/12/EC, when providing one or more investment services or performing investment activities as defined by article 4 (1) (2), in the same way as it applies to investment firms.

Article 2

Definitions

1. “*personnel*” in relation to an investment firm, means:
 - (a) a director, partner or equivalent, employee or tied agent of the firm,
 - (b) a director, partner or equivalent, employee of any tied agent of the firm,
 - (c) a natural person whose services are placed at the disposal and under the control of the firm or its tied agent for the purposes of the provision by the firm of investment services and activities;
2. “*relevant person*” in relation to an investment firm, means:
 - (a) any personnel of the firm,

- (b) a natural person who is involved in the provision of services to the investment firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities;
3. "*personal transaction*" means a transaction in a financial instrument, as defined in Article [] of Regulation []¹ effected by or on behalf of a relevant person, where:
- (a) that relevant person is acting outside the scope of his professional activities, or
 - (b) the transaction is carried out –
 - (i) for his own account, or
 - (ii) for the account of any person with whom he has a family relationship, or with whom he has close links, or
 - (iii) for the account of a person whose relationship with the relevant person is such that the relevant person has a financial interest in the outcome of the transaction (other than a standard fee or commission for the execution of the transaction);
4. "*person with whom a relevant person has a family relationship*" means:
- (a) the spouse of the relevant person or any partner of that person considered by national law as equivalent to a spouse,
 - (b) a child or stepchild of the relevant person,
 - (c) any other relative of the relevant person who has shared the same household as that person for at least one year on the date of the personal transaction concerned;
5. "*outsourcing*" means an arrangement of any form between an investment firm and a service provider by which that service provider performs a process, a service or an activity which constitutes or contributes to the provision or carrying out of investment services or activities on behalf of a client of the investment firm and which would otherwise be undertaken by the investment firm itself;

¹ Transaction is defined in WP ESC/7/2005

Organisation of the Investment Firm

Article 3

General Organisational Requirements

1. In order to comply with the obligations set out in paragraphs (2) to (8) of Article 13 of the Directive, an investment firm shall ensure that:
 - a) it creates, regularly updates and communicates to its personnel decision making procedures and an organisational structure which clearly and in documented manner specifies reporting lines and allocates functions and responsibilities
 - b) its personnel is aware of what decision-making procedures must be followed for the proper discharge of their responsibilities;
 - c) it creates adequate controls designed to secure compliance with internal decisions and procedures at all levels of the investment firm;
 - d) it employs personnel with the skills, knowledge and expertise necessary for the discharge of the allocated responsibilities;
 - e) it establishes and maintains effective internal reporting and communication of information at all levels of the investment firm;
 - f) it maintains adequate and orderly records of its business and internal organisation.
 - g) the performance of multiple functions by its personnel does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and in accordance with high standards of business conduct.
2. An investment firm shall maintain information processing systems and procedures that safeguard the security, integrity and confidentiality of information to an adequate degree, taking into account the nature of the information in question and general standards of good practice.
3. An investment firm shall adopt and maintain a business continuity policy which ensures that its essential data are preserved and its investment services and activities maintained in the case of an interruption to its information processing systems and procedures, or (where that is not possible) the timely recovery of such data and the timely resumption of its investment services and activities.
4. An investment firm shall adopt and put into effect accounting policies and procedures that enable it, on the request of the competent authority, to deliver in a timely manner to the authority financial reports which reflect a true and fair view of its financial position and which comply with all applicable accounting standards and rules.
5. The investment firm shall, on an ongoing basis, monitor and evaluate the adequacy and effectiveness of the investment firm's systems, internal control mechanisms and

arrangements established in accordance with paragraphs (1) to (4) above, and take appropriate measures to address any deficiencies.

