証券取引法研究会研究記録
第５号

ＥＵにおける資本市場法の統合の動向

―投資商品、証券業務の範囲を中心として―

財団法人 日本証券経済研究所
証 券 取 引 法 研 究 会

ま　え　が　き

今回、「証券取引法研究会研究記録」の第５号として、『ＥＵにおける資本市場法の統合の動向－投資商品､証券業務の範囲を中心として』を公表する。この研究記録は、本年２月２日に開催された証券取引研究会における東京大学神作裕之教授による研究報告と当日の討議内容を整理したものであり、使用された資料のうち若干のものを添付してある。

この研究報告では、ＥＵ資本市場法制定作業の進展状況、その背景や方向性、ＥＵの新「投資サービス指令」の適用範囲、指令やドイツ証券取引法における金融商品・投資サービス業の定義の拡大、顧客のプロ・アマ区分の考え方等最近の動向が取り上げられている。

我が国でも「投資サービス法」の制定を目指す金融審議会の審議が進展しており、米国やＥＵの関連法制の動向に関心が高まっている。本研究記録の公表が広く研究者や実務家の方々のお役に立てること期待している。この研究記録は、従来と同様当研究所のホームページでも公開しているので、御覧いただければ幸である。

当研究所の証券取引法研究会は、昨年 11 月、メンバーを再編成したうえ研究活動を再開しているが、この記録は新しいラウンドにおける学者委員による最初の研究報告であり、その後の研究記録も同様な形で公開できればと考えている。

研究成果の早期の公表をお認めいただいた江頭憲治郎・森本滋共同会長を始めとする研究会の先生方、特に、この研究記録のまとめに当たり多忙な時間を割いて御尽力いただいた神作先生に、心からお礼を申し上げたい。

2005 年６月

財団法人日本証券経済研究所
理事長　関　　要

［参考］ 既に公表した「証券取引法研究会研究記録」

第１号「裁判外紛争処理制度の構築と問題点」　2003 年 11 月
報告者　森田章同志社大学教授

第２号「システム障害と損失補償問題」　2004 年１月
報告者　山下友信東京大学教授

第３号「会社法の大改正と証券規制への影響」　2004 年３月
報告者　前田雅弘京都大学教授

第４号「証券化の進展に伴う諸問題　2004 年６月
（倒産隔離の明確化等）」
報告者　浜田道代名古屋大学教授

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―投資商品、証券業務の範囲を中心として―

（平成１７年２月２日開催）

報告者　　神　作　裕　之

（東京大学教授）

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証券取引法研究会出席者（平成17年2月2日）

報告者	神作裕之	東京大学教授
共同会長	森本滋	京都大学教授
幹事	神田秀樹	東京大学教授
〃	前田雅弘	京都大学教授
委員	黒沼悦郎	早稲田大学教授
〃	藤田友敬	東京大学教授
〃	中東正文	名古屋大学助教授　（現　教授）
〃	青木浩子	千葉大学助教授
〃	山田剛志	新潟大学助教授
〃	戸田暁	京都大学助教授
〃	中村聡	森・濱田松本法律事務所パートナー
〃	太田洋	西村ときわ法律事務所パートナー
オブザーバー	永井智亮	野村證券法務部長
〃	浅野浩司	日興コーディアル証券法務部長
〃	浅場達也	みずほ証券法務室長
〃	坂下晃	日本証券業協会常務執行役
〃	小柳雅彦	日本証券業協会自主規制企画部長
〃	美濃口真琴	東京証券取引所総務部法務グループリーダー
〃	大島眞	証券保管振替機構業務部次長
研究所	関要	日本証券経済研究所理事長
〃	若林良之助	日本証券経済研究所常務理事
〃	新道仁信	日本証券経済研究所主任研究員・企画調整室次長
〃	須藤時仁	日本証券経済研究所主任研究員
〃	藤田哲史	日本証券経済研究所事務局長

（敬称略）

ＥＵにおける資本市場法の統合の動向
―投資商品、証券業務の範囲を中心として―

森本共同会長　時間になりましたので、第３回の研究会を始めさせていただきます。

本日は、神作さんから、「ＥＵにおける資本市場法の統合の動向」ということで、事前に資料配付されていたと思いますが、それと本日、レジュメ（資料１）がありますので、それをもとにご報告をいただきます。

１．はじめに―ＥＵ資本市場法制定作業の進展

神作委員　それでは、ご報告させていただきます。

ＥＵでは、レジュメの１ページ目に掲げてございますように、1979 年の取引所上場許可指令を嚆矢として、目論見書、投資ファンド、内部者取引、投資サービス業等、分野ごとに次第にＥＵ指令が制定されてゆき、2003 年の相場操縦規制を中心とする市場詐害行為指令の制定により、ＥＵ資本市場法の主要領域がほぼカバーされたといわれています。特に、ユーロ導入の前後からＥＵにおける投資サービス市場統合の動きは加速しており、2005 年の統合を目指して行われてきました立法作業は終幕を迎えております。

2000 年３月にリスボンで開催された欧州理事会において、ヨーロッパ資本市場の統合がヨーロッパの経済改革の核心であること、および 2005 年に域内資本市場の統合を目指し、タイトなタイムスケジュールに従って精力的に作業を進めてゆくことが決定されました。アクションプランに従い、ＥＵ資本市場法の立法作業が着実に進められてきたわけです。

本年１月１日からは、取引所に上場している企業は、国際会計基準（International Financial Reporting Standards）、直訳すると、国際財務報告基準と訳した方がいいのかもしれませんけれども、この基準に基づく連結計算書類の作成が義務付けられ、計算書類の比較可能性が画期的に向上するこ

とが期待されるなど、ＥＵ資本市場法の統合は、法制面、実態面の双方において急速に進展しつつあるように思われます。

もちろん、ＥＵ資本市場法の領域では、まだ重要な分野の立法作業が残っております。それは証券決済法制の統合でございますけれども、しかし、それを除く資本市場法の全貌がほぼ見えてきたというわけであります。

ＥＵ内部市場およびサービス業担当のマクレビー（McCreevy）ＥＵ委員会委員は、「ＥＵ資本市場法の領域における立法活動は一段落つき、現在は、事態の推移を見きわめる段階に達した」と、昨年末 12 月 18 日のインタビューで発言されております。

では、現在ＥＵの資本市場法で最も注目されている事項は何かと申しますと、資本市場法の分野でほぼ整備されたＥＵ指令が、各加盟国により確実に国内法化されるかどうか、および各加盟国の監督機関の協働、連携を強化し、ヨーロッパ全域にわたって信頼できる監督実務をどのように根づかせていくかに専ら関心が集まっています。

もっとも、業界の方は、先ほど述べましたアクションプランのタイトなタイムスケジュールが実務に著しく大きな影響を与えているので、指令の国内法化のタイムスケジュールを緩和してほしい、こういう要望を強く出しているところであります。ところが、ＥＵ内部市場担当のマクレビーＥＵ委員会委員は、そのような要請につきまして、態度を保留しています。今年の１月末までに態度を明らかにするということだったのですけれども、私がインターネットで調べた限りでは、実務の要請に応ずるかどうかついては、まだ明確にしておらず、予定通りに進められているようです。

近時のＥＵ資本市場法の立法過程で特に注目されるのは、立法に市場のプレーヤーの意見が強く反映されている点です。例えば、先ほど申しました金融市場についてのＥＵのアクションプランですとか、ランファルシー（Lamfalussy）報告書などは、市場参加者との十分な協議を経て作成されたものといわれております。このことは、逆に、ＥＵの資本市場法が必ずしも明確な理論によって導かれてきたわけではないということを意味するのかも

しれません。

しかし、先ほど申し上げましたように、パッチワーク的ではあったにせよ、2003年の市場詐害行為指令により、ＥＵ資本市場法の全貌がほぼ明らかになったこともあり、ＥＵ資本市場法の理論化への努力が始まっていることも確かです。本日のご報告の中では、そのようなＥＵ資本市場法の概念化、理論化についての学界の試みを若干ご紹介したいと思っております。

また、ようやくＥＵ資本市場法の全貌が明らかとなった矢先の昨年４月30日、ＥＵでは旧投資サービス指令が廃止され、新投資サービス指令（資料２）が公布されました。1993年に制定された旧投資サービス指令の基本的な考え方が、わずか10年ほどで資本市場の発展に適合しなくなってしまった、こういう認識が改正の背後にあります。逆にいえば、昨年の新投資サービス指令により、現代の資本市場に適合する資本市場法制のあり方に対するある程度のビジョンが見えてきたということではないかと思われます。そこで、本報告では、投資サービス法の適用範囲に焦点を絞りつつ、新投資サービス指令の考え方を明らかにし、ドイツ法も参考にしつつ、ご紹介をしたいと思います。

具体的には、まず初めに、ＥＵ資本市場法の目的および立法に際する原則とその原則に対する若干の揺らぎについて明らかにしたいと思います。次に、ＥＵ資本市場法がほぼ整備されたといわれておりますけれども、ＥＵ資本市場法の目的と手法は何か、立法を推進している原動力は何かについて述べたいと思います。続いて、なぜ昨年新投資サービス指令が制定されなければならなかったのかについて、その理由を分析し、ＥＵ資本市場法の基本的な考え方および規制の構造の変化等について、内在的に明らかにしてみたいと思います。以上のＥＵ資本市場法の法整備により、実際にＥＵ資本市場法の進展がどの程度進み、どのように評価されているのかということを第４で述べます。第５以下では、いわば各論として、新投資サービス指令の中から注目される幾つかの規定を紹介したいと思います。なお、前ラウンドの本研究会におきまして、私は、ＭＴＦおよび投資サービス業者の最良執行義務の問題

について、既にご紹介させていただく機会がございました。重複を避け、本日は、新投資サービス指令の適用範囲、すなわち投資サービスおよび金融商品の範囲が拡大されたことを中心にご紹介し、あわせてＥＵ加盟国の１つであるドイツ法を採り挙げ、証券取引法の適用範囲について、適宜触れたいと思います。

ドイツ証券取引法は昨年の末に改正され、証取法上、金融商品の概念を初めて導入するなど､本日のご報告にかかわる点も多々含まれています。ＥＵ、ドイツともに金融商品および投資サービスの定義は､我が国より広範であり、投資サービス法を射程に進められている金融審議会の議論とまさに方向を一にするものであると考えられます。

なお、ドイツ法をも適宜参照するのは、次の３つの理由からであります。

第１に、ＥＵ指令が直接適用されるということはなく、ＥＵ指令はそもそも国内法化され、国内法の体系の中で効力を有し、解釈されることになるわけですから、ディレクティブを紹介するだけでは不十分であること。

第２に、ＥＵ資本市場法は急速に整備が進み、全貌がほぼ明らかになってきたとはいえ、その沿革に徴するだけでも明らかなように、法の体系性、一体性という観点から見ると、甚だ不備が多いことは否めないこと。したがって､法の体系性､一体性が重視される国内法の議論の参照に供するためには､具体的にどこかの国を例にとって、その国の国内法としての在り方を観察することが有益であると思われること。

第３に、ドイツ証券取引法は既に、新投資サービス指令に先立ち、商品デリバティブを証券取引法の適用範囲に含めており、また、財務分析についても、利益相反規制を中心に規制をしていました。そのように見てまいりますと、今回の新投資サービス指令は、ドイツ法に追随する面がございます。ＥＵにおけるドイツの一定の影響力にも鑑み、ドイツ法について概観しておくことには一定の意義があるように思われます。

前置きが長くなりましたけれども、続きまして、本論に入りたいと思います。

２．ＥＵ資本市場法の目的・沿革・背景

レジュメの２でございます。ＥＵは、先ほど申し上げましたように、1979年の取引所上場許可指令を嚆矢として、資本市場法の分野で多くの指令を制定し、改正を重ねてきたわけであります。その目的は、金融サービス市場の統合であり、さらにその統合の目的は、資本移動の自由、業務提供の自由の実現です。

個人の自由、とりわけ経済活動の自由が、ＥＵ法およびＥＵ資本市場法の実現すべき価値である点については、全く異論がないところです。そして、個人の自由を基礎として、そのルールが構想されるべき経済秩序・組織における自由の形式としての競争が、守られるべきもう１つの基本的価値ということになります。

金融サービス市場における活動、選択の自由およびその形式としての競争の促進を前提として、ＥＵ資本市場法制において、次の２つの原則が支配すべきであると語られます。

第１は、レジュメでは（ア）「補充性の原則」もしくは「補完性の原則」と呼ばれる原則です。これはＥＵ条約５条に発現している考え方です。ＥＵが排他的な権限を有しない領域については、加盟国レベルで検討されている措置が加盟国レベルではその目的を十分に達成できない場合に限って、初めてＥＵが立法権限を行使する。さらに、ＥＵの立法権限の行使も、その範囲または効果から見てＥＵレベルで規制することによって、よりよく達成できる限りにおいてＥＵが行動を起こす、こういう考え方です。この「補充性の原則」は、ＥＵ法の大原則としてほぼ異論なく認められているところであります。

これに対し、２番目の原則は、非常にコントロバーシャルなところですけれども、「法秩序間の競争の原則」と呼ばれるものです。これは「補充性の原則」と正反対に、その妥当性をめぐって極めて議論の多いところではありますけれども、製品やサービスの市場と同様に、規制および規制者の間にも

競争が成立するという考え方であります。市場の失敗が存在するのと同様、規制および規制者にも失敗が存在し、誇張した言い方になりますが、規制より競争を、法制度の調和よりも法制度間の競争を支持すべきであるという考え方であります。「法秩序間の競争の原則」が非常に重要であるという確信がある一方、この原則に対する重大な修正と見られる考え方が、特に金融の分野では有力になりつつあることもまた否定できないように思われます。すなわち、「法秩序間の競争の原則」は具体的にどう発現するかと申しますと、第１の原則である「補充性の原則」と相まって、いわばＥＵレベルでは「最低限の要請」のみを加盟国に課し、加盟国のレベルではその「最低限の要請」を遵守した上で、法システム、規制システムの競争を行わせるということになります。このような規制手法がこれまでのＥＵ法の有力な規制手法であったわけです。

ところが、「最低限の要請」のアプローチのもとではＥＵ域内における規制は一向に収斂せず、その結果、業者がＥＵ域内で自由に活動を行うことが結果的に妨げられているとして、むしろ規制をより高いレベルでそろえ、画一化するべきではないか。こういう方向に一部で転換しつつあることが注目されます。この点については、後ほど具体的な例を挙げながら再び論じてみたいと思います。

次に、レジュメ２ページの（２）に移ります。このような精力的なＥＵの資本市場法の立法を推進する原動力は何かということです。ここでは、外在的な理由を挙げます。

第１に、資本市場に対する重要性の認識の高まりを指摘できます。レジュメに（２ページの 15 行目）ＥＵの文書を引用しておりますけれども、2002 年末に公表されたある研究によると、ＥＵの域内資本市場が形成され始めたことによって、既に株式資本コストは 0.5％減少し、雇用は 0.5％改善した。また、実質ＧＤＰは 1.1％上昇した、ということです。ＥＵ資本市場の統合がさらに進んでいけば、より大きな経済的、社会的メリットを受けられるであろう、そのことに対する期待が非常に強いわけであります。

第２に、このような経済的成長に期待するＥＵの政策だけではなく、ＥＵ資本市場法の推進に拍車をかけている他の要因としては、統一通貨ユーロの導入ですとかＩＴの発展が非常に大きな原因になっていると指摘されています。なお、資本市場に内在的な理由につきましては、後ほど改めて説明をいたします。

次に、レジュメの（３）「資本市場法の規制理念・規制の手法」です。ＥＵにおける投資サービス分野の立法を貫く規制の原則は２つありまして、第１は、投資家保護の原則およびその発現である投資家の個別的保護であり、第２は、取引所、資本市場等の経済的な機能の保護です。この第１の目的と第２の目的は、通常はメダルの表裏の関係にあり、資本市場の機能が十分に果たされているところでは、投資家保護もよく実現しているはずであると考えられます。

もっとも、先ほど述べましたように、ＥＵレベルでの投資家保護に関する措置は、域内資本市場の成立、すなわち資本市場の統合を積極的に促進する限りにおいてのみ法的行為の課題となる、こういう性格のものであります。

と申しますのは、ＥＵ資本市場法は、市場の統合にとって機能する限りにおいて立法化措置を講ずるものとされているからです。ＥＵの資本市場法制に係る立法権限は、ＥＣ条約の定めに基づく、そのような枠組みの中で行われるものだからであります。要するに、ＥＵ資本市場法のレベルでいわれる投資家保護というのは、社会政策としての投資家保護ではなく、市場政策としての投資家保護であるわけです。

したがって、従来、加盟国が指令より高度の投資家保護水準を導入することは全く妨げないとして認められてきたのですが、これについてむしろより高いレベルで規制をそろえるべきではないか、こういう考え方が出ており、ディレクティブにも一部そういった考え方が反映しています。