Article 4

Compliance

1. In order to comply with the obligations set out in Art. 13(2) of the Directive, an investment firm shall establish and maintain policies and arrangements aimed at ensuring effective compliance by the investment firm and its relevant persons with the firm's obligations under the Directive and its implementing measures and at enabling the competent authorities effectively to exercise their powers under the Directive. Those policies and arrangements shall, in particular:
 - a) identify and assess the risk of, and the risks associated with, a failure by the firm to comply with its obligations under the Directive;
 - b) put in place adequate measures and procedures to minimise any such risk;
2. An investment firm shall maintain a permanent and effective compliance function which shall have the following responsibilities:
 - a) to monitor on an ongoing basis:
 - i) the adequacy and effectiveness of the measures and procedures put in place in accordance with paragraph (1)(b) in ensuring the firm's compliance with its obligations under the Directive, and
 - ii) the adequacy and effectiveness of actions taken to address any deficiencies in the firm's compliance with those obligations;
 - b) to advise and assist persons responsible for carrying out investment services and activities on behalf of the firm to promote compliance with the firm's obligations under the Directive.
3. In order to enable the compliance function to discharge its responsibilities properly and independently, the investment firm shall ensure:
 - a) the personnel designated to carry out the compliance function have the necessary authority, resources and access to all relevant information
 - b) the compliance function reports directly to the senior management;
 - c) those personnel are not involved in the performance of services or activities they monitor in the course of carrying out duties related to the compliance function;

- d) the method of determining the remuneration of those personnel does not and is not likely to compromise their objectivity.
4. The competent authority may waive the obligation of an investment firm to comply with one or both of the requirements set out in paragraphs (3)(c) and (d) above if, in view of the nature and complexity of the business of that firm, and the nature and range of investment services and activities undertaken in the course of that business, the obligation is not proportionate, and the firm is not likely, as a result of such a waiver, to breach its obligations under the Directive.

Article 5

Risk control

In order to comply with the obligation set out in Article 13(5) to have effective procedures for risk assessment, an investment firm shall:

- a) establish and implement adequate risk management policies and procedures which -
 - i) identify the risks relating to the firm's activities, processes and systems, including operational risk, market risk and credit risk, and
 - ii) set the level of risk tolerated by the investment firm;
- b) adopt effective arrangements, processes and mechanisms to manage the risks referred to in paragraph (a)(i) in light of the level of risk tolerance set in accordance with paragraph (a)(ii);
- c) monitor on an ongoing basis –
 - i) the adequacy and effectiveness of the investment firm's risk management policies and procedures,
 - ii) the level of compliance by the investment firm and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with sub-paragraph (b),
 - iii) the adequacy and effectiveness of measures taken to address any deficiencies in those arrangements and procedures, including any failure by personnel of the firm to comply with such arrangements or follow such procedures;
- d) advise senior management on risk management.

Article 6

Internal audit

1. In order to comply with the obligation set out in Art. 13(5) to have sound internal control mechanisms, an investment firm shall establish and maintain an internal audit function which shall have the following responsibilities:
 - a) establishing and implementing an audit plan to examine and evaluate the adequacy and effectiveness of the investment firm's systems, internal control mechanisms and arrangements; and;
 - b) issuing recommendations based on the result of work carried out in accordance with (a) and verifying compliance with those recommendations.
2. An investment firm is not required to establish an internal audit function if it can reasonably justify that the requirement in paragraph (1) is not proportionate in view of the nature and complexity of the business of that firm, and the nature and range of investment services and activities undertaken in the course of that business.

Article 7

Responsibility of Senior Management

1. The senior management (or, where appropriate, the supervisory function) of an investment firm shall be responsible for ensuring that the firm complies with its obligations under the Directive. In particular, they shall assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under Articles 3 to 6 of this Regulation, and take appropriate measures to address any deficiencies.
2. An investment firm shall ensure that its senior management (or, where appropriate, the supervisory function) receives:
 - a) on a frequent and ongoing basis, reports on the matters covered by Articles 4, 5 and 6 (compliance, risk control and internal audit) indicating in particular whether the appropriate measures have been taken in the event of any deficiencies; and
 - b) at least annually, a written report setting out an overview of the outcome and findings of the monitoring and assessment during the relevant period.

Article 8

Complaints handling

An investment firm shall:

- a) maintain effective and transparent procedures for the reasonable and timely handling of complaints received from clients or potential clients;
- b) within 15 days of receiving a complaint, notify the complainant in writing of the name and contact details of the person responsible for handling the complaint and expected timescale for the resolution of the complaint;
- c) keep a record of each complaint and the measures taken for its resolution; and
- d) regularly verify whether complaints are effectively processed.

Article 9

Personal transactions

1. An Investment firm shall take all reasonable steps in order to prevent each relevant person who is subject to a conflict of interest or who has access to price sensitive information by virtue of an activity carried out by him on behalf of the firm:
 - a) from entering into a personal transaction which –
 - i. that person is prohibited from entering into under directive 2003/6/EC on insider dealing and market manipulation, or
 - ii. conflicts or is likely to conflict with any obligation of the investment firm under the Directive;
 - b) from advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would fall within sub-paragraph (a) above;
 - c) from communicating, other than in the proper course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that communication the other person will or would be likely to –
 - (i). enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would fall within sub-paragraph (a) above, or

- (ii). advise or procure another person to enter into such a transaction.
2. In particular it shall establish adequate arrangements aimed at ensuring that:
 - a) each relevant person is aware of the restrictions on and in connection with personal transactions established by the investment firm under paragraph (1)(a) to (c) above;
 - b) the firm is informed promptly of any personal transaction entered into by a relevant person, either by notification of any such transaction or by other procedures enabling the firm to identify such transactions; and
 - c) a record is made of the personal transaction notified to it or identified by it.
 3. Paragraphs (1) and (2) do not apply in the case of personal transactions effected on behalf of a relevant person under the provisions of a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed.

Outsourcing

Article 10

Critical and Important Operational Functions

For the purposes of article 13(5) of the Directive an operational function is critical or important if a defect or failure in its performance would cast doubts upon the continuing compliance of investment firm with the conditions and obligations of its authorisation or its obligations under the Directive, or upon its financial stability or soundness or the continuity of its investment services and activities.

Without restricting the assessment of any other function, the following functions are not to be considered as critical or important:

- a) advisory services and other services which do not form part of the investment business of the firm, including the provision of legal advice to the firm, the training of personnel, billing services and the security of the firm's premises and personnel;
- b) the purchase of standardised services, including market information services and the provision of prices.

Article 11

Quality of the Internal Control

The outsourcing of critical or important operational functions, or of any other investment services or activities, shall not release the investment firm from its regulatory obligations under the Directive, and in particular shall not –

- a) result in the delegation of responsibility by senior management;
- b) alter the relationship and obligations of the investment firm towards its clients under the terms of the Directive;
- c) undermine the conditions with which the investment firm has to comply in order to be and remain authorised in accordance with Article 5 of the Directive;
- d) remove or modify any other conditions subject to which the firm's authorisation was granted.

Article 12

Conditions for Outsourcing

1. An investment firm shall exercise care and skill when entering into, managing and terminating any arrangement for the outsourcing to a service provider of critical or important operational functions or of any other investment services or activities. The firm shall in particular take the necessary steps to secure that:
 - a) the service provider has the ability, capacity, and any authorisation required by law to perform the outsourced functions, services of activities reliably and professionally;
 - b) the service provider carries out the outsourced services effectively, and to this end the firm shall establish methods for assessing the standard of performance of the service provider;
 - c) the carrying out of the outsourced functions is properly supervised, the risks associated with the outsourcing adequately managed and that appropriate action is taken if it appears that the service provider may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;
 - d) the service provider discloses to it any development that may have an impact on the carrying out of the outsourced functions effectively and in compliance with applicable laws and regulatory requirements;
 - e) the arrangement for outsourcing can be terminated where necessary by the investment firm without detriment to the continuity and quality of its provision of services to clients;
 - f) the service provider cooperates with the competent authorities of the investment firm in connection with the outsourced activities;
 - g) the investment firm, its auditors and the competent authorities of the investment firm have effective access to data related to the outsourced activities and to the business premises of the service provider;

- h) confidential information is protected.
- 2. The respective rights and obligations of the investment firm and the service provider shall be clearly allocated and set out in a written agreement. The terms of the agreement shall be give effect to, or be consistent with, the obligations of the investment firm under paragraph (1).
- 3. The investment firm shall give prior notification to the competent authority about any outsourcing arrangement of a kind mentioned in paragraph (1) and, in particular, indicate the identity of the service provider. It shall also make available to the competent authority all information necessary to enable the Authority to supervise the compliance of the performance of the outsourced activities with the requirements of this [Regulation] / [Directive].