次に、規制の手法という観点から分類いたしますと、新たな規制は、選択肢を拡大する方向で行われることが多く、その際、既存の金融商品に係る品質規制に置きかわる規制として､情報に関する規制と仲介業者に対する規制、

この２つが重視されています。すなわち、市場参加者をプロとアマの２段階に大別し、金融商品の品質規制にかわって、投資サービス業者に対し、顧客の属性に応じて顧客の最良の利益のためにサービスを提供すべき義務等を課す。さらに、情報規制としてディスクロージャーを進める。

ＥＵ法の基本理念である「補充性の原則」は、資本市場法の文脈では、開示規制にとって優位に働きます。というのは、情報規制は、資本市場の統合の機能にとって必要不可欠であるとともに必要最小限の規制という要件にも合致するからです。

したがって、ＥＵ資本市場法においても、ディスクロージャーに関する規制が非常に重要になるわけですけれども、次回、山田先生から、開示についてご報告される予定ですので、本日のご報告では業者に対する規制に焦点を絞り、その対象を画する投資サービスおよび金融商品の概念・定義を中心に論じたいと思います。

ＥＵ資本市場法の全貌が明らかとなった矢先に、早くもその柱の１つである投資サービス指令が改正されることになったわけですけれども、このことはＥＵ資本市場法がどのような方向に向かっているかについて示唆を与えているように思われます。

新投資サービス指令が制定された理由は、旧投資サービス指令の考え方では、投資サービス業の現代的展開および資本市場の現状にうまく対応できないということが次第に明らかになってきたからです。要するに、旧投資サービス指令の規制手法が、現代の投資サービス業の発展と適合しないことが判明してきたわけです。では、現代的な投資サービス業の特徴とは何か。一言で申しますと、その特徴は市場参加者および取引手法の多様化が急速に進展しているという点にあります。それに伴い証券市場が複雑になり、取り扱われる商品も多様化し、仲介業者自身が市場代替的な流動性機能をも提供するようになってきた結果、仲介業者と市場との区別がだんだんあいまいになってきたのです。

旧投資サービス指令の規律の構造は、投資サービス業者と市場とを截然と

区別するというところから出発していました。証券業および規制市場に係る規制において、金融商品ですとか、仲介業者が実際に果たしている機能に即したアプローチを採用する必要性が強く認識され、その果たしている機能の変化から、投資サービス指令の見直しは必至であると考えられたわけです。そして、繰り返しになりますけれども、この規制の対象および手法として業者に対する規制と情報規制の重要性が増してきたわけです。ＥＵ資本市場法の規制の種類は、レジュメの２ページ（３）に、①から⑤まで５つ大きく分類しております。このうち②「金融仲介業者すなわち、銀行、証券業者およびその他の金融仲介者に対する規制」と③「開示規制」が決定的に重要になってきているということです。

このことを別の言葉で申し上げますと、ＥＵレベルにおける証券取引に係る規律は、投資家保護と市場の機能保護に大別されますけれども、実質的に両者はかなりの程度において重なります。そして、その場合の規制は、ＥＵ法における「補充性の原則」ですとか、ＥＵが資本市場法の分野に関して有している立法権限に照らしても、ディスクロージャーに関する規制、情報規制が中心となることは当然であります。

しかし、注意しなければならないのは、ＥＵではディスクロージャーに対する規制だけでは甚だ不十分であると考えられており、市場の失敗に対処するための規制が欠かせないと考えられている点です。ところが、市場の失敗に対処するためには、従前と異なるタイプの規制が必要となってきます。

３．ＥＵ資本市場法の方向性

ＥＵ資本市場法は、金融商品の種類あるいは投資サービスの種類については選択肢を拡大する方向にあり、その際、既存の品質規制に置きかわる規制として、情報規制を重視していることは前述したとおりです。ところが、情報規制を補完するという意味付けで業者等に対しさまざまな規制を課しています。その具体的な内容については、後ほど申し上げますが、例えば業者に課されている顧客の情報収集義務、それに基づく最良執行義務、こういった

義務等は、情報規制だけでは不十分な部分を補うものである、とＥＵでは理解されています。

先ほど、ＥＵ法では「補充性の原則」にのっとって、いわば「最低限の要請」のみを加盟国に課し、あとは加盟国のレベルで規制に上乗せをすることは自由である、と申し上げたわけですけれども、結局、このようなルールの結果どうなったかと申しますと、各国で、特に投資家保護に関する規律についてばらつきが生じ、業者は、ヨーロッパ・パスポートを持っていても、自分が活動を行う国の投資家保護等に関する規律がどうなっているかを調べなければ活動できない。これが非常に大きなコストになっているといわれているのです。ただ、ここで若干注意を要する点は、ＥＵには「補充性の原則」とか、「最低限の要請」という考え方を貫くと不都合があるので、むしろ高いレベルでそろえるべきではないかという主張が出てきているとご説明しましたが、他方で、もう１つ有力な考え方として、規制の間の競争を働かせるべきであって、ルールの間にばらつきがあるのはむしろ望ましいことである、こういう考え方も一方で根強いということを指摘しました。そこで、あるルールについてはそろえ、あるルールについては競争を働かせる、この区別をどのような基準に基づいてどうするのかが問題となるわけですけれども、この点について、ドイツで最近若手の有力な学者であるグルンドマン教授は、次のような仮説を述べています。

投資家保護のような市場の失敗に係る問題については、「最低限の要請」アプローチが妥当しない理論的な説明は、次のようになされます。市場の失敗をフォローするための法規制については、どのような場合に、いかなる内容の規制をすべきかについて、加盟各国の国内法の間にばらつきがあるにはあるが、実質的に見ると、それほど大きな相違ではない。逆にいうと、市場の失敗に対処するための法規制については、法秩序間の競争ですとか、規制者間の競争が機能する余地は少ないと彼は診断します。

もっとも資本市場法のあらゆる分野で「最低限の要請」アプローチを廃棄し、むしろマキシマムの規準にそろえる方向のアプローチを採用すべきかと

いうと、それはそうではない。例えば、取引所にどのような商品を上場させ、それに対しどのような規制をするかは、むしろ競争が非常に有効に機能する分野である。このように、ＥＵ資本市場法といっても、分野、領域ごとに競争が機能する場合と機能しない場合があるのである。そして、業者の最良執行義務ですとか、利益相反規制、こういった投資家保護に係る規律については、全体的に見れば、もともとそれほど大きな各加盟国間の規律のばらつきがあるわけではなく、それを上のレベルでそろえるのは合理的である、彼はこういう議論を展開しているのです。

事務局のお手を煩わせて配っていただきましたＥＵ指令のうちの 2002 年の第２次投資ファンド指令は、理由書の説明を読みますと、投資持分を域内で販売することを容易にするためには、投資家保護を改善しなければならない、という強い問題意識から改正されており、そういう意味ではグルンドマン教授の議論の方向性がＥＵ法の動向とも合致しているように思われます。

しかし、繰り返しになりますけれども、このような投資家保護の強化は、ＥＵ法レベルで行われるときは、投資家保護そのものとしてではなくて、むしろＥＵの域内市場を統合するために必要であるという観点から行われている点が、若干注意を要するところであります。

４．ＥＵにおける資本市場統合の実態と評価

続きまして、レジュメ３ページの４をごらんいただけますでしょうか。ＥＵにおいて資本市場法の分野で法的枠組みについて統合が相当に進んできたわけですが、経済的、実質的にもＥＵの投資サービス市場の統合は進んでいるのでしょうか。進んでいるとしたら、どの程度進展しているのでしょうか。

昨年の４月に証券専門家グループは、「金融サービス･アクション･プラン、その経過と展望」と題する最終報告書を公表し、ＥＵの資本市場が統合しつつある幾つかの証拠を示すとともに、どの段階まで達しているかについて診断を下しています。結論として、証券専門家グループは、わりかし楽観的と申しますか、順調に統合が進展しているという積極的な評価を下しておりま

す。専門家グループが、統合が進んでいる証拠として挙げた徴表が、レジュメに掲げた幾つかの事項です。例えば、国債や社債市場におけるイールドのスプレッドが顕著に縮小してきたこと。金融の仲介手数料が安くなって、しかも収斂してきたこと。インターネット取引、特にエクイティー、株式の取引が進展してきたこと。こういった幾つかの証拠を挙げて、ＥＵの資本市場が順調に統合されつつあると述べました。証券専門家グループは、これまでどおりのアクション・プランで、これまでどおりのタイム・スケジュールでいきましょうと結論付けたわけです。しかし、実際に見ますと、ＥＵ資本市場法の統合といっても、実はホールセールかリテールか等、さらに市場を細分化して観察しなければならないのではないかと思われます。そういう意味では、証券専門家グループの観察にはやや一面的なところがございまして、確かにインターバンクの市場あるいはデリバティブの市場については、既に単一市場が形成されているといってもよろしいかと思います。また、国債および社債市場についても、先ほど掲げた証拠にありましたように、ＥＵ資本市場の統合はかなり進展しつつあります。また、証券取引のインフラ、すなわち取引所であるとか電子的取引システム、決済システムも、統合への動きを加速しているように見受けられます。昨年 12 月にドイツ証券取引所がロンドン証券取引所に対し株式公開買付けの提案を行い、ユーロネクストが対抗案を提出したことが話題となり、今もニュースをにぎわせていますけれども、これなどはＥＵ域内における証券取引所または取引決済のプラットホームの統合に向けた動きとして積極的に受けとめることができるかと思われます。

ところが、リテール分野に目を転じますと、依然としてクロスボーダーの取引は主流ではないということは認めざるを得ないのではないかと思います。確かに、株式についてインターネット取引が普及し始めていると指摘されていますけれども、まだ実は北欧の一部の諸国に限られておりまして、ＥＵ全域で一般的に行われているとまではいえないようです。リテール市場においては、国ごとに分断しているのが実情であり、さらに信用供与ですとか、

投資に対するリスクは国ごとにかなりばらつきがある。ようやく加盟国内のレベルでリテール市場の統合が行われ始めた、そういう段階にあるにすぎないように思われます。リテール市場は国内においてすら実は統合されていないようなのです。

リテール関連のＥＵ資本市場を統合するためには、金融仲介業者および情報媒介者が決定的に重要な役割を果たします。2004 年４月に制定された新投資サービス指令が投資サービス業者に最良執行義務を課すとともに、取引条件等についてディスクロージャーを義務付けた背景には、何よりもリテール市場における統合を実現し、顧客にとっての選択肢を広げることが強く意識されていたわけです。これについては前ラウンドの研究会で報告させていただきましたので、本日は割愛します。

５．投資サービス指令およびドイツ証券取引法の適用範囲

次に、レジュメの第５に移ります。

ＥＵ投資サービス指令およびドイツ証券取引法は、基本的には共通しておりまして、一言で申しますと、伝統的な「有価証券」概念を基礎としつつ、代替性という観念に着目し、さらには資本市場という概念に依拠しつつ、金融商品の範囲を定める､こういう考え方でございます。しかし､伝統的な「有価証券」概念から出発しながらも、それに限らず、有価証券以外の資産を原資産とする取引所デリバティブや店頭デリバティブ等にもその適用範囲を広げています。昨年４月の新投資サービス指令により、商品デリバティブやクレジット・デリバティブなどが新たに金融商品の定義に追加されたのです。

しかし、銀行預金であるとか保険は依然として投資サービス指令の適用範囲に含まれておりません。その理由は、ＥＵの文章等からは必ずしも明らかでないのですけれども、ホプト教授は、次のように説明しております。すなわち、保険法の分野では、ＥＵでは資本市場とは異なり、保険市場の保護ということは余りいわない。資本市場との違いは保険分野における市場のプロセスに対する介入の程度が､銀行､証券分野と比較すると大きいためである。

そのため重心が市場の保護ではなく、保険契約者の個別的な保護に移っているのである。契約自身に焦点を当てた個別的保護に重点があるからこそ、保険の分野では、ディスクロージャーの規制だけではなく、業法上の詳細な監督規定が重要であり、厳格な監督こそが保険者保護にとっても有効である、と考えられるわけです。

先ほど資本市場法の分野では、規制緩和と情報規制および情報規制を補完する位置付けをもつ投資家保護規制の組み合わせが中心であると申しましたけれども、保険監督法の分野は、むしろ規制強化の方向が顕著であります。ちなみにドイツでも、昨年の暮れに、規制強化の方向で保険監督法が改正されました。

では、銀行預金については、なぜ投資サービスの対象から外されているか。これも、理由書等では述べられていないのですけれども、私が推測するところでは、銀行預金というのは金融商品の中でも普及が著しく身近である点において極めて特殊な商品である、そういう理解がヨーロッパにあるように思われます。

こういった点をより一般化、理論化していいますと、特定の商品の設計の禁止ですとか、市場のプロセスに介入する法規制と、情報規制に基づく投資家保護の有効性とは負の相関関係にあると考えられるわけであります。言葉を換えて申しますと、適切な法規制の欠缺によって生じている市場の失敗を是正する手段として、情報規制は非常に有効なわけですけれども、法規制に基づかない市場の失敗への対応策としてはディスクロージャーは必ずしも有効ではないと考えられるわけです。

なお、先ほど申し上げましたように、ここにいう情報規制とは単なるディスクロージャーだけでなく、業者の助言義務ですとか適合性の原則など、狭い意味での情報規制をいわば補完する意味での広義の情報規制も含まれている。そういう意味では、投資家保護のメカニズム全体が、この情報規制をフォローするものであるという位置付けがＥＵ資本市場法の立場であるといってよろしいかと思います。なお、このように情報規制を非常に広くとらえるの

は、投資家の中には合理的な情報解析能力ですとか、合理的な投資分析を行う能力が欠けている者がいるという現実を踏まえる必要がある点を強調するためです。

投資サービス指令では、同指令の認めるいわゆるヨーロッパ・パスポートが、業者側の支店開設の自由を中心とする経済活動の自由を促進するものであったわけですが、投資家の側から見れば、投資選択の自由の拡大を意味します。

例えば、企業が株式を発行しようが、社債を発行しようが、投資家の投資選択の自由という観点からは、それらは同じレベルのものであって、投資家の選択の自由の妥当範囲については、裁定的な機能がどこまで果たされるかという観点が決定的に重要であると指摘されています。ＥＵ投資サービス指令やドイツ証券取引法における金融商品の範囲はこのような観点からも決められているのです。冒頭に金融商品の範囲が資本市場という観念にも依拠していると述べたのはこのような意味においてであります。

新投資サービス指令の方向性を大まかに申しますと、投資サービス業および金融商品の範囲をそれらの多様化に合わせて拡大する一方、それとバランスをとる形で、過剰規制、不適切な規制とならないよう相当に詳細な適用除外規定を設けるほか、業者の行為規制については投資家がプロかアマかにより、投資家保護の規定の適用に差を設ける、こういう方向です。なお、プロ・アマを区別する基準、手続、および効果については、ご報告の最後で簡単に申し上げさせていただきます。

続きまして、レジュメ４ページの（２）「証券業者等に対する規制の理由」に移ります。

先ほど来、ＥＵ資本市場法においては、とくにリテール市場の統合を進めるにあたり、金融仲介業者に対する期待が非常に高いということを申していますが、これらの業者が、金融商品を仲介する際に、さまざまな情報を一緒に創造し、伝達するということが期待されているわけであります。

資本市場法の分野でどのような市場の失敗が存在するかということを考え

てみますと、外部不経済の問題はほとんど生じないと考えられます。と申しますのは、投資家と会社はみずから意思決定をする者ですから、結局のところは情報問題に帰着し、片や、会社の債権者等のいわゆる外部者は、投資判断ですとか、取引所に上場するかどうか、といった決定に、原則としては余り依拠しないと考えられるからです。

これに対して競争の制限については、資本市場法の分野でも、市場の失敗が存在するリスクは極めて大きいといわれます。とりわけ、金融仲介業者と独立の投資助言者との間の競争が制限される可能性が高いと懸念されています。しかも、このことは規制者間の競争制限にも間接的な影響を与える可能性があります。以上のことを少し詳しく説明しますと、独立の投資助言者は、例えば、異なる法に従う発行者間の競争を、仲介業者よりも促進する可能性があると考えられます。なぜなら、ユニバーサル・バンク制度のもとでは、仲介業者は、金融商品の発行者との間に強力な財務上の結びつきですとか利害関係を持っているのが通常だからです。現に、ドイツの統計を挙げますと、証券等の販売において、財務上の結びつきがある発行者の金融商品を投資仲介業者が推奨または媒介する例が、全取引の約半分から75％に達するそうです。

ＥＵでは、実際に証券取引を行うためには、証券仲介業者を通じて取引し、彼らに対し報酬を支払う必要があり、かつ独立した投資助言者には取引を媒介する権限がないので、結局のところ、顧客は独立の投資助言者を使うと２倍のコストがかることを恐れて、独立の投資助言者を用いないのが通常であるといわれます。ＥＵ指令の考え方では、独立した投資助言者と、そうでない仲介業者との間の競争を阻害する効果が生ずるのではないか。すなわち、独立した投資助言者による競争からユニバーサル・バンクを防御する機能を果たすのではないか、こういった批判が一部でなされています。