Record Keeping

Article 13

Client Order Handling and Recording Requirements

- 1. An investment firm shall not carry out a client order unless the order includes all the information necessary to carry it out, and the firm can provide evidence that this information corresponds to the client's instructions in relation to that order.
- 2. The following information is necessary to carry out a client order:
 - the name or other designation of the client;
 - the name of any relevant person acting on behalf of the client;
 - the class and details of the financial instrument;
 - the number or total value of financial instruments;
 - the nature of the order;
 - any other details, conditions and particular instructions from the client that specify how the order must be carried out.
- 3. An investment firm must, in relation to each order which it receives, make a record of –
 - a) the information detailed in paragraph (2); and
 - b) the date and exact time of the receipt of the order by the investment firm.

4. Where the order is received by an investment firm by telephone, the firm shall record on a voice recording system the telephone conversation during which the order is given. This recording (and only this recording) will constitute the evidence required by paragraph (1).
5. An investment firm shall retain a recording made in accordance with paragraph (4) above for as long as it considers it may need to provide evidence in relation to that order for the purposes of paragraph (1), and in any case for a period of at least [one] year.

Article 14

Retention of Records

1. Competent authorities shall provide investment firms with an up to date list of all the records which firms are required to retain in order to comply with article 13(6) of the Directive.

That list shall include all records required by or mentioned in the Directive and its implementing measures and shall be based on any current list drawn up by the Committee of European Securities Regulators in accordance with paragraph (3).

2. Competent authorities may require Investment Firms to retain additional records to those in paragraph (1) if (and only if):
 - a) the records relate to financial instruments or to investment services or activities carried out in connection with financial instruments which are specific to the national market of the competent authority or to a new type of financial instrument; and
 - b) the retention of such records by investment firms is necessary to enable the authority to exercise its supervisory functions under the Directive.
3. The Committee of European Securities Regulators shall draw up and maintain a harmonised list [or lists] of all the records which investment firms are required to keep in order to comply with article 13(6) of the Directive, in order to secure that firms carrying on similar business retain the same records. The list shall also specify the format and content of the records.
4. An investment firm shall retain the records required by the competent authority under paragraph (1) for a period of at least five years.
5. A competent authority may require an investment firm to retain any or all records which it is required to retain in accordance with paragraph (1) for more than five years if that is necessary to enable the authority to exercise its supervisory functions under the Directive.
6. The records shall be retained in such a form and manner that:
 - a) the records may be readily accessed and easily reproduced on paper

- b) the competent authority is able reconstitute each stage of the processing of all transactions and instructions by the investment firm
 - c) any corrections or other amendments as well as the contents of the records prior to any such corrections or other amendments can be easily ascertained
 - d) the records cannot otherwise be manipulated or altered
7. Following the termination of the authorisation of an investment firm under the Directive, records retained in accordance with paragraph (2) shall be retained for the outstanding term of the period required by that paragraph.
8. Following the liquidation of an investment firm, records retained in accordance with paragraph (2) shall be retained for the outstanding term of the period required by that paragraph if the competent authority so decides.
9. Before the end of 2010, the Commission shall make an assessment of the application of this Article and take the necessary steps to effect any changes it considers necessary in the light of that assessment.

Safeguarding of client assets

Article 15

Safeguarding of client assets

1. In order to comply with the requirement in Article 13(7) and (8) of the Directive to safeguard clients' rights in financial instruments and funds, an investment firm shall:
- a) keep such records and accounts as are necessary to enable it at any time and without delay to distinguish assets held by it for one client from assets held for other clients, and from its own assets;
 - b) maintain its records and accounts in a way that ensures their correspondence to the financial instruments and funds held for clients by conducting, on a regular basis, reconciliations between its internal accounts and records and those of any third parties with whom those assets are held;
 - c) take the necessary steps to ensure that the client funds deposited, in accordance with Article 16 below, in a central bank, a credit institution or a bank authorised in a third country are held in accounts identified separately from any accounts used to hold funds belonging to the investment firm;
 - d) take the necessary steps to ensure that the client financial instruments deposited with a depository, in accordance with Article 17 below, are separately identifiable from the

financial instruments belonging to the investment firm by virtue of differently titled accounts on the books of the depository.

- e) introduce adequate organizational arrangements to minimize the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.
2. If, for reasons of the applicable law, including in particular the law relating to property or insolvency, the arrangements made by an investment firm in compliance with paragraph (1) to safeguard clients' rights are not sufficient to satisfy the requirements of Article 13(7) and (8) of the Directive, the firm shall take such additional or alternative measures as it may lawfully take to allow it to comply with those obligations to the fullest extent possible.
3. If the applicable law of the jurisdiction in which the client funds or financial instruments are held prevents an investment firm from complying with paragraph (1)(d) above, that firm shall achieve an effect equivalent to that required by paragraph (1) by taking such alternative measures as it may lawfully take to enable it to comply with the obligation in Article 13(7) and (8) of the Directive to the fullest extent possible.

Article 16

Depositing Client funds

1. An investment firm which is not a credit institution shall promptly deposit client funds into one or more accounts opened with:
 - a) a central bank;
 - b) a credit institution authorised in accordance with Directive 2000/12/EC ; or
 - c) a bank authorised in a third country.
2. Where an investment firm does not deposit client funds with a central bank, it shall exercise skill, care and diligence in the selection, appointment and periodic review of the credit institution or bank where the funds are deposited and the arrangements for the holding of those funds. In particular, the investment firm shall take into account the expertise and market reputation of such institutions, as well as any legal or regulatory requirements or market practices related to holding of client funds that could adversely affect clients' ownership rights.

Article 17

Depositing client financial instruments

1. An investment firm may deposit client financial instruments into an account or accounts opened with a depository provided that the firm exercises skill, care and diligence in the

selection, appointment and periodic review of the depository and of the arrangements for the holding and safekeeping of client financial instruments. In particular, the investment firm shall take into account the expertise and market reputation of the depository as well as any legal requirements or market practices related to holding of client financial instruments that could adversely affect clients' ownership rights.

2. If depositories and the holding and safekeeping of client financial instruments are subject to specific regulation and supervision in a jurisdiction, the investment firm shall deposit the client financial instruments with a depository subject to such regulation and supervision
3. An investment firm may not deposit financial instruments with a depository in a third country that does not regulate depositories and the holding and safekeeping of financial instruments unless the nature of financial instruments or of the investment services connected with those instruments so requires.

Article 18

Use of Client Financial Instruments

1. An investment firm may use financial instruments held by it on behalf of a client for its own account or for the account of another client if (and only if):
 - a) the firm has provided the client, in a durable medium, clear, full and accurate information on -
 - i) the obligations and responsibilities of the investment firm or of the client for whose account the financial instruments may be used, with respect to the use of those financial instruments (including the terms for the restitution of the financial instruments), and
 - ii) in the case of a retail client, the risks involved;
 - b) the client has given his prior express consent to the use of the instruments on specified terms, as evidenced by his signature, and that consent indicates that he has read and understood the information set out in sub-paragraph (a); and
 - c) the use of that client's financial instruments is restricted to the specified terms to which the client consented.
2. In addition to the requirements set out in paragraph (1), if client financial instruments are held on an omnibus basis, the investment firm may use or enter into arrangements for lending of
3. financial instruments held by it on behalf of a client for its own account or for the account of another client only if:
 - a) each client whose financial instruments are held together on an omnibus basis has given his consent in accordance with paragraph (1); or

- b) the investment firm has systems and controls in place which ensure that only financial instruments belonging to clients who have given their prior consent in accordance with paragraph (1) are so used.

In either case, the records of the investment firm must include details of the client on whose instructions the use of the financial instruments have been effected and the number of financial instruments used belonging to each client who has given his consent , so as enable the correct allocation of any loss.

Article 19

Reports by external auditors

An investment firm shall secure that its external auditors to report at least annually to the competent authority of the home Member State of the firm on the adequacy of the firm's arrangements under Articles 15 to 18 above to ensure the firm's compliance with its obligations under Article 13(7) and (8) of the Directive.

Conflicts of Interest

Article 20

Conflicts of interest potentially detrimental to a client

For the purposes of Articles 13 and 18 of the Directive, circumstances which should be treated as giving rise to a conflict of interest entailing a risk of damage to the interests of a client shall include (but are not restricted to) the following:

- (a) as a result of an activity carried out by or on behalf of the investment firm, the firm or a relevant person, or a person directly or indirectly linked by control to the firm is likely to make a profit, or avoid a loss, to the detriment of the client;
- (b) the investment firm, or a relevant person, or a person directly or indirectly linked by control to the firm has an interest in the outcome of a service provided to the client, or a transaction carried out on behalf of the client, which is distinct from the client's interest in that outcome;
- (c) the investment firm, or a relevant person, or a person directly or indirectly linked by control to the firm has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client;
- (d) the investment firm, or a relevant person, or a person directly or indirectly linked by control to the firm carries on the same business as the client;
- (e) the investment firm, or a relevant person, or a person directly or indirectly linked by control to the firm receives or will receive from a person other than the client an

inducement in relation to a service provided to the client, in the form of monies, goods or services, other than the standard commission or fee for that service.