こういったルールについてどう対処するかについては、昨年の新投資サービス指令においても十分に検討されていないように私には思われましたが、学界では、こういった点も重要であるとして議論がなされています。

６．投資サービス指令およびドイツ証券取引法における金融商品の範囲

（１）商品デリバティブ

続きまして､レジュメ４頁の６でございます。金融商品の拡大については、商品デリバティブについて一言申し上げさせていただきます。

新投資サービス指令で、商品デリバティブを対象とする定型化された取引およびその媒介行為に対し、同指令を適用するため、商品デリバティブが新たに金融商品に追加されることとなりました。

もっとも、現物に係る商品市場というのは、幾らマーケットがあっても、新投資サービス指令の適用の範囲外です。なぜ商品デリバティブは適用範囲なのに現物は含まれないかといいますと､２つ理由が挙げられておりまして、第１に、現物商品には十分な代替性があるとはいえない。商品デリバティブや有価証券と比肩し得る代替性がないというのが第１の理由です。第２に、たとえ代替性が認められるとしても、取引されている商品ごとに市場のミクロ構造が極めて異なっている。流動性が極めて高くても、例えば小麦の現物のマーケットと石油のマーケットとでは市場の構造が相当に異なる、以上の２点が指摘されています。

ここからも明らかなように、商品デリバティブにおける「商品」の概念においては次の２つの要素が決定的に重要です。

第１は代替性です。代替性はＥＵではどのように定義されているかと申しますと、資産の一部を残部から区別することができず、完全な交換可能性を有するかどうか、これがＥＵにおける代替性の判断基準です。第２の重要なメルクマールは物であることです｡代替性の程度についてコメントしますと、代替性の程度は当該資産に係る債務の条件が何かということに依存し、同じ家畜、例えば豚であっても、それが代替物になることもあれば、そうならないこともある。代替性の有無は結局何によって決まるかというと、取引の条件､契約上のアレンジメントが何かということに依存するわけです｡したがっ

て､｢代替性｣を有するか否かは取引されている対象に着目するのではなくて、取引の仕組みに着目して決まることとなるわけです。

なお､｢物｣と言えるかどうかを巡って争われている論点として、無体物は物にあたるかという論点があります。例えば電気のようなエネルギーは、無体物であるにもかかわらず、新投資サービス指令の「商品」に含まれることについては、コンセンサスが形成されています。すなわち、新投資サービス指令における「物」は、必ずしも有体物には限られません。このことは明確であります。

取引可能な代替性のある物と広義に定義するか、それとも、引渡し可能な代替性のある物と狭く定義するか。すなわち、取引可能性に注目するか、引渡し可能性に注目するか、この２つが現在ＥＵレベルで争われている最大の争点の１つのようです。現時点においては、私が見るところ後者、すなわち引渡し可能性を要件とするという考え方が有力であるように見受けられますけれども、ここにいう引渡しというのは極めて緩やかにとらえられておりまして、商品の物理的な移転はもちろん、適切な需要にこたえることができる限りにおいて一般的に引渡し可能性が認められる。具体的に申しますと、ＢＬ（Bill of Lading）のような有価証券による引き渡しはもちろん、エネルギー供給ネットワークのオペレーターに対し、取引の通知によって契約を決済する、こういったアレンジメントにすら引渡し可能性が認められると解されています。

また、新指令にいう「商品」とは、本源的価値を有する物でなければならないのか、本源的な価値がなくても構わないのかといったことも、現在ＥＵレベルで細かく議論されています。

いずれにいたしましても、商品の範囲ですとか種類は限定列挙し得る性質のものではなく､相当に広く解釈されることになると予想されます｡したがって、むしろ商品に含まれないのは何かという点から議論していった方が生産的であると思います。例えば、サービスですとか、不動産や通貨など、物に該当しないもの、あるいは完全な無体物、パイプライン使用権のような権利

にすぎない場合、こういったものは商品には含まれないということは恐らく争いがないのではないかと思います。

もっとも、商品に含まれなくても、新指令付表ＩのＣ節８号から10号までの規定によって金融商品に当たる場合がありますので、注意を要します。

商品デリバティブを指令における金融商品の定義から外していた旧指令には、次のような問題点があったと指摘されています。

第１に、業者が商品デリバティブを対象とする投資サービス業務を国境を越えて行う場合に、ヨーロッパ・パスポートを利用できない。

第２に、投資サービス指令に定める権利義務に係る規律の適用を特定の業者について排除する結果になる。

第３に、商品デリバティブを扱う取引所およびその他の取引システムは、遠隔地から参加する取引所構成員に係る投資サービス指令の規律や、画像取引の認可等に係る投資サービス指令の規律の適用を求めることができない。

すなわち、商品デリバティブが旧投資サービス指令においては金融商品とされていなかったために、規律すべき業者が漏れてしまう点と、むしろ投資サービス指令の規律に服することによってできることができない、この両面が問題にされたのです。

域内市場でなされる商品デリバティブについては、ＥＵレベルではこれまで何ら法規制が存在しませんでした。ところが､商品デリバティブの市場は、実態として非常に発展している。そこで、ＥＵレベルでも上記の観点から規制が必要であるとして、資本市場法の規制対象に含められることとなったのです。

実際ＥＵにおいては、商品デリバティブの領域では、主としてプロの市場参加者が大口の取引を行っています。それにもかかわらず、新投資サービス指令の対象に商品デリバティブを含める必要があったのは、当事者が倒産した場合のリスクを看過することができないと判断されたためです。そこで、商品デリバティブも金融商品の定義に含め、それを扱う者は投資サービス業者だということにして、さまざまな業者規制を適用する。財務比率規制等も

当然にかかってくることとなるわけです。

商品ないし商品デリバティブ取引を主たる業務とする企業に対し、どのように監督法上の規律を及ぼすかについては、ヨーロッパで大変争われ、難しい問題が多いところであります。結局のところ、ＥＵの新指令では、かなり緩やかに一定の条件を設け、その条件のもとでは、投資サービス業者には当たらないとして、相当に広範な適用除外規定を置くことで妥協点を見出しました。なお、ある企業の主たる業務が商品デリバティブ業務かどうかを判断する際は、当該企業だけに着目するのではなく、企業グループないし連結ベースで判断するということとされています。

商品デリバティブを投資サービス指令の目的のためにどのように定義するかについては、特に慎重な吟味がなされました。新投資サービス指令の適用範囲は、伝統的な金融商品と機能的に同程度に監督法上の問題を提起している商品デリバティブに限定すれば、必要にして十分であるというのが立法の基本方針でした。そこで、金融商品と同等の商品デリバティブをどう定義するかが問題となったわけですけれども、ＥＵ指令では第１に、規制市場またはＭＴＦで取引されるときは、現物の引渡しがなされ得る場合にも商品デリバティブを金融商品として定義する。第２に、認可された清算機関を通じて清算・決済なされるかどうか。第３に、差金決済がなされるか。第４に、個別取引とは異なり、規則的に公表される相場を参照して取引条件が決定されているか。こういった幾つかの徴表を挙げ、これらを判断して金融商品に当たるかどうかを判断するものとされました。

加盟国は、明確かつ透明な規則に従って金融商品が取引される場であることを担保するために規制市場を認可制のもとに置かなければならず、当該規則において認可される金融商品は、公正、正規かつ効率的に取引できるものでなければなりません。デリバティブについては、金融商品の品質をどう確保するか、そしてそれをどう基準化・標準化するかが立法の過程で大きな問題となったわけですけれども、新指令では、結局上述した規定を置くことで決着しました。デリバティブ取引の形成が正規の価格付けおよび実効的な決

済を可能とするような規則を取引所等は定めなければいけない。結局、こういう規定を設け、商品デリバティブの品質確保については各規制市場の規則に委ねた形になっています。

（2）クレジット･デリバティブ等

続きまして、②の「クレジット・デリバティブ、天候デリバティブ等」に移ります。①に述べた商品デリバティブの対象はあくまでも商品、すなわち物に限られるため、商品デリバティブ取引に類似しており、それと同等の規律に服すべきデリバティブ取引が残されることになります。この問題への対策が、お配りいただいております新指令の付表ＩＣ節８号から 10 号までの規定です。単なる権利の移転や排出権割当等の移転が問題となっている場合でも、①差金取引がなされる、②規制市場あるいはＭＴＦで取引される、③認可された清算機関を通じて清算および決済がなされる、④証拠金の支払いを求められる、等の諸事情に鑑み、金融商品としての徴表を示す場合には、商品デリバティブと同等の規律に服さしめることとしています。

（3）ドイツ証券取引法

続いて、ドイツに目を転じたいと思います。ドイツ証券取引法は、新投資サービス指令を待たずにデリバティブを既に広範に射程におさめ、金利、通貨デリバティブなどの金融デリバティブはもちろん、商品デリバティブも適用範囲にしております。

なお、ドイツ証取法は、昨年 10 月 29 日に公布された投資家保護の改善のための法律、これを以下、投資家保護改善法と申しますけれども、これにより改正されました。投資家保護改善法の一部は公布の翌日である 10 月 30 日から施行されていますが、残部は 2005 年７月１日施行です。

投資家保護改善法に基づく証取法の改正によって、先に言及した 2002 年の市場詐害行為指令を国内法化するとともに、従来ドイツにおいて問題視されてきた「灰色の市場」に対する規制が本格的になされることとなりました。

投資家保護改善法によりドイツ資本市場法における情報規制の欠缺が埋まり、不公正取引からの投資家保護も大幅に改善したといわれております。そして、投資家保護改善法によって初めて、ドイツの証取法に金融商品という概念が入れられ、有価証券、短期金融市場商品、デリバティブという３つの概念の上位概念として定立されるに至っております。実質はそれほど変わらないのですが、証券取引法という名の法律に金融商品という概念が導入されたことは、形式だけではありますけれども、ある意味では象徴的なことだったのかもしれません。

金融商品の定義については、レジュメの４ページ（２）に仮訳してありますので、そちらをご参照いただければと思います。金融商品とは、「有価証券、短期金融市場商品、デリバティブおよび有価証券を引き受ける権利ならびにドイツ国内またはＥＵの他の加盟国における規制市場で取引することを認可されもしくはその認可を申請中の商品」、と定義されています。「有価証券」概念については、従来から変更はございません。すなわち、ドイツ証券取引法２条１項は、有価証券を次のように定義しています。１号において、株式および債務証書が、２号において、市場で取引し得る株式または債務証券に類似するその他の有価証券、が掲げられています。株式に類似する有価証券とは何かが問題となりますが、組織形態とか法形態のいかんを問わず、社員権を表象したものを指すと解されており、したがって、資本市場で取引し得る以上は、有限会社、合資会社の有限責任社員の地位等も含まれると解されています。これに対し、無限責任社員たる地位は定型的に代替性を欠くとドイツでは理解されており、証取法上の有価証券概念には含まれません。

なお、投資会社および外国投資会社の投資ファンドに対する持分は、有価証券とみなすと明定されています。すなわち、集団的投資スキームに対する持分は、国の内外のいずれにおいて組成されたかを問わず、また投資先が金融商品かどうかを一切問わず金融商品となるわけです。例えば、不動産ですとか、貸付債権に投資するファンドであっても、集団的投資スキームを通じて投資がなされていれば、それは証取法上の有価証券になるということです。

不動産ですとか、貸付債権等を投資対象とする集団投資スキームは、ドイツでは投資会社法を全面改正した2003年12月の投資法による仕組み規制および運用規制等に服します。

なお、これもひょっとしたら次回触れられるかと思うのですが、昨年末のドイツの投資家保護改善法では、改正前の証取法上の「有価証券」概念では、結局のところ民法上の組合員たる地位ですとか、匿名組合の組合員たる地位、あるいは人的会社の社員たる地位、こういったものを拾い上げることがむつかしい。その間隙を縫って「灰色の市場」といわれるところに資金が流れ込み、大きな問題を起こすこともあったわけですけれども、ドイツではやっとそこにメスが入ることになったわけです。

すなわち、投資家保護改善法によって、人的会社、有限会社や民法上の組合に対する持分、協同組合に対する持分、それから今述べました会社とか組合に対する匿名参加、こういったものが販売目論見書法の適用範囲に含まれるとともに、さらに信託もこの中に含まれ、信託財産およびその他のクローズド型不動産ファンドに対する持分等も販売目論見書法における直接開示の対象になりました。したがって、販売目論見書を公示し、交付しなければならないというルールが適用されることとなります。この規律は2005年７月１日までに発効することとされておりますので、まだこの目論見書義務がドイツで通用しているわけではありませんが、この規律が施行されればドイツの資本市場法は変わり得るのではないかと思われます。

次に、証取法上のデリバティブの定義を説明します。デリバティブは２条２項に定義されています。仮訳をレジュメ４ページの（２）②にのせておきましたので、ご覧いただければと思います。実質は旧法とほとんど違いはないと思います。有価証券の取引所または市場価格（２条２項１号）、短期金融市場商品の取引所または市場価格（２条２項２号）に応じて価格変動する期限取引がデリバティブとされます。ただ、細かく申しますと、改正前法は、金融デリバティブについて、組織化された市場で取引される外為期限取引、通貨先物取引、外為オプション取引、通貨スワップ、外為スワプション、そ

れから外為先物オプションを列挙していたのですが、５号で単に「通貨の価格」という、たったこれだけの言葉に整理しました。これによって取引所外で行われる外国通貨、または通貨期限取引も証券取引法の適用範囲とされたわけであります。

また、文言の問題ですけれども、これまでドイツの証取法は、「相場（Kurs）」という言葉を用いていたのですが、新法では「プライス」という言葉を用いており、仮訳では「価格」と訳しております。

ドイツ証取法のデリバティブの定義は、基準となる原資産の価格変動に応じて、当該デリバティブの価格が変動するものと一般的に定義されており、このような包括的な定義によって技術の進歩にも適用できると考えられているわけです。

我が国の証取法とは異なり、金利やその他の指標、商品、通貨を原資産とするデリバティブが証取法上のデリバティブとして定義され、それらを他人の計算で売買したり、媒介することは証券業となります。

特に、商品または貴金属を原資産とするデリバティブは、新投資サービス指令を待たず、ドイツでは 1997 年の改正によってデリバティブとして証取法の適用範囲に含められました。これらのデリバティブの提供業者に対しても、証取法上の各種行為規制を課すとともに、不当行為を排除し、もって当時ハノーファに設置しようとしていた商品先物取引所の設置を後押しする、こういう趣旨があったといわれています。なお、ドイツの特殊な状況を説明する必要があると思います。実はドイツでは、商品先物取引が長らく禁止されていまして、第２次資本市場振興法によってやっと解禁されたという沿革があります。1800 年代には非常に活発に行われていたのですが、大変大きな問題を起こして禁止されていた、こういう特殊な歴史的な沿革のもとでの法規制ですので、そういった事情も鑑みてドイツ法を見る必要があろうかと思います。

７．新投資サービス指令およびドイツ証券取引法における投資サービス業の拡大等

続きまして、レジュメ５ページの７でございます。

新投資サービス指令では､新たに「投資助言業務」およびＭＴＦを投資サービス業のコア業務として追加し､「財務分析業務」を付随業務として追加しました。このうちＭＴＦ（多数当事者間取引施設）につきましては、前のラウンドで詳細にご報告いたしましたので、本日は「投資助言業務」と「財務分析業務」について触れたいと思います。「投資助言業務」から扱います。

「投資助言業務」は、旧投資サービス指令では、非中核業務、コアでない業務とされていたわけですけれども、それ自体で独立のコアの投資サービス業務として、いわば格上げされました。投資助言は、レジュメに掲げましたように､「顧客の要請に基づき、または投資サービス業者のイニシャティブに基づき、顧客に対し、金融商品に係る取引に関する属人的な助言を行うこと」と定義されています。専ら一般投資家に対し、各投資家の諸般の事情および状況に適合した合目的的な投資に関する助言を行うことにより、顧客の獲得を目指す業務であると一般に解されています。提供されるサービスが属人的な性格を有する点に着目すると、投資助言業務は既にコア業務とされているポートフォリオ管理業務に類似します。

なお、新投資サービス指令の制定過程において､「独立の」投資助言という文言が使われていました。「独立の」という文言の意味するところは、投資助言サービスの対価を顧客が支払う場合のみを対象にするという趣旨でした。ところが、このような業者はＥＵでも多くなく、また、投資サービス業者等から報酬を得て投資助言を行う者の法的地位が不明確になるという問題点があったため、最終的には「独立の」という文言が削除された経緯があります。その結果、投資助言の範囲は非常に広くなったわけですけれども、逆にさまざまな解釈問題を生ぜしめています。