Article 21

Conflicts of interest policy

1. In order to satisfy the requirements mentioned in Articles 13 and 18 of the Directive, an investment firm shall draw up, maintain and implement a conflicts of interest policy which shall -
 - (a) be set out in writing; and
 - (b) be appropriate to –
 - (i) the size and organisation of the firm; and
 - (ii) the nature, scale and complexity of its business.

In any case where the firm is a member of a group, the policy shall take into account any potential for a conflict of interest arising as a result of the firm's membership of that group, and the structure and business activities of other members of that group.

2. A conflicts of interest policy established in accordance with paragraph (1) shall, as a minimum -
 - (a) identify, with reference to the specific investment services and activities and ancillary services carried out by or on behalf of the investment firm, the circumstances that constitute or may give rise to a conflict of interest entailing material a risk of damage to the interests of a client;
 - (b) specify procedures to be followed and measures to be adopted in order to prevent damage to the interests of a client arising from a conflict of interest of that kind;
 - (c) state why the procedures and measures specified in accordance with paragraph (b) above are believed to be effective in achieving the purposes for which they are adopted.
3. The procedures followed and measures adopted by an investment firm for the purposes of paragraph (2)(b) above shall ensure that relevant persons engaged in different business activities involving a conflict of interest entailing a risk of damage to the interests of a client carry on those activities independently of one another. The level of that independence shall be appropriate to the size and activities of the investment firm, and the degree of risk to the interests of a client entailed by the conflict of interest.
4. Measures and procedures adopted by an investment firm for the purposes of paragraph (2)(b) shall include such of the following organisational structures as are necessary or appropriate to ensure the independence required by paragraph (3):

- (a) effective procedures to prevent or control the exchange of information between relevant persons engaged in activities involving a risk of a conflict of interest where the exchange of that information may harm the interests of a client;
 - (b) the separate supervision of relevant persons whose principal functions involve carrying out activities on behalf of, or delivering services to, clients whose interests may conflict, or who otherwise represent different interests (including those of the firm) that may conflict;
 - (c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated, by relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
 - (d) structures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out investment or ancillary services or activities;
 - (e) structures to prevent or control the simultaneous or sequential involvement of a relevant person in separate investment or ancillary services or activities where such involvement may impair proper conflicts management.
5. If one or more of the organisational structures mentioned in paragraph (4) is not adequate or sufficient to ensure the level of independence required by paragraph (3), an investment firm shall adopt alternative or additional measures and procedures to satisfy that requirement.

Article 22

Record of services or activities giving rise to detrimental conflict of interest

1. The investment firm shall keep and regularly update a record of any investment or ancillary activity carried out by or on behalf of the firm in which a conflict of interest entailing a risk of damage to the interests of a client has arisen or, in the case of an ongoing activity, may arise. This obligation applies to any conflict of interest of a kind mentioned in Article [] above, and any other conflict of interest which risks damaging the interests of one or more clients.
2. The record shall include a description of -
 - (a) the nature of the interests which gave rise to the conflict or potential conflict;
 - (b) the categories of persons whose interests were or may be affected (either to their benefit or to their detriment);

- (c) the kind of activities in question including, as applicable, the type of service provided, the type of transaction carried out, and the category of financial instrument involved in a transaction;
- (d) any specific measures taken to eliminate, control or otherwise manage the conflict of interest.

Article 23

Disclosure of conflicts of interest

1. Where Article 18(2) of the Directive requires an investment firm to disclose to a client the nature or source of a conflict of interest, that disclosure –
 - (a) shall be made in a durable medium; and
 - (b) shall include sufficient detail to enable the client to take a informed decision with respect to the investment or ancillary service in the context of which the conflict of interest arises.
2. Where an investment firm has made a disclosure to a client in relation to a conflict of interest in accordance with Article 18(2) of the Directive, it shall not provide, or continue to provide, the service or services in relation to which that conflict arises, without the consent of the client.

Article [...]

This Regulation shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

ANNEX