今般の改正の背景には、投資家がますます投資助言を重視するようになっ

てきているという事情があります。投資助言業務が証券の本来業務とされたのは、当該業務によって投資家に生ずるリスクを的確かつ柔軟に考慮するための法的枠組みを創設しやすくするためです。すなわち、具体的に申しますと、第１に、開業に当たって認可を要し、業務継続中には行為義務を課され、不適切な助言に基づき、投資家のリスクが増大したり、あるいは職業倫理に反するような行為を投資助言業者が行った場合には、それに対して適切な監督規定が発動される。

第２に、認可を受けた投資助言業者は、ヨーロッパ・パスポートの恩恵を受けることができます。投資助言業者に対して従来の投資サービス業者と同等の法的枠組みが適用されることになるからです。

ちなみに、投資助言業者はイギリスで 4000 社、イタリアで 7000 社、ドイツでは、数は不明ですが、イタリア以上の数の投資助言業者が存在するといわれています。

なお、投資助言業務を他の証券業務と合わせて営むことはもちろん可能ですが、その際、利益相反の厳格な管理およびそれに関する開示義務並びに投資家の利益が優先されることが確保されるよう手当てを講ずべきことになります。

なお、先ほど、投資助言という概念が、属人的な推奨をなすことと定義されていることとの関係で、一般的推奨との違いがどこにあるのか、特に、いわゆるマーケティング・コミュニケーションとどこから重なり、どこからずれているのかという点が、現在ＥＵで盛んに論じられています。

次に、財務分析業務ですけれども、顧客または公衆に対する財務分析や投資研究等の形態で、金融取引に対する一般的な推奨を行うことについては、これらの情報を受け取る側の利益が害されないよう、厳格な職業上および倫理上の基準を適用する必要がある、そういった考え方から、新投資サービス指令では、財務分析業務を新たに投資サービスの付随業務にしました。付表のＩのＢ節第５号です。

他方、財務分析や投資研究を非中核業務のリストに掲げることによって、

専門性および独立性の高い研究が規制の対象とされることがないよう、監督当局は他の投資業務と研究ないし分析等との間に利益相反の誘引が生じているような企業だけをコントロールの対象とするように注意を促しています。アカデミックな研究ですとか、理論分析がこの規律によって阻害されることがないよう、特段の注意を払う必要があると念を押しているのです。

なお、ドイツでは、既に第４次資本市場振興法により、証券会社およびその結合企業が行う証券分析に対し特別のルールを課してきました。証券分析を行う者に対する注意義務と利益相反防止義務を課していたわけでして、昨年末の投資家保護改善法で、新投資サービス指令のように一気に投資サービス付随業務にすることまではしませんでしたが、次のような大幅な実質改正を行いました。しかも、今般の指令を超えて規律している部分が幾つかありますので、若干、ドイツ法の最新の情報をご提供したいと思います。

まず、ドイツにおいて初めて財務分析が法律上定義されることとなりました。これはドイツ証取法の 34 ｂ条第１項、レジュメ５ページの下から６行目です。財務分析とは、「特定の投資判断のための直接または間接の推奨を含み、かつ、不特定の人々が入手し得る情報であって、金融商品またはその発行者に関する情報を、職業上または営業上、生成すること」、と定義されました。

改正前は「証券分析」として規制されていたのですが、定義規定はございませんでしたため、どう解釈するのかいろいろ争いがありました。今回、「財務分析」の定義規定を置いたわけですが、理由書は、ここに言う「推奨」には、投資戦略に対する指南も含まれると述べています。そうすると、「財務分析」と「資産管理」あるいは「ポートフォリオ管理」との境界が微妙になってくるように思われますが、「不特定の人々が入手し得る」かどうかで区別される場合が多くなるのかもしれません。

第２に、証券分析という形で、従来は有価証券の分析だけに限られていたわけですが、今回の証取法改正により、金融商品という概念が導入されたことに伴い、財務分析の対象も、有価証券のみならず、金融商品一般にまで拡

大されました。幾つかの適用除外がございますけれども、原則としてすべての金融商品に及ぶ、これも旧法との大きな違いであって、先ほどのＥＵ指令の「最低限の要請」を超えた部分です。

第３に、財務分析を伝達または公表する場合についての特別のルールが設けられました。具体的には、①当該財務分析が適切に行われ、または提供されたものであること、②当該行為につき責任を有する者がだれかを財務分析とともに開示すること、③情報生成者、情報作成者、あるいは当該作成に責任ある法人またはその結合企業の間に利益相反をもたらし得る状況、または関係についてディスクローズすること。こういったルールを設け、財務分析の結果を伝達する際のルールについて定めています。

第４に、第三者が行った財務分析の要約をほかの人に伝える場合、具体的には雑誌等で財務分析の結果の要旨を掲載する場合を考えているわけですけれども、この場合についての特別のルールを定めています。さらに、ジャーナリストについて適用除外がなされています。これは報道の自由に配慮したものです。

第５に、改正前法においても、証券分析を行う企業に対し、利益相反を可能な限り小さくするための組織を構築すべき義務を課していましたが、具体的に何をすれば良いのか甚だ不明確でした。適切な組織化義務の詳細な規定については、法規命令に委ねられ、法規命令の方で適切かつ柔軟に具体的なルールを明らかにすることになりました。

第６に、ＥＵ指令を超えている部分ですが、公表のために特定の推奨を行う場合ではなく、単に情報を伝達するにすぎない場合も、顧客に対する行為義務をかぶせるために規制の対象としました。具体的に申しますと、証券会社が顧客との関係において、つまり、証券会社と顧客との２者間だけで直接または間接に特定の投資判断のための推奨を含む情報の伝達を行う。こういう場合も、財務分析に係る規定が適用されます。そのため、証券会社は専門家としての注意を尽くして当該情報を伝達しなければならず、利益相反の状況等について開示義務を負います。さらに、前述した組織化義務を負います。

こうして、財務分析の結果を２当事者間だけで伝達する場合について特別なルールが定められました。

なお、証券会社、投資会社または投資株式会社以外の者であって、業として財務報告の作成または伝達を行う者は、金融監督庁に届出なければなりません。

８．プロ・アマの区別

最後にいわゆるプロ･アマの区別について申し上げます。

ＥＵのプロ･アマの区別はどういう考え方に基づいているかといいますと、投資家保護をいたずらに強調するのは適切ではない、むしろ投資家保護の実質的な根拠を市場の機能､特に情報規制との関連でとらえていくべきである、そのような観点からすると、同じ投資家でもプロとアマでは全然話が違うとして、大きくプロとアマの２類型に分け、その要件、手続を詳細に定めております。

さらに、プロ顧客は大きくみなしプロ顧客と請求によるプロ顧客の２つに区別され、みなしプロ顧客はさらに３つの類型に分かれます。第１はいわゆる機関投資家、２番目がいわゆる大会社、３番目が公的金融機関であり、こういったものはみなしプロ顧客となるわけですけれども､みなしプロ顧客も、請求によってアマ顧客として扱ってもらうことができます。

投資に関連するリスクを正しく評価できず、コントロールできないと思うプロ顧客はむしろアマの申出をしなければならないものとされております。逆に、みなしプロ顧客の範疇に入らない個人等であっても、みずから申し出て、自己に与えられている保護水準を放棄することが認められます。その場合の客観的な要件としては、大規模な取引を行った回数、ポートフォリオの資産総額、職業、こういった基準等が考慮されるとともに、手続要件として書面によるプロ顧客としての取扱いの申請、その効果についての業者側からの書面による説明、その書面の内容を了解した旨を証する書面の徴求などさまざまな手続が課されています。

以上、昨年４月に制定されましたＥＵの新投資サービス指令の適用範囲、2004 年末のドイツ投資家保護改善法を中心として、金融商品の範囲、証券取引法の適用範囲という観点からヨーロッパの状況を簡単に見てまいりました。

ＥＵ法もドイツ法も、有価証券、短期金融市場商品およびデリバティブ、この３つを金融商品の基軸の概念としながら、デリバティブについては株式や金融商品以外の資産を原資産とする場合であっても、金融商品としての徴表を示す場合には、金融商品として扱うことを可能とする機能的な定義を置きました。このような機能的な開かれた定義規定を置くことによって、金融市場、金融技術の変化、発展に適切に対応しようとしているわけです。

さらに、投資サービスの仲介業者と市場の境界自体があいまいになりつつある現状を踏まえ、両者に対する規律を整理し直す一方、投資判断に決定的に重大な影響を与える投資助言とか財務分析、これを投資サービスのコア業務に加えるなど、現在我が国で行われている機能的、横断的な投資サービス法に向けた議論にとっても、何がしか参考になる点があるのではないかと思われます。

非常に長い報告で恐縮ですけれども、私からは以上でございます。ご教示の程、どうぞよろしくお願いいたします。

森本共同会長　どうもありがとうございます。

討　議

森本共同会長　最新の非常に複雑な法整備の状況をご紹介いただいてありがとうございました。アメリカもすごいな、イギリスもすごいなと思ったけれども、ＥＵ、さらにはドイツもすごいなということで、大変だったのですが、今日のご報告を大きく分けますと、最初に、最近の状況、特にＥＣ法の理念をベースにご説明になったところと、各論に分けられて、各論については、投資商品というか金融商品の拡大、とりわけデリバティブの問題、第２番目に投資サービス業、我々の言葉でいうと証券業の中での投資顧問というか投

資助言と財務分析について、本来の業務と付随業務に分けられたところと、最後にそれらよりは重要性が少し少ないのかもわかりませんが、プロ・アマあたりの見解についてもご説明があった。それから、総論と各論の中間領域ですけれども、証券、銀行、保険、特に保険、銀行がこういうものにどうかかわるかということもご説明があったと思います。

一応総論と各論に分けまして、まず最初は、一般的な最近の動向、特にＥＵを勉強する場合には、アメリカの場合のインターステーツ・コマース条項と同じように、アメリカの判例を読むときには、この問題はパッと飛び越せばいいという形で読んだりしますけれども、ここでも、補充性の原則とか、国際組織である特殊事情もありますが、それも踏まえた総論的なことについて、ご質問なりご意見を少しおっしゃっていただいた後、現在の日本の金融サービス法というのか証取関連の改正ともかかわる金融商品や証券業、プロ・アマのあたりの各論、そういう形で進めさせていただけたらと思いますが、神作さん、そういう方向でよろしゅうございますか。

神作委員　よろしくお願いいたします。

森本共同会長　それでは、レジュメで申しますと３ページぐらいまでの総論的なご説明のところで、何かご質問、ご意見がありましたら、どうぞおっしゃっていただきたいと思います。

興味深くお聞きして、こちらが少しテークノートできなかったということなのですが、最近の動きについて、プレーヤーの意見を重視するようになってきたというご趣旨、そこをもう少しご説明いただけたらと思うのです。イギリスの場合なども実務家が主導している。これは昔からの状況だったと思うのです。ＥＵの場合に、そういわれる変化について、少しご説明いただけたらと思うのですが。

神作委員　ＥＵ資本市場法の嚆矢とされる 1979 年の取引所上場許可指令制定時と今日とで、非常に大きく変わったのは、いわゆるＥＵ官僚が果たす役割よりも市場参加者の意見が重視されるようになった点にあるといわれております。例えばアクションプランの制定に際し、あるいはランファルシー報

告書などＥＵ資本市場法の基本的な方向を決める場面において、プレーヤーが大きな役割を果たすようになったといわれています。また、ＥＵ資本市場法の規定の仕方も大きく変化しております。すなわち､指令では大枠を定め、重要であるけれども細かい所は、コミトロジー手続にのっとって、実施細則の方で決める。その実施細則を決めるグループは専ら実務家から構成されております。このように、ＥＵ資本市場法の方向性を決める局面と、制定されたディレクティブを具体化、詳細化していくという両局面において、実務家が非常に大きな役割を果たしているということがいえようかと思います。この背景には、資本市場法の規制対象の変化のスピードの速さ、専門性の高さ等があるものと思います。

黒沼委員　レジュメの２ページの上のところで、投資家の個別的保護と市場機能の保護ということを挙げられたのですけれども､私､ドイツの議論で昔、インサイダー取引規制などについての議論を読んだことがあって、機能保護だから、これに違反しても民事責任は生じないとか、そういう議論があったと思うのですが、ここでいわれているのは、この２つは別だという考え方なのですか。それとも、市場機能の保護の裏側としての個別的保護と少し限定的にとらえるという意味で、こういう議論がなされているのでしょうか。

神作委員　一応概念的には分けているのですが、特に資本市場の分野では、結局、個別的な保護と機能的保護が重なるところが随分多く、かつ、投資家の行動を通じた資本市場法のエンフォースメントへの関心が高まっています。したがって、実質的には、区別する必要が低下しているということだと思うのですけれども、他方で、ご報告の中でも申しましたように、保険契約においては、むしろ個別的な保護が重視されているという文脈におきましては、概念的には、両者の区別は一応は維持されているということではないかと思います。

黒沼委員　これはつまらない質問ですが、これはドイツでの議論なのか、それとも、ドイツ以外のＥＵ諸国でもこういう議論があるのかという点も教えてほしいのですが。

神作委員　確かに私が参照している文献はほとんどがドイツ人によるものなので、そういう意味では、ドイツ人が書いた、ドイツ人の頭で見たＥＵ法ですから、ほかの国の方が説明したら、ちょっと違う説明になるのかもしれません。なお、ドイツでは、投資家の個別的保護を目的とした保護法規であれば、民事法上、その違反に対し不法行為法に基づく救済を得られることになります。

藤田委員　今日の話で非常におもしろかった点の１つは、投資家の保護のレベルを上げる必要があるから規制が高まっているのではなくて、規制を上げることで統一性をつくり出す。必要だから規制のレベルを上げているのではなくて、統一が必要性なのでそのために規制のレベルを上げているのだという話です。

ただ、補充性原則を維持したまま、これをやるときに、そうすると、どこまで上げることになるのか。今、非常にミニマムなところでそろえている。その結果、多くの国でそれにみんな上乗せしていて、その上乗せしている部分の最大公約数レベルまでは上げますという形で、ある程度はそろうわけですね。そういうことを目指しているのか。本当に補充性原則を維持したまま、完全に統一しようと思ったら、一番厳しい国のところまで上げて、それ以上、だれも規制を加えようとしないレベルまで上げなければいけないのですが、そうすると、規制は恐らく過重なところまでいってしまうので、結局、どのあたりまで上げることで、規制強化による統一を目指そうとすることになるのだろうかという質問なのです。それが本当に各論分野でそれがみんな説明できるかどうかはまた別問題として、プリンシプルとして唱えている人たちは、どういうことをイメージしているのでしょうか。

神作委員　大変難しいご質問なのですが、確かにＥＵの「補充性の原則」の下で、最低限のミニマム・スタンダードを課して、それに上乗せするのは各国の自由だというやり方によって、結局、規律がばらばらになり、さらに、乖離の幅が拡大している、こういう認識が持たれているのは事実だと思います。ＥＵ法の究極の目標である活動の自由、特に業者の側からの活動の自由

を確保するためには、どこの国でも同じように業務を展開できないと困る。投資家保護の水準もそろえてくれという声が、むしろ業者の側から強く上がってきたので、そういう観点からすると、とにかくまずそろえることが大事だということになります。

投資家保護にとって規制が低い国と高い国があるときに、どちらにそろえるかといったら、高い国を低くしなさいということは現実問題としては多分難しいことになると思いますので、そろえるとしたら高い方にそろえることになるのではないか。しかし、それは投資家保護を目的としているのではなくて、むしろそろえるところに意味があるのではないかという説明の仕方もできると思うのです。

これまた、私が読んだのは主としてドイツの文献なのですけれども、ドイツ人たちはこれをどう受けとめているかというと、むしろその限りにおいては、「補充性の原則」が後退しているのだと、そこまでいっている人もいるのです。「補充性の原則」とか「最低限の要請」という原則自体が資本市場法の一部の領域では妥当しなくなっている。ただ、他方で、ＥＵの「補充性の原則」は、資本市場法だけではなくＥＵ法全体を貫く大原則ですので、ＥＵ法全体の体系との関係では、資本市場法のように一部だけこの原則は適用されませんといえるのかどうかという問題はあろうかと思います。

先ほども申し上げましたように、個別に見てゆきますと、高いところで規制をそろえている部分もあれば、そうでない部分もありまして、もうちょっと子細に検討してゆく必要があるという感じを持っております。

ご報告の中で紹介したグルンドマン教授の議論は、資本市場の統合といっても、市場にもいろいろあるし、ルールにもいろいろあるから、もう少し分けて見ていきましょうという分析的な視点を取り入れて、投資家保護、特にグルンドマンが念頭に置いているのは利益相反規制なのですけれども、利益相反規制は、国ごとにそんなに大きな違いはないし、むしろそろえるのであれば、投資家保護という観点からベストと思われるものを決めてしまえばいいのではないかといっているわけです。グルンドマン教授の論文は 2001 年

に公表されたのですが、去年の新投資サービス指令は大体同教授の主張していた方向で実現したので、私は、そういう意味では、グルンドマン教授の論文は先見の明があったと思って、本日のご報告においてもかなり参考にさせていただいております。

森本共同会長　私も、去年廃棄された93年採択の旧投資サービス指令ぐらいまではＥＵ法をフォローしていたのですが、この10年、全然フォローしていませんので、この10年の動きをびっくりしているのです。70年を目指してインターナルマーケットをつくろうということで、60年代後半から70年にかけては、ＥＵの統合の話が物すごく強まったのです。そこで、例えばそのころには統一証券取引所もつくろうではないかとか、統一ということが厳しかったのですが、イギリスが入ったころから、統一ということよりはハーモナイゼーションの方がいいのだ。結局、加盟国がどんどんふえて、補充性の原則が多く語られるようになったのは、70年代後半から80年になってからだと思うのです。これはイギリスあるいはフランスもそうでしょうけれども、主権を維持したいという機能もあって、それこそＥＵ官僚の暴走をとめるためにも、補充性というようなことがいわれた。

ところが、証券とかグローバルな競争の場では、インターナルマーケットの機能を促進するために、主権をある程度移譲するというのか、あるいは個々の国の立法権を制約しても、その方がトータルに個々の国の利益になるというような形の議論の中で、2001年あたりにそういう論文が出てきて、また、それに対応するような立法過程になっているのかなという気がします。

結局、こういう国際機構の場合には、時々の政治状況とか何かもあっていろいろ難しくて、補充性の原則も、70年代前半には国際法の文献にもほとんど出ていなかったように思うのです。そういう歴史的な概念ですので、それが前面に出たり、後退している面があって、それは証券のことだけでなくて、やっぱり全体のＥＣ政策の中で考えなければいけない難しい問題があるのだろうなという感じはいたしますね。

神作委員　資本市場の統合を目的とするＥＵ資本市場法につきましては、特

にローカルな市場、リテールの市場を統合していくためには、ルールをそろえないとどうにも業者が進出できないという意見が強く、「最低限の基準」アプローチがその元凶とされている面があるのかと思います。

中東委員　今の話で、補充性の原則にしてもだんだん変わってきて、事実上、破られているのではないかという話と、市場参加者の意見が重視されてディレクティブがつくられるようになったというのは、どういう関係にあるのでしょうか。自分が勝てると思えば、みんなそろっている方が、自分はほかの国へ出ていけるということだと思うのですが、逆に、規制が難しくて個々が違っている方が、自分の今のテリトリーは守れるという考えもあるわけですね。

神作委員　ＥＵの立法に携わる専門家たちがどういうスタンスで臨んでいるかということだと思いますけれども、確かにメンバーを見ると、いわゆるメガバンクから派遣されている人たちが多いとは思うのです。

中東委員　この原則が破られているのも、分野によって違うという話だったのですが、これは業者によって都合のいいところは破られて、都合の悪いところは維持されるとか、そういう状況はありますか。

神作委員　むしろ現象から見ると、「最低限の要請」は、投資家保護規制のように、業者にとっては厳しいところから破られているのです。そういう意味では、業者が自己の利益だけを図ってルールづくりをしているわけではないと信じたいのですけれども。

神田幹事　今の点に関連して、１点よろしいですか。藤田さんのおっしゃったことと関係するのですけれども、最小限か最大限かという点なのですが、もちろん域内で市場が１つとかいうときにはレベルはそろっていないと難しいと思うのですけれども、なぜヨーロッパ・パスポートというかシングル・パスポートの観点からそろっていないと不便なのか、すぐにはのみ込めなかったのですね。

例えばＡ国とＢ国のルールが最低限ではそろっていて、Ｂ国の方が水準が高かったとしますね。そうすると、Ｂ国の方でライセンスを得た業者はＡで

も活動できますけれども、Ａ国でライセンスを得たら、Ｂ国では支障が生じますね。高い方に合わせないといけない。では、そのときにＡ国のルールを高めたらどうなるかというと、Ｂ国でやる人にとっては同じだし、その場合は、Ａ国でライセンスが取れれば、Ｂ国でも活動できるでしょうけれども、仮にＡ国がルールの水準を高めていないとすると、Ａ国でライセンスを得たら、Ａ国でだけは低い水準で活動できるわけですね。Ｂ国に行こうと思えばどうせレベルを上げなければいけない。そういうようにライセンスを取ろうという方から見れば、両方高めることによってシングル・パスポートで活動がしやすくなるとは、すぐには思えないのです。

ですから、高いほうにそろっていた方がいいというのは、別の理屈ならわかるのです。レジュメにあるように、例えば仲介業者と市場の境界があいまいになっているとか、そういう理由ならよくわかるのですけれども、保護の最小限のハーモナイゼーションか､最大限というか高いレベルかという話は、業者の活動を阻害しているから高めましょうというロジックだとすると、ちょっと私にはすぐにはわからないところがあるのですが。

神作委員　理由書などの説明によりますと、そもそもＡとＢとでルールが同じなのか、違うのか。それを調べること自体にコストが非常にかかる。どちらの法制が規制のレベルが高いか低いかということはいわば結論でして、実際に他国で業務を展開しようとすると、違う可能性が高いわけですから、まずルールを全部調べるところから始まると思うのです。さらに、実際はある事柄についてはＡ国の規制のレベルがより高いけれども、他の事柄についてはＢ国の方が高い、結局、国毎に組織や事業方法・マニュアルを変えねばならないということになると思われます。

神田幹事　理由にはなると思うのですけれども、その次のロジックとして、では、高いところへそろえましょうということにすぐになるのか。さっきの話で、高い方の国が下げたがらないというのは、政治的にあるのかもしれないのですけれども。そういう政治的な力関係の方がもうちょっと大きいように思うのです。

神作委員　情報だけを出すというのは、手段としては非常に緩やかな規制ですので、ディスクロージャー規制は「補完性の原則」に非常にマッチすると考えられます。その情報ルールをいわば補完する形での投資家保護のルールをどこまでそろえるかが問題となりますが、そこがロジカルなのかどうかはわかりませんけれども、少なくともグルンドマン教授の判断だと、高い方にそろえておいた方が、彼の言葉でいうと、市場の失敗を補完できるというのです。それをどこまで高くしたときに、本当に情報モデルと相まって市場が機能するのかは、実証的に立証すべき問題ではないかと思います。他方で、業者の最良執行義務のような規律については、わりかし説明が容易であると思います。顧客の最善の利益に適う市場やシステムで執行することにより、分断している市場が緩やかな統合に向かい得ると考えられるからです。

規制者間の競争というと、まず私たち会社法学者にとって思い浮かぶのは、アメリカにおける州法間の会社法の競争なのですが、グルンドマン教授はＥＵ資本市場法における投資家保護は、それとは話が相当に違うというのです。つまり、アメリカの会社法の規制者間の競争は、自分の州に会社を呼び込むという非常に強いインセンティブを各州は持つのだと、それが本当かどうかわかりませんけれども。しかし、ＥＵの方では、例えば投資家保護法を高めようということについて各加盟国のインセンティブは必ずしも働かない。そうだとすると、まさにＥＵのレベルで高いところでそろえてやらないと、規制者間の競争はここでは機能しないということもいっています。

森本共同会長　ここら辺の話は結局は禅問答になって、信ずる者はそれでよしということになって、おかしいと思う者は納得しないということで、これを余り堂々めぐりしても仕方がないと思うのですが、２ページ目の一番上にある規制の目的①、②の関係が相互補完的なのだという気がするのです。私も前文だけを読ませていただいたのですが、ＥＣ域内の各国の投資家が積極的にいろいろの投資活動をしようとするときに、きちっとした投資家保護のレベルがないと十分なことができないではないかというようなこともいっていますので、やっぱり投資家が積極的に投資商品にアクセスするときに、証

券業者のレベルがきちっとしていなければだめだという面もあったのではないかなという気がするのです。

Ａ国の基準が厳しければ、Ｂ国に行っても基準のいい人が活動すればいいではないかということになるのでしょうけれども、やっぱりＢ国も、少なくとも投資家保護のレベルについては、ある程度きちっとした規制をすることによって、証券業者が競争し、かつ、そのことによって信頼が高まるとか、①と②がそういう相互関係にあるということで、機能化だけではない。やっぱり投資家の信頼というものも、それが機能化の１つの側面かもわかりませんけれども、そういう面もあるのかなという気がする。やっぱりこういう規制あるいは立法作業に携わる人たちの１つの理念が、それが経済的に実証されるかどうかは別としても、前文にあらわれているのかなとふっと思ったのです。

藤田委員　神田先生のご質問になった、要するに、統一といっていることが、レベル・プレーイング・フィールドみたいな意味での統一をいっているのか、多様に見えて、実質が高い低いは実は余りはっきりしないし、余り変わらないのだけれども、多様に見えることをやめるという意味での統一のためにこういうことをしているのかで、受けとめ方とか理解の仕方が全然変わってきそうです。さっきから伺っている限りだと、実質が余り変わらないところに同じような体裁を与えるのだったら、多くの国のいわば最大公約数的なところまでは上げられるし、上げた方がいいというロジックで、それは今までよりは高い水準だ。その程度の意味での高い規制―最初のご報告のときに受けた印象とは、ちょっと違った意味での高い規制―なのかなという感じです。

森本共同会長　そこでいわれている高い基準は、先ほどの例ですと、何を念頭に置いているかというと、最良執行義務だとか適合性原則、そういう形のことかなという気はするのです。それはやはりある種の統一的な基準にした方がいいのでしょう。実質同じですといわれてもよくわからないということなのでしょう。

前田幹事　各論的な話になるのかもしれないのですけれども、例えば投資商

品の概念のようなものはどうなのでしょうか。これは、現在のところは、各国が、ディレクティブでいう投資商品よりも広い範囲で規制をかぶせる分には自由ですということになっているという理解でよろしいのでしょうか。

神作委員　むしろそこでは、競争が働くことを期待していると思うのです。典型的には取引所に何を上場し、上場する商品の品質をどこまで確保するかということについては､むしろそろえるべきではないという意見が､ヨーロッパでは強いかと思います。

前田幹事　ドイツの金融商品という概念は、ディレクティブの投資商品よりは広いという理解でよろしいのですか。

神作委員　はい。

森本共同会長　時間もあることですから、そろそろ各論に入りたいと思います。

今、金融商品と投資商品の話が出ましたが、各論の第１番目に、そこら辺のところをご議論いただければと思います。現在の日本の議論とも、特に神作さんは、ＥＵの動きとともに、ドイツのことを非常に詳細にご説明いただきましたので、そこら辺のところをご議論いただければと思います。

永井オブザーバー（以下 OBS）　特に 2000 年ぐらいから 2001 年にかけて、日本でもＩＴバブルが華やかでしたが、ドイツではベンチャーのノイエマルクトという市場をつくって、一時は飛ぶ鳥を落とすような勢いでした。しかし、結局うまくいかなかったのではないかと思っています。この辺が 2004 年までの投資家保護改善法を新たにつくることに影響していると思いますが、その辺のマーケットの背景等、ドイツが特にＥＵの中でリーディング・カントリーになりたい、あるいは取引所でもむしろイギリスをのみ込むような形でリードしたいという意気込みがあるように思えるので、もう少し教えていただきたいと思います

神作委員　ご指摘になったＩＴバブルと投資家保護改善法との関係は大ありで、理由書の中にも明確に、株式市場、証券市場に対する信頼が大きく損なわれている、それを回復しなければいけないのだということがいわれており

ます。ですから、ノイエマルクトの失敗などの経験が、今回の改正法に反映しているという面は確かにあると思うのですが、他方で、今回の投資家保護改善法は、ドイツ資本市場法の積年の課題に対処したという面もありまして、これまで灰色の市場が問題だということがずっといわれ続けてきたのですが、なかなか抜本的な対策を打ち出すことができなかったのです。今回、そこに手を入れて、匿名組合への参加ですとか、あるいは信託受益権ですとか、そういうものを一括してカバーし、証券取引法上の証券概念には当たらないのですけれども、販売目論見書法上は目論見書義務が課される対象となる、こういう解決を図ったわけです。

そういう意味では、確かに投資家の信頼を回復するという面もありますけれども、ドイツの資本市場法の改正は、わりかしロジカルというか論理的に行われている面もありまして、これまでの規制の欠缺を埋める。いわば予定どおりに行われたという面もあろうかと思います。もっとも、証券市場に対する投資家の信頼の欠如が、「灰色の市場」への規制の導入を可能にしたという側面は否定できないと思います。

永井 OBS　１つ切り口を変えてお伺いすると、ＥＵですと、業者に対してはライセンスを与えるというレギュレーションは、かなり厳しいものを前提に考えていますが、日本では、免許制に戻すなどということはあり得ません。規制の概念として、免許と登録をそれほど峻別しているのかどうかもよくわかりませんが、日本では規制緩和により業者として来る者は拒まず的なところがあります。その辺、ヨーロッパは厳しいように思うのですが、いかがでしょうか。

神作委員　一言でいうと、かなり厳しいのではないかと思います。なぜそうなっているのかというのはよくわからないのですが、金融の定義、投資サービス業の定義が広いことも関係あるのでしょうか、１つの金融機関でいろいろなことを行って、特にそれがクロスボーダーで行われて、破綻したときのリスクが連鎖することに対する懸念が非常に強いと見受けられます。したがって、証券業者を含め金融機関は免許制の下におき、特に一定の財務的な

規制を課すことは必要である。とりわけ、決済リスクに対する感覚は、ヨーロッパでは非常にナイーブではないかと思います。

黒沼委員　１つ確認なのですけれども、先ほどご説明があったように、組合に対する持分は、証券取引法上の金融商品、有価証券には当たらないですね。これは有限責任ではないからですか。

神作委員　証取法上の「有価証券」あるいは「金融商品」概念は、代替性という概念により画されておりまして、無限責任社員たる地位は個人の信用等に依存しているもので、個別的なものだと考えているのです。したがって、ドイツの証券取引法上の有価証券概念との関連では、代替性を有しないため、有価証券にはあたりません。

黒沼委員　しかし、販売目論見書法は適用されるから、販売するときには目論見書を交付しなければならない。

神作委員　それも販売目論見書法ではどういう概念を入れたかというと、投資持分という概念を入れて、Wertpapiere とは違う言葉で、それを定義付けております。

黒沼委員　そうすると、有価証券ないしは金融商品という概念と、さらにそれの１つ外側に投資持分という概念があって、二重構造になっているのかなという感じもするのです。

神作委員　おっしゃるとおりで、ドイツの考え方は、ディスクロージャー、有価証券報告書なのか、販売目論見書なのか、あるいは不公正取引にしても内部者取引かそれ以外の類型なのか等々、規律されるルールごとに適用範囲が異なってきて構わない、むしろそれは当然と考えておりますので、そういう意味では非常に重層的な、ワンセットではない規制の構造がとられておりまして、それは従来からそうです。ですから、法制上も、証券取引法という１本の法律ではなくて、日本でいう資本市場法の分野が幾つもの法律に分けて規律されているのです。ドイツの場合は、確かにＥＵ指令を国内法化したために、後追い的に、結果的にそうなったという面もあるのですけれども、むしろ論理的にも分けておくべきだと考えて、分けているところも少なくな

いと思います。

山田委員　最後に聞くべき質問かもしれませんけれども、いみじくもドイツの証券取引法２条でいう有価証券の概念と、日本の証券取引法２条の概念と、先ほど神作先生がご説明されましたように、ドイツでは、銀行はご承知のようにユニバーサル・バンクであります。ところが、保険はアルフィナンツということで融合しようという動きはありますけれども、先ほどのご説明では、いわばそこだけ別に規制を強化しよう。ということになると、今の黒沼先生のご質問とも関連してくるのですけれども、結果的に、ドイツ法でいう２条の立法趣旨と、日本における２条の立法趣旨の相違点、また、できましたら、今後、我が国のいわゆる大金融サービス法が、それらの違いを踏まえてどのような方向に行くべきかと神作先生はお考えなのか、その辺を総合的にご教示いただければと思うのですけれども。

神作委員　お答えする能力がないのですけれども、ただ、先ほどちょっと述べた、ルールによって適用範囲を考えたり、規律を重層化する。そういう発想は日本でも必要で、特に情報規制をむしろ広くかけていくという意味では、ドイツの販売目論見書法のように、そのレベルにおける日本でいう証券概念は当然広がってしかるべきですけれども、だからといって、例えば適時開示の規制も同じようにかぶせるのかというと、同じディスクローズでも適用範囲は異なり得るように思われます。ドイツでは適時開示の規制は販売目論見書法ではなく証取法で行われています。これに対し、目論見書規制は別の法律で行われている。さらに、取引所法という法律があって、そこでも別のディスクローズ規制が行われていて、そこまで分けるのが適切かどうかという話はあるかと思いますけれども、一応ルールごとに、それに適した適用範囲を考えていくという発想は、作業の出発点としては必要ではないかと思っております。

ご質問のごく一部しかお答えできていないと思いますけれども、よろしいでしょうか。

森本共同会長　日本でも、金融商品販売法と証取法の関係というように、少

しオーバーラップするところがあるのかなという気はしますね。

大島 OBS　大きなテーマでなくて、小さなテーマで恐縮なのですけれども、外国株券についてお聞きしたいと思います。

ドイツでも外国株を上場していると思うのですが、フランス株でも、日本株でも、アメリカ株でもこれらを上場しようとしたときに、先ほどの有価証券定義の拡大で対応しているのか、それとも寄託法の中で、寄託概念の拡張、例えばみなし保管みたいな形で対応しているのか。外国株というものがあるときに、有価証券の概念なのか、それともみなし保管のような実務的な手続の拡大で対応されているのか、その辺がよくわかりませんのでご教示いただけたらと思います。

神作委員　正しいお答えをしているのかどうかわかりませんけれども、恐らく先ほど有価証券の定義をご説明したときに、株式と同等の金融商品という一般条項的なものがありまして、そういうところで拾われてくる。確かに会社形態が違うと、これはドイツ法上の株式とはいえないと思いますので、むしろ機能的に同等か否かというところでかなりのものは拾われてくるのではないか。そういう意味では、「有価証券」概念の中に含まれてくるのではないかと思います。

これに対して、集団的投資スキームに対する持分は、証券取引法上、「国の内外を問わず」と明確に書いてありますので、その規定に基づいて、「有価証券」に当たるということになるのではないかと思います。

森本共同会長　細かにいえば、外国株券は市場で取引されていなかったら有価証券にならないということになってしまう。１号と２号には、その区別がある。そして、投資信託は内外だから、取引所で取引されているかどうかはかかわらないということですか。

また戻っていただいても結構ですが、そろそろ投資サービス業というか証券業の拡大の方、投資アドバイスと財務分析、そこら辺のことについての神作さんのご報告についてご討議下さい。

従来、ドイツでは、日本でいう投資顧問業者は、専業は想定されていなかっ

たわけですか。あるいは、いたとしても、それはほとんど規制がなかったということですか。

神作委員　投資ファンドに対する持分につきましては、市場で取り引きされ得るかどちらかは問題とされませんので、森本先生ご指摘のとおり、いわば当然の証取法上の有価証券となります。ドイツで投資顧問業者の実態が実際にどうなっているのかよくわからないのですが、投資アドバイスだけを業としてやってゆくことはこれまではヨーロッパでは容易でなかったし、ドイツでも独立の業としてやっていくのは難しかったようですが……。

森本共同会長　そういう業界があったような気もしますが、ＥＵレベルでは、今回入ったということですね。

神作委員　今回、付随業務からコア業務の方に格上げされるという形で入りました。

森本共同会長　これをするためには、このサービス法のルールの、先ほどの認可を受けなければいけないということになるわけですね。

神作委員　はい。

永井 OBS　その意味では、投資助言業務というのは、日本の概念では、どこら辺までのことを意味するのでしょうか。森本先生がおっしゃるように、投資顧問業は当然入るような気がしますが、それ以外の、分析はアナリスト的なものをいうのでしょうか。どこまで入るのかわかりにくいですね。

神作委員　本当にわかりにくくて、いろんな機能がだんだん分解されてきた一方で、それぞれの間の境界が次第に不明確になって、ＥＵでも投資助言、財務分析、ポートフォリオ管理、財産運用、これらの概念相互の関係が一体どうなるのかということも問題となりますし、そもそも投資サービス業に当たるか当たらないか、マーケット・コミュニケーションと、この規律の対象となってくる例えば財務分析、投資助言との関係等々、今、境界がどこまでかということをめぐって、活発な議論がなされていると承知しています。

新投資サービス指令で投資助言と財務分析が、それぞれ証券業務のコア業務と非中核業務に加えられることになったわけですけれども、大事なことは、

実施細則の方で決められることとなりますので、現在、それをどう定めるのかということで、いろいろ意見照会等がなされている段階だと理解しております。日本では、財務分析の結果を単に顧客に伝達するだけでも証券業務の付随業務にあたるのでしょうか。

黒沼委員　日本では、付随業務に。従来は、特に付随業務としては挙がっていなかったのですけれども、平成 10 年の改正で付随業務にひっくるめてしまいました。

永井 OBS　それだけで収入を得ること、業として成り立つかというのは、ちょっと別かもしれません。投資顧問業というなら別ですけれども、投資助言だけをやることにお金を払っていただけるかどうかというと、難しいかもしれませんね。

中村委員　投資助言業務と財務分析業務の区別なのですけれども、属人的な助言なのか、それとも特定の人だけが入手し得る情報なのかというところがポイントなのですか。

神作委員　投資助言では「属人性」が要件とされており、財務分析では「一般的入手可能性」が要件とされております。両概念が必ずしも論理的に排他的関係に立つものではないため、議論があるのだと思われます。

中村委員　日本の投資顧問業でいう一任勘定みたいなものは投資助言業務ではなくて、先ほどおっしゃっていたポートフォリオ管理業務の方に入ってくるのでしょうか。

神作委員　恐らく投資助言ではないと思います。投資一任まですると、それはポートフォリオ管理に入ってくると思います。

中村委員　注文を出させれば、ポートフォリオ管理に入ってくる。

神作委員　ポートフォリオ管理業務は、旧投資サービス指令の下でもすでに中核業務とされていましたが、新投資サービス指令においても変更ありません。新投資サービス指令は、ポートフォリオ管理業務を次のように定義しています。すなわち、「ポートフォリオ管理業務とは、個々の顧客に応じて異なる範囲の裁量権を有しつつ、顧客の指図に従いポートフォリオを管理する

ことを言う。ただし、当該ポートフォリオが１つまたは複数の金融商品から構成されている場合に限る。」（新指令４条１項９号）。要するに、ポートフォリオ管理業務とは、他人のために金融商品に対する投資を行う業務であって、投資に関する決定に係る裁量を業者が有するポイントです。顧客が投資判断につき決定権限を有する場合には、投資助言業務が問題となるにすぎず、また、単に証券の売買を媒介するだけであれば証券の売買に関する仲介業務が問題となるにすぎません。実際上は、ポートフォリオ管理業務に係る契約は、投資助言や証券の売買仲介に係る契約に比べると長期的・継続的契約であることが多いとされますが、これは法的徴表ではないことは言うまでもありません。

関理事長　今、話題になっているところですけれども、先ほどのレジュメの５ページから６ページの関連で、森本先生がいわれた（１）のところは新指令の条文なのですか。（２）の財務分析業務はドイツ投資家保護改善法があって、34ｂ条が５ページにあるわけですけれども、（１）の投資助言業務の新指令に対応するドイツの国内法は、何か手当てがどこかで新しくあったのでしょうか。それとも、それは当然入っているという前提なのですか。（１）の方は既存の中に読み込めていたのか、そのあたりはどういう関係になるのでしょうか。

神作委員　新投資サービス指令自体は、ドイツにおいてまだ国内法化されておりません。ドイツ証取法34ｂ条は、財務分析について定義しておりますけれども、まだそれによって投資サービスの付随業務とされたわけではないのです。むしろ投資家保護改善法は、市場詐害行為指令６条５項およびその実施措置を国内法化したものですが、それとは別に、ドイツ独自に財務分析の規律を強化といいますか改善した側面があります。

森本共同会長　私もゆっくり考えると、たしかそんなものが何かあったなという気もするのです。たしか投資顧問に関連する規制は、ドイツはかつてからあったと徐々に思い出してきたのですが。

神作委員　既にドイツ証取法の中に、有価証券、短期金融市場商品、または

デリバティブの投資に際する助言が、証券の付随業務として取り入れられていましたが、現行法では「金融商品」の投資に際し行う助言と改められています（ドイツ証取法２条３ａ項３号)。

関理事長　そうすると、これも今までのご議論の中であった新しくできたドイツ投資家保護改善法の規定は、さっきの多重的規制の一例にもなるのでしょうか。

神作委員　はい。昨年末に成立しました投資家保護改善法は、ＥＵ資本市場法との関連では市場詐害行為指令を国内法化したものですが、それにプラスして、先ほど申し上げた販売目論見書の規制ですとか、プラスアルファの規制もたくさん含んでいます。と同時に、保険監督法を改正するなど、金融関連法のかなり大幅な改革をしております。

黒沼委員　ドイツ法でいう財務分析は、投資戦略に関する指南を含むとおっしゃられたのですけれども、いわゆるファイナンシャル・プランナーみたいなものも、ここに入ってくるのですか。

神作委員　そこは、実ははっきりしていないのですが……。

黒沼委員　金融商品またはその発行者に関する情報というのが、限定としてどれぐらい効いているのかですね。

神作委員　財務分析（Finanzanalyse）とは「特定の投資判断のための直接または間接の推奨（Empfehlung）を含み、かつ、不特定の人々が入手し得る情報であって、金融商品またはその発行者に関する情報を、職業上または営業上、生成する（erstellen）こと」と定義されました（ドイツ証取法 34ｂ条第１項)。改正前法において定義規定がありませんでしたが、証券分析に対する投資家の特別の信頼を保護するという規制目的から、投資家の観点から証券分析の意義が明らかにされるべきであるとされたのです。なお、旧法下の証券分析とは、有価証券に係る企業の発展や状態、経済環境等も含む包括的な深められた検討であると一般に解されていたところです。この解釈論は、新法の解釈においても、参考となり得るでしょうが、「理由書」には、推奨という概念には､投資戦略に対する指南も含まれると述べられています。

やや従来の定義より広いように思われますが、「不特定の人々が入手し得る」に該当するかどうかは、要件として明確に揚げられた以上、個別に判断されることになりましょう。

永井 OBS　格付機関なども入ってくるのでしょうか。

神作委員　格付機関については「推奨」の要件を満たすかどうか疑問であるうえ、現在格付機関の取扱いについて別途議論をしておりますので、新たな規律が入るのか入らないのかわかりませんけれども、格付機関は「財務分析」には入らないという前提であると理解しております。

森本共同会長　いただいたコピーの 2004 年のディレクティブの付表の付随業務の５番ですが、これを見ると、インベストメント・リサーチとファイナンシャル・アナリストもジェネラル・リコメンデーションの１つという理解で、そういう枠組みになっているから、格付は入らない。広い意味では、入ったって悪くはないという気はするのですが。

永井 OBS　推奨を含んでいないということですね。

森本共同会長　それでは、予定の時間はある程度あります。最初から最後まですべて、ご自由にまとめの結論的なご質問、ご意見でもいいし、その他のことでも、ご自由にご発言いただきたいと思います。

山田委員　細かい点でもよろしいでしょうか。プロ・アマの区別という点なのですけれども、さっきおっしゃいましたご説明で、説明義務を２本立てにする。つまり、プロという位置付けとアマという位置付けを２つ置いて、プロには基本的には説明は要らない。アマにはわかるまできちんと説明するということなのですけれども、その区別が、果たしてこういうように明確にできるのかどうか。むしろ一本化して、レベルの問題だと考えるという考え方もあると思いますけれども、その辺、先生のお考えをご教示いただければと思います。

神作委員　私は、投資家保護についても実質的な根拠にさかのぼって検討し、その根拠に従って規制を分化していった方が、きめ細かい適切なルールになるのではないかと考えておりまして、基本的には、このプロ・アマの分け方

は正しい方向なのではないかと個人的には考えております。

山田委員　それは難しい事例も今後出てくると思うのですけれども、それでもあえて二分論といいますか、その方向でやる方が、むしろ実務的にもよい考えだと……。

神作委員　区別の基準は、ＥＵ法のもとでは割合明確だと思います。みなしプロというのが割合きっちりした要件で決まっておりまして、それ以外は基本的にアマになりますので、あとは、双方の間でそれぞれ入れかえといいますか、自分の申請とか申出に基づいて、みなしプロがアマになったり、逆に、アマが自分に与えられている権利を放棄することはあり得ます。

一番問題になるのは、アマが権利を放棄するときに、実際に適正な放棄が行われるようなルールをつくる､そこがちょっと難しいところだと思います。そこでＥＵは、先ほど申しましたように、12カ月の間に１四半期当たり平均10回以上の大口取引を行ったこととか、50万ユーロを超える金融資産のポートフォリオを有するなど客観的な要件を３つ設けて、そのうち２つ以上の要件を満たしていることを最低の条件とし、更なる条件にも鑑みアマからプロに行くことを認めようとしています。そこの要件をどうするかというのは非常に難しいところがあるかと思いますけれども、方向としては、私は、適当なのではないかと思っております。

黒沼委員　プロ・アマの区別は、説明義務とか適合性の原則の局面だけなのでしょうか。それとも、私募の定義とかそういうことも関連してくるのですか。

神作委員　利益相反規制にもかかってきます。

黒沼委員　私募かどうかということには、この区別はかかっていないのですか。

神作委員　かかってきていないです。本指令の区分は、主として投資サービス業者の行為規制に関するものです。私募かどうかは、適格投資家かどうかという別の概念で画されています

中村委員　プロ・アマの区別で、２点ほどお伺いしたい点があるのです。

まず、プロ顧客のところで、実質的な基準もあるようなのですが、その際に、米国と同じように、例えばアドバイザーから助言を受けていることも勘案して、プロ顧客となることが認められるのかという点が１つ目の質問です。もう１つの質問が、外国語による販売勧誘、端的にいうと、ドイツの顧客が英語による勧誘を受けるようなケースについて、例えばプロ・アマに準じた形で、英語の書類については、プロであるからというような理由で英語による勧誘を認めるということがあるかどうか、この２点について教えていただければと思います。

神作委員　前者について、例えば自分はほかにアドバイザーがいるのだというようなことは、少なくともこの付表Ⅱには全く触れられていないと思います。したがって、そのことだけを根拠に申請によるプロ顧客になることはないと考えられます。しかし、きちんとしたアドバイザーがついているという事情は、他の要件を満たす場合には、もはやプロの扱いをしてもいいという認識に証券会社が至るかどうかについて、証券会社は一定の措置を講じなければいけないということになっているのですが、その措置の一環としてそういうことを考慮することは、恐らく正当なことではないかと思います。

前田幹事　顧客の方から、私には保護は必要ありませんということについて、顧客にとってのメリットは、例えば手数料を安くしてくれといいやすいということなのでしょうか。請求によってプロ顧客として認められるわけで、業者の方は助かりますけれども、顧客の方は何を考えて請求するのでしょうか。

神作委員　確かにどういう合理性があるかということだと思います。利益相反についても顧客は保護を受けられないことになるので、そういった利益相反について何か別段の約定などがある場合は、場合によっては、ＥＵ法のルールから逸脱した方が顧客にとっても、たとえば手数料が低下するといった有利となる場面もあり得るかと思います。

中村委員　プロとしての購入が可能になるという点はあるのではないですか。日本でいえば、プロ私募で販売された商品は転売制限がかかっているのと同様に、プロ並み商品に対して、一般の個人であっても、自分がプロとみ

なしてくれと請求すればできるという点が、多分メリットではないかと思います。

森本共同会長　それは先ほど質問があったけれども、それと直接かかわらないということだったので、ほかに何があるのかなというご質問だと思うのですが。これは開示規制というよりは、むしろ実体規制的な面ですね。

神田幹事　日本は、不動産の宅建業法の説明義務は、お客さんがいいですといっても、目の前でしゃべりまくらなければならない。それはさすがに恥ずかしいので、金融商品販売法では、顧客の方が私は聞かなくていいですといったらいいことにしてあるのですけれども、今のご質問で、そういう人がいるかというのは……。

山田委員　今、インターネットで１回 1000 円ぐらいで、そのかわり投資サービスは何もやらない。そういう場合には、投資情報を何も与えないわけですが、ただ、区分上はプロには到底なり得ない。その場合には、説明しなかったということでやはり説明義務違反ということになるのでしょうか。

神作委員　それはエグゼキューション・オンリーの場合ですか。

山田委員　その場合です。

神作委員　ＥＵの投資サービス指令では、エグゼキューション・オンリー・ビジネスの扱いは、明確でないと思いますが、プロになり得ない以上、一般的に投資者保護を得られないということにはならないと思います。しかし、説明義務については情報の必要性がない等の別の理屈で対応するのかもしれません。

青木委員　それは勧誘していないから問題ないということなのではないですか。

神作委員　ＥＵ投資サービス指令は、勧誘規制のところだけではなくて、その後の行為規制も規律していますので、非プロ顧客に対する利益相反規制の適用は問題になり得ると思います。

永井 OBS　インターネットによる取引は、ヨーロッパでそれほど盛んだとは思いませんが、特に個人のリテールについて。我々の会社もヨーロッパ大

陸では支店方式での展開も行っています。ただし、リテールをやっていないので、リテールの規制については、私も 2000 年までロンドンにいましたけれども、実感が余りわきません。むしろ適格な契約者となり得る、プロといわれている人たちのみを相手にして取引をしています。デリバティブについても、ＩＳＤＡで決めている標準形を契約の基礎にして、相手のクレジットをどう読み合うかという話が中心になって、そこは投資家保護の議論をする必要が余りないという状況です。

ただ、先ほど山田先生がおっしゃったのは、上場している商品をセカンダリーで取引する場合にどうするかという点では、そんなに保護しなくても、情報も開示されているし、違うところからも情報がとれる。しかし、発行開示となるとまた別でしょうし、流動性が余りない、市場性がないようなものを取引する場合、仮に上場していても、本当にどこまで保護するかという議論は別途しなければいけないと思います。神作先生がいろいろと説明されたのとは、ちょっと違う議論をされているような気がいたします。

ですから、リテールで、セカンダリーで、しかも、上場されていて、一応規制を受ける取引所であれば､マーケット･アビュースとしてのインサイダーとかの規制は非常に重要だとは思いますけれども、それ以外は、それほど問題にしていないということではないかと思います。

山田委員　そうすると、金融商品によって、この規制がかかるのかかからないのか、つまり、発行市場なのか、それとも流通市場なのかというところで分離するということですか。

永井 OBS　いえ、そうではなくて、業者に対する規制は厳しく行います。ですから、取引所で取引されているものであっても、業者に関するものは厳しくやる。それはマーケット・アビュースがないとか、インフォメーションの不正がないとかいうことです。個別契約であっても、それの時価を把握しポジションを持つようなものであれば自己資本規制をかけ、規制は物すごく厳しく課されています。取引所の最良執行の問題もありますけれども、取引した内容に関しての通知義務は、仮にＯＴＣであっても取引所に上場されて

いる商品についてであれば、即座に取引所に報告しなければいけないという規制もあります。業者規制をどうするのかという議論そのものは必要です。

森本共同会長　プロ・アマの場合には、業者側と投資家側にどういうメリット、デメリットがあるか。これはいろいろのレベルで、例えば計算書マターでは結構いろいろあって、例の平成４年か５年のときの特定債権とか何かに２つか３つの基準を置きましたし、そういう形で、その中で同意したらプロになるというのも、１つのメリットがあるのかなという気はしますけれども。

青木委員　要するに、プロとアマを私募でまず分ける。アマが２つに分かれて、アマ２に対しては適合性原則というか、そもそも物を売らないというような形で、段階が分かれている。昔、日本で中間報告書が出たときも、アマ１、アマ２みたいに、３つに分けてあったと思うのです。新投資サービス指令でも３つありますね。機関投資家みたいなのが１つと、プロクライアントというように。プロ・アマといっても、私募の話をしているのか、それとも適合性原則の話をしているのか。適合性原則にしても、およそその物を売ってはいけないというレベルの話をしているのか。それらを明確にしないといけないと思うのですけれども、プロ・アマと一くくりにされてしまっているので、正確ではないかなと思うことがあるのですけれども、その点はいかがでしょう。

もう１つ、今、ランファルシープロセス（レベル２）で、規則が具体化されております。だから、指令自体を見ていても余り細かいことは書いてありません。その点について、何かご存じでいらっしゃいますか。

神作委員　本日のご報告で用いたプロ・アマの区別は、投資サービス業者の行為規制に関するもので、私募かどうかはまた別の話です。私募かどうかということと新投資サービス指令にいうプロ顧客とはＥＵ法上はリンクしていないと思います。コミトロジー手続きに基づき現在実施措置の策定作業が行われている最中と承知しています。

青木委員　新指令に適格相手方当事者（カウンターパーティ）というのがありましたが、あれが私募・公募と分ける概念だと思うのです。プロ・アマと

いうときには、その話が出てきているので、それは違う。普通はプロ・アマというときには、適合性原則のことを考えていると思うのですけれども、ついつい私募・公募の話になってしまう。

神作委員　プロ・アマとはまた別の概念がもう１つあるのですね。

青木委員　あれがまじってきているものだと思うのです。

神作委員　適格相手方当事者（エリジブル・カウンターパーティー）、これはプロ顧客とは一応違う概念であるし、私募の範囲を確定する概念でもないということで整理されていると、私は理解しているのですが。

青木委員　違う概念です。ユーロ市場で公募しなくていいという形での取引相手、これがまず１つあって、それ以外に、プライベート・カスタマーがあるというシステムをもともとイギリスとっていました。つまり、ユーロ市場にプロの機関投資家がいて、第２段階として、個人とか会社だけれども、権利放棄してプロ並みの取引ができるのがいる。それから、普通の人間がいる。それが新投資サービス法の顧客区分にまでつながっているのだと思うのですが、その整理をいろいろ聞いているうちに、つながりがわからなくなってしまう。

神作委員　私がちょっと誤解しているかもしれませんけれども、プロ・アマというのは、ヨーロッパでは、プロかアマかは決まっていないと、業者にとってはまさに活動の自由が、ある国ではプロ、ある国ではアマというのでは、なかなか困ると思うのです。そういう意味では、プロ・アマはヨーロッパ全体について統一の基準なのですけれども、適格相手方当事者はそうではなくて、国ごとに決めていい。

適格相手方当事者にはどういう意味があるかというと、その国の規制市場にアクセスできる。つまり、例えばそこの取引所の会員になれる資格をどう限るか、それが適格相手方当事者という概念で、確かに適格相手方当事者になると、投資家保護についてのルールは適用されない。だから、結果的にはプロと重なる部分が多いのですけれども、概念としては、プロと適格相手方当事者は異なるものだと私は理解していたのですが。また、ＥＵ法上は、私

募については適格投資者という異なる概念で画されていると思います。

青木委員　例えばアメリカのルール144Aとか、レギュレーションＤとかにかかわるようなのは、まさに適格相手方という、今、神作先生がおっしゃったプロ市場に行けるものです。そのアメリカの話を、今までのイギリスの話へ持ってくると、プロ･アマのところに機関投資家の話が入ってきて、私募･公募の話が入ってくる。私募・公募とか機関投資家は、プロ・アマの話、少なくとも投資サービス指令でのプロ・アマには入れないということなのですね。きょうお話しなされた文脈では、それは含まないと。

神作委員　本日は、開示指令は対象とせず投資サービス指令を対象といたしましたが、適格相手方当事者という概念は投資サービス指令でも用いられており、その限りで触れました。新投資サービス指令の中では、適格相手方当事者を指令自身の中で定義しているのです。これに対し、プロ・アマは付表にしか出てこない概念で、そういう意味では、適格相手方当事者という概念は重要な概念だと思うのです。適格相手方当事者に対しては、先ほどから青木先生がご指摘のように、投資者保護に関する規定は適用されないということは明文で書いてあります。だから、その限りにおいては関連してくるといえばいえるのですが、概念としては、やっぱりプロ・アマという概念と、適格相手方当事者かどうかというのは、全く違う問題だと思います。そして、私募の範囲については、開示指令において、適格投資者というこれまた異なる概念で画されています。

青木委員　わかりました。ありがとうございます。

森本共同会長　外国語で、それも結局、今、何カ国になったか、多数の国で組織されるＥＵの上部構造の話で、いろいろな附則がつくのでしょうから、非常にわかりにくいことなので、詰めていくと不明なこともあるかと思いますが、そろそろ次の手続的な方に入らせていただきます。最後にあと１つ、２つ、全般的なことでもよろしいですが、ご質問、ご意見ございますでしょうか。

美濃口 OBS　基本的なことを質問させていただいて恐縮なのですが、先ほ

どＥＵで業者の参入要件が非常に厳しいというお話をされていたかと思うのです。それは財務的な要件が厳しいという意味なのか、あるいは、それに加えて人的な要件とか組織的な要件も含めてというお話なのか。それはどちらなのかということと、よくわからないのは、ユニバーサル・バンキングということが前提になって、そのような厳しさが出てきているということなのかどうか。それとは全然関係ない話なのか。そこら辺はいかがでございましょうか。

神作委員　今日手元に資料を持ってくるのを忘れたのですが、ＥＵ法も、例えばどういう業務を扱うかによって、また参入の基準とか財務の基準がちょっとずつ違ったりして、そういう意味では、投資サービス業を営む者はすべて同一の規律に従っているわけではない。例えば特に預金者がいる機関と、預金者がいない機関とでは、規律がまた全然違っていますし、きめ細かく規制しているとは思うのですけれども、基本的には、何でもできる。金融機関の免許を得れば、それこそ銀行業務も、証券業務もできるということが前提となって、それを想定した制度づくりがされているのは確かではないかと思います。さらに、金融機関同士の取引における決済リスクに非常に神経質になっていることにつきましては、すでに申し上げたとおりです。

森本共同会長　その点、永井さんが最初にご質問になったこととの関連で、日本は免許から登録制になったけれども、こちらはまだオーソライゼーションがある。それでこちらは厳しいということですが、先ほども、イギリスでは一緒になって数千の証券業者がいますし、イタリアは 7000 で、ドイツはそれ以上だろうという話があったと思うのです。そういう意味でオーソライゼーションは必要だけれども、日本の証券業者は、今 260 ぐらいしかないのです。260 と 7000 なり１万のところで、オーソライゼーションがあるかないかで厳しいかどうかという議論は、ちょっと次元が違うことだと思うのです。だから、日本はもともと免許制のときにはむしろ 220 で推移していたのです。

永井 OBS　7000 というのは、投資顧問業務も入るのでしょうか。

森本共同会長　結局、オーソライゼーションだから厳しいということではなかろうという気はするのです。日本の登録とどこが違うかというのは、今おっしゃったように、財務状況とか組織状況の要件を見ないと、それほど違わないのではないかという見方もできると思うのです。それはオーソライゼーションが必要で、こちらは登録という言葉だけでは、ちょっとどうかなという気もします。

美濃口 OBS　ありがとうございました。

森本共同会長　ほかに何か、よろしいでしょうか。

　では、ＥＵの非常に新しい動きを、ドイツと絡めてご報告いただきまして、また、それをめぐって活発な議論を、ありがとうございました。とりわけ神作さん、ありがとうございました。これで散会させていただきます。

資料１

EU における資本市場法の統合の動向

―投資商品、証券業務の範囲を中心として―

2005 年２月２日
東京大学　神作裕之

１　はじめに

EU；2005 年の域内投資サービス市場の統合をめざし精力的な立法措置
　前提　①支店開設の自由（ヨーロッパ・パスポートと呼ばれる）
　　②資本移動の自由

○投資サービス市場法の領域における主要な指令
1979 年；取引所上場許可指令
1980 年；取引所上場許可目論見書指令
1985 年；投資ファンド指令
1989 年；発行目論見書指令、内部者取引指令
1993 年；旧投資サービス指令（「旧指令」という。）、資本適正化指令
1998 年；ファイナリティー指令
2001 年；改正投資ファンド指令
2003 年；目論見書指令、市場詐害行為指令
2004 年；新投資サービス指令（「新指令」という。）

２　EU 資本市場法の目的・沿革・背景
（１）目的・立法の動向
EU（金融サービス市場）法の原則
前提＝追及されるべき基本的価値
　①個人の自由とりわけ経済活動の自由
　　→金融サービス業者にとっては「ヨーロッパ・パスポート」
　　投資家にとっては選択肢の拡大
　②競争
（ア）「補充性の原則(Subsidiaritätsprinzip)」
（イ）「法秩序間の競争の原則」
　→「最低限の要請(Mindestanforderungen)」

規制の目的

①投資家保護原則およびその発現である個々の投資家の個別的保護

②取引所、金融サービス市場および経済の機能の保護

（２）立法を推進する力

○改正の理由

①金融サービス市場に対する重要性の認識の高まり

2000 年３月；リスボン宣言

ヨーロッパ金融サービス市場の統合がヨーロッパの経済改革の核心である

2005 年に域内金融市場の統合をめざすこと

金融差サービス市場の統合により大きな経済的･社会的メリットを享受できるであろうという期待

たとえば、最新の研究によれば、統合された、厚みのある流動性の高いＥＵの域内金融サービス市場の形成により､すでに株式資本コストは０．５％減少する一方､雇用は０．５％改善し実質 GDP は１．１％上昇したとの試算

● Begründung des Vorschlages über Wertpapierdienstleistungen und geregelte Märkte, KOM(2002) 625 endgültig vom 19.11.2002, S.4

②旧指令の考え方では投資サービス業の現代的展開にうまく対応できない

市場参加者および取引手法の多様化が急速に進展ー金融仲介業者の機能と市場の機能の接近、境界の曖昧化

（３）資本市場法の規制理念・規制の手法

規制の種類

①金融サービス市場の混乱を抑制する規制

ー例えば内部者取引規制などで、ここでは刑事法的規律が重要な役割を担う

②金融仲介業者すなわち、銀行、証券業者およびその他の金融仲介者に対する規制←本日の中心的テーマ

③開示規制

④証券の発行および発行者に対する特別の規制

⑤例えば銀証分離のような構造・組織に関する規制

３　EU 資本市場法の方向性

①資本市場の発展に適合的な資本市場法

市場参加者および取引手法の多様化が急速に進展ー金融仲介業者の機能と市場の機能の接近、境界の曖昧化

②選択制、「最低限の要請」アプローチの限界

４　EU における資本市場統合の実態と評価

● Securities Expert Group, Financial Services Action Plan: Progress and Prospects, Final Report (May 2004)より抜粋

1.1. WHAT EVIDENCE IS THERE OF INTEGRATION?

2. Securities markets are gradually becoming more integrated, as evidenced by:

・Higher trading volumes and increased liquidity, accompanied by a marked reduction in yield spreads, in national government bond markets, as the introduction of the euro in 12 Member States and the development of structured trading platforms, such as those of the MTS Group, have increased competition between government bond issuers to access a common investor base;

・Converging corporate bond yield spreads across different European markets (and only slightly higher than those for government bonds), indicating that the European corporate bond market (which, whilst relatively young compared to the US and Japan, have grown strongly since the introduction of the euro) is reasonably well integrated;

・Corporate finance services becoming more integrated. Fee levels for intermediaries have converged as a result of enhanced competition, particularly for larger bond issues, where underwriting fees for the euro bond segment are now comparable to the US $ segment. Integration is also evident from less frequent coincidences of issuer and intermediary nationality, again particularly for larger bond issues, and also in the syndicated loans market. However, no clear trends can be observed for equity issues where, moreover, the decline in fees has not been so strong. This may point to lower integration and a greater importance attached to local factors;

・The emergence of on-line securities trading provided by e-banks and investment firms on a cross-border basis, for instance in the Nordic countries.

５　投資サービス指令およびドイツ証券取引法の適用範囲

（１）「投資商品」の概念

「資本市場」との関連

（２）証券業者等に対する規制の理由
仲介業者の担う役割の重大性

６　投資サービス指令およびドイツ証券取引法における金融商品の範囲
（１）新投資サービス指令による金融商品の拡大
①商品デリバティブ
○代替性、物、引渡可能性

②クレジット・デリバティブ、天候デリバティブ等
（２）ドイツ証券取引法における金融商品の範囲
「金融商品」概念の導入
「金融商品」＝有価証券（①）、短期金融市場商品、デリバティブ（②）および有価証券を引き受ける権利ならびにドイツ国内または EU の他の加盟国における規制市場で取引することを認可されもしくはその認可を申請中の商品（同法２条 2b 項）
ドイツ証券取引法は、有価証券（同法２条１項）、短期金融市場商品（同法２条 1a 項）、デリバティブ（同法２条２項）および金融期限取引（同法２条 2a 項）の４種類を定義
①「有価証券」ー株式、債務証券、それらに類似するその他の有価証券
②証券取引法上の「デリバティブ」の定義
ドイツ証券取引法２条２項（信用制度法１条１１項４文も同様）は、デリバティブについて次のように定義する。
「本法にいうデリバティブとは、次の価格に直接または間接に基づき価格が決まる期限取引であって、確定期取引またはオプション取引として形成されるものである。
１．有価証券の取引所価格もしくは市場価格
２．短期金融市場商品の取引所価格もしくは市場価格
３．金利もしくはその他の指標(Erträg)、
４．商品もしくは貴金属の取引所価格および市場価格、または
５．通貨の価格」

[参考]　ドイツ証券取引法２条
(1) Wertpapiere im Sinne dieses Gesetzes sind, auch wenn für sie keine Urkunden ausgestellt sind,
1. Aktien, Zertifikate, die Aktien vertreten, Schuldverschreibungen, Genussscheine, Optionsscheine und
2. andere Wertpapiere, die mit Aktien oder Schuldverschreibungen vergleichbar sind,

wenn sie an einem Markt gehandelt werden können. Wertpapiere sind auch Anteile

an Investmentvermögen, die von einer Kapitalanlagegesellschaft oder einer ausländischen Investmentgesellschaft ausgegeben werden.
(1a) Geldmarktinstrumente im Sinne dieses Gesetzes sind Forderungen, die nicht unter Absatz 1 fallen und üblicherweise auf dem Geldmarkt gehandelt werden.
(2) Derivate im Sinne dieses Gesetzes sind als Festgeschäfte oder Optionsgeschäfte ausgestaltete Termingeschäfte, deren Preis unmittelbar oder mittelbar abhängt von
1. dem Börsen- oder Marktpreis von Wertpapieren,
2. dem Börsen- oder Marktpreis von Geldmarktinstrumenten,
3. Zinssätzen oder anderen Erträgen,
4. dem Börsen- oder Marktpreis von Waren oder Edelmetallen oder
5. dem Preis von Devisen.
(2a) Finanztermingeschäfte im Sinne dieses Gesetzes sind Derivate im Sinne des Absatzes 2 und Optionsscheine.
(2b) Finanzinstrumente im Sinne dieses Gesetzes sind Wertpapiere im Sinne des Absatzes 1, Geldmarktinstrumente im Sinne des Absatzes 1a, Derivate im Sinne des Absatzes 2 und Rechte auf Zeichnung von Wertpapieren. Als Finanzinstrumente gelten auch sonstige Instrumente, die zum Handel an einem organisierten Markt im Sinne des Absatzes 5 im Inland oder in einem anderen Mitgliedstaat der Europäischen Union zugelassen sind oder für die eine solche Zulassung beantragt worden ist.

７　新投資サービス指令およびドイツ証券取引法における投資サービス業の拡大等
（１）投資助言業務
投資助言の定義＝「顧客の要請に基づき、または投資サービス業者のイニシャティブに基づき、顧客に対し、金融商品に係る取引に関する属人的な助言を行うこと」（新指令４条１項４号）
（２）財務分析業務
財務分析業務を投資サービス付随業務と位置づける（新指令付表ＩＢ節５号）
[参考]　ドイツ投資家保護改善法
財務分析(Finanzanalyse)とは「特定の投資判断のための直接または間接の推奨(Empfehlung)を含み、かつ、不特定の人々が入手し得る情報であって、金融商品またはその発行者に関する情報を、職業上または営業上、生成する(erstellen)こと」（同法34b 条第１項）

［参考］　ドイツ証券取引法 34b 条
(1) Personen, die im Rahmen ihrer Berufs- oder Geschäftstätigkeit eine Information

über Finanzinstrumente oder deren Emittenten erstellen, die direkt oder indirekt eine Empfehlung für eine bestimmte Anlageentscheidung enthält und einem unbestimmten Personenkreis zugänglich gemacht werden soll (Finanzanalyse), sind zu der erforderlichen Sachkenntnis, Sorgfalt und Gewissenhaftigkeit verpflichtet. Die Finanzanalyse darf nur weitergegeben oder öffentlich verbreitet werden, wenn sie sachgerecht erstellt und dargeboten wird und

1. die Identität der Person, die für die Weitergabe oder die Verbreitung der Finanzanalyse verantwortlich ist, und
2. Umstände oder Beziehungen, die bei den Erstellern, den für die Erstellung verantwortlichen juristischen Personen oder mit diesen verbundenen Unternehmen Interessenkonflikte begründen können, zusammen mit der Finanzanalyse offen gelegt werden.

(2) Eine Zusammenfassung einer von einem Dritten erstellten Finanzanalyse darf nur weitergegeben werden, wenn der Inhalt der Finanzanalyse klar und nicht irreführend wiedergegeben wird und in der Zusammenfassung auf das Ausgangsdokument sowie auf den Ort verwiesen wird, an dem die mit dem Ausgangsdokument verbundene Offenlegung nach Absatz 1 Satz 2 unmittelbar und leicht zugänglich ist, sofern diese Angaben öffentlich verbreitet wurden.

(3) Finanzinstrumente im Sinne des Absatzes 1 sind nur solche, die

1. an einem inländischen organisierten Markt zum Handel zugelassen oder in den geregelten Markt oder in den Freiverkehr einbezogen sind oder
2. in einem anderen Mitgliedstaat der Europäischen Union oder einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum zum Handel an einem organisierten Markt zugelassen sind.

Der Zulassung zum Handel an einem organisierten Markt oder der Einbeziehung in den geregelten Markt oder in den Freiverkehr steht es gleich, wenn der Antrag auf Zulassung oder Einbeziehung gestellt oder öffentlich angekündigt ist.

(4) Die Bestimmungen der Absätze 1, 2 und 5 gelten nicht für Journalisten, sofern diese einer mit den Regelungen der Absätze 1, 2 und 5 sowie des § 34c vergleichbaren Selbstregulierung einschließlich wirksamer Kontrollmechanismen unterliegen.

(5) Unternehmen, die Finanzanalysen nach Absatz 1 Satz 1 erstellen oder weitergeben, müssen so organisiert sein, dass Interessenkonflikte im Sinne des Absatzes 1 Satz 2 möglichst gering sind. Sie müssen insbesondere über angemessene Kontrollverfahren verfügen, die geeignet sind, Verstößen gegen Verpflichtungen nach Absatz 1 entgegenzuwirken.

(6) Wertpapierdienstleistungsunternehmen, die anderen eine Information über Finanzinstrumente oder deren Emittenten zugänglich machen, die direkt oder indirekt eine Empfehlung für eine bestimmte Anlageentscheidung enthält, haben diese Information mit der erforderlichen Sachkenntnis, Sorgfalt und Gewissenhaftigkeit darzubieten und Umstände oder Beziehungen, die bei den Erstellern, den für die Erstellung verantwortlichen juristischen Personen oder mit diesen verbundenen Unternehmen Interessenkonflikte begründen können, offen zu legen. Die Organisationspflichten des Absatzes 5 gelten entsprechend.
(7) Die Befugnisse der Bundesanstalt nach § 35 gelten hinsichtlich der Einhaltung der in den Absätzen 1, 2 und 5 genannten Pflichten entsprechend. § 36 gilt entsprechend, wenn die Finanzanalyse von einem Wertpapierdienstleistungsunternehmen erstellt, anderen zugänglich gemacht oder öffentlich verbreitet wird.
(8) Das Bundesministerium der Finanzen kann durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, nähere Bestimmungen über die sachgerechte Erstellung und Darbietung von Finanzanalysen, über Umstände oder Beziehungen, die Interessenkonflikte begründen können, über deren Offenlegung sowie über die angemessene Organisation nach Absatz 5 erlassen. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf die Bundesanstalt für Finanzdienstleistungsaufsicht übertragen.

８　プロ・アマの区別

プロ顧客の定義＝「自ら投資決定を下し、その投資決定に関連するリスクを適切に評価できるのに十分な経験、知識、専門的知識を持っている顧客」

①みなしプロ顧客

（ｉ）銀行・証券会社・保険会社・集団投資スキーム等のいわゆる機関投資家

（ii）貸借対照表の総額、純売上高および資本基準に基づくいわゆる大会社

（iii）中央銀行や IMF 等の公的・国際金融機関

②請求によるプロ顧客

９　結びに代えて

資料２

新投資サービス指令

I

(Acts whose publication is obligatory)

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

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

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

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

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4],

Whereas:

(1) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [5] 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.

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

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

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

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

[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.
[4] Opinion of the European Parliament of 25 September 2003 (not yet published in the Official Journal), Council Common Position of 8 December 2003 (OJ C 60 E, 9.3.2004, p. 1), Position of the European Parliament of 30 March 2004 (not yet published in the Official Journal) and Decision of the Council of 7 April 2004.
[5] 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).

〔出所〕Official Journal of the European Union, L 145(Vol.47, 2004年4月30日)
http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_145/l_14520040430en00010044.pdf

(6) Definitions of regulated market and MTF should be introduced and closely aligned with each other to reflect the fact that they represent the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller. The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a 'technical' system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest. The requirement that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term 'non-discretionary rules' means that these rules leave the investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract, meaning that execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.

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

(8) Persons administering their own assets and undertakings, who do not provide investment services and/or perform investment activities other than dealing on own account unless they are market makers or they dealon own account outside a regulated market or an MTF on an organised, frequent and systematic basis, by providing a system accessible to third parties in order to engage in dealings with them should not be covered by the scope of this Directive.

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

(10) Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession [1], First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of direct insurance other than life assurance [2] and Council Directive 2002/83/EC of 5 November 2002 concerning life assurance [3] should be excluded.

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

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

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

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

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

[1] OJ 56, 4.4. 1964, p. 878/64. Directive as amended by the 1972 Act of Accession.
[2] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2002/87/EC.
[3] OJ L 345, 19.12.2002, p. 1.

(16) In order to benefit from the exemptions from this Directive the person concerned should comply on a continuous basis with the conditions laid down for such exemptions. In particular, if a person provides investment services or performs investment activities and is exempted from this Directive because such services or activities are ancillary to his main business, when considered on a group basis, he should no longer be covered by the exemption related to ancillary services where the provision of those services or activities ceases to be ancillary to his main business.

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

(18) Credit institutions that are authorised under Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [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.

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

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

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

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

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

(24) Since certain investment firms are exempted from certain obligations imposed by Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions [2], 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 [3]. This particular treatment for the purposes of capital adequacy should be without prejudice to any decisions regarding the appropriate treatment of these firms under future changes to Community legislation on capital adequacy.

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

[1] OJ L 126, 26.5.2000, p. 1. Directive as last amended by Directive 2002/87/EC.

[2] OJ L 141, 11.6.1993, p. 1. Directive as last amended by Directive 2002/87/EC.

[3] OJ L 9, 15.1.2003, p. 3.

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

(27) Where a client, in line with Community legislation and in particular Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements [1], transfers full ownership of financial instruments or funds to an investment firm for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, such financial instruments or funds should likewise no longer be regarded as belonging to the client.

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

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

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

(31) One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties).

(32) By way of derogation from the principle of home country authorisation, supervision and enforcement of obligations in respect of the operation of branches, it is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.

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

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

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

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

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

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

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

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

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

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

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

(43) Member States shall protect the right to privacy of natural persons with respect to the processing of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data. [1]

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

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

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

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

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

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

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

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

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

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

(53) It is not the intention of this Directive to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.

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

(55) Revision of Directive 93/6/EEC 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.

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

(57) The provisions of this Directive concerning the admission of instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities [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.

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

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

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

[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.).

(61) With a view to protecting clients and without prejudice to the right of customers to bring their action before the courts, it is appropriate that Member States encourage public or private bodies 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]. 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).

(62) Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC.

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

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

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

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

(67) The Resolution of the European Parliament of 5 February 2002 on the implementation of financial services legislation also endorsed the Committee of Wise Men's report, on the basis of the solemn declaration made before Parliament the same day by the Commission and the letter of 2 October 2001 addressed by the Internal Market Commissioner to the chairman of Parliament's Committee on Economic and Monetary Affairs with regard to the safeguards for the European Parliament's role in this process.

(68) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [2].

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

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

(71) The objective of creating an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the Community and governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the European financial system as a whole. Since this objective may be better achieved at Community level, the Community 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,

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

[2] OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

DEFINITIONS AND SCOPE

Article 1

Scope

1. This Directive shall apply to investment firms and regulated markets.

2. The following provisions shall also apply to credit institutions authorised under Directive 2000/12/EC, when providing one or more investment services and/or performing investment activities:

— Articles 2(2), 11, 13 and 14,

— Chapter II of Title II excluding Article 23(2) second subparagraph,

— Chapter III of Title II excluding Articles 31(2) to 31(4) and 32(2) to 32(6), 32(8) and 32(9),

— Articles 48 to 53, 57, 61 and 62, and

— Article 71(1).

Article 2

Exemptions

1. This Directive shall not apply to:

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

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

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

(d) persons who do not provide any investment services or activities other than dealing on own account unless they are market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;

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

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

(g) the members of the European System of Central Banks and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;

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

(i) persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;

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

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

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

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

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

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. In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may, in respect of exemptions (c) (i), and (k) define the criteria for determining when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner.

Article 3

Optional exemptions

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

— are not allowed to hold clients' funds or securities and which for that reason are not allowed at any time to place themselves in debit with their clients, and

— are not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and the provision of investment advice in relation to such financial instruments, and

— in the course of providing that service, are allowed to transmit orders only to:

(i) investment firms authorised in accordance with this Directive;

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

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

(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 regulated at national level.

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

Article 4

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

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

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

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

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

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

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

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

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

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

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

2) '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 determine, acting in accordance with the procedure referred to in Article 64(2):

— the derivative contracts mentioned in Section C 7 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls

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

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

4) '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;

5) '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;

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

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

8) '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;

9) '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;

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

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

12) 'Retail client' means a client who is not a professional client;

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

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

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

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

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

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

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

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

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

19) '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;

20) 'Home Member State' means:

(a) in the case of investment firms:

(i) if the investment firm is a natural person, the Member State in which its head office is situated;

(ii) if the investment firm is a legal person, the Member State in which its registered office is situated;

(iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;

(b) in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;

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

22) 'Competent authority' means the authority, designated by each Member State in accordance with Article 48, unless otherwise specified in this Directive;

23) 'Credit institutions' means credit institutions as defined under Directive 2000/12/EC;

24) 'UCITS management company' means a management company as defined in Council Directive 85/611/EEC of 20 December 1985, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([1]);

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

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

27) '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 Article 92 of Directive 2001/34/EC, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;

28) '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 ([2]);

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

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

31) '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.

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.

2. In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may clarify the definitions laid down in paragraph 1 of this Article.

([1]) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2001/108/EC of the European Parliament and of the Council (OJ L 41, 13.2.2002, p. 35).

([2]) 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).

TITLE II

AUTHORISATION AND OPERATING CONDITIONS FOR INVESTMENT FIRMS

CHAPTER I

CONDITIONS AND PROCEDURES FOR AUTHORISATION

Article 5

Requirement for authorisation

1. Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis be subject to prior authorisation in accordance with the provisions of this Chapter. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 48.

2. By way of derogation from paragraph 1, Member States shall allow any market operator to operate an MTF, subject to the prior verification of their compliance with the provisions of this Chapter, excluding Articles 11 and 15.

3. Member States shall establish a register of all investment firms. This register shall be publicly accessible and shall contain information on the services and/or activities for which the investment firm is authorised. It shall be updated on a regular basis.

4. Each Member State shall require that:

— any investment firm which is a legal person have its head office in the same Member State as its registered office,

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

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

Article 6

Scope of authorisation

1. The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex I. Authorisation shall in no case be granted solely for the provision of ancillary services.

2. An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension of its authorisation.

3. The authorisation shall be valid for the entire Community and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Community, either through the establishment of a branch or the free provision of services.

Article 7

Procedures for granting and refusing requests for authorisation

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

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

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

Article 8

Withdrawal of authorisations

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

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;

(b) has obtained the authorisation by making false statements or by any other irregular means;

(c) no longer meets the conditions under which authorisation was granted, such as compliance with the conditions set out in Directive 93/6/EEC;

(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.

Article 9

Persons who effectively direct the business

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

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

2. Member States shall require the investment firm to notify the competent authority of any changes to its management, along with all information needed to assess whether the new staff appointed to manage the firm are of sufficiently good repute and sufficiently experienced.

3. The competent authority shall refuse authorisation if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the firm pose a threat to its sound and prudent management.

4. 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 alternative arrangements be in place which ensure the sound and prudent management of such investment firms.

Article 10

Shareholders and members with qualifying holdings

1. The competent authorities shall not authorise the performance of investment services or activities by an investment firm until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

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

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

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

3. Member States shall require any natural or legal person that proposes to acquire or sell, directly or indirectly, a qualifying holding in an investment firm, first to notify, in accordance with the second subparagraph, the competent authority of the size of the resulting holding. Such persons shall likewise be required to notify the competent authority if they propose to increase or reduce their qualifying holding, if in consequence the proportion of the voting rights or of the capital that they hold would reach or fall below or exceed 20%, 33% or 50% or the investment firm would become or cease to be their subsidiary.

Without prejudice to paragraph 4, the competent authority shall have up to three months from the date of the notification of a proposed acquisition provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the investment firm, it is not satisfied as to the suitability of the persons referred to in the first subparagraph. If the competent authority does not oppose the plan, it may fix a deadline for its implementation.

4. If the acquirer of any holding referred to in paragraph 3 is an investment firm, a credit institution, an insurance undertaking or a UCITS management company authorised in another Member State, or the parent undertaking of an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, or a person controlling an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, and if, as a result of that acquisition, the undertaking would become the acquirer's subsidiary or come under his control, the assessment of the acquisition shall be subject to the prior consultation provided for in Article 60.

5. 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 3, that investment firm is to inform the competent authority without delay.

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

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

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

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

Article 11

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.

Article 12

Initial capital endowment

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

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

[1] OJ L 84, 26.3.1997, p. 22.

Article 13

Organisational requirements

1. The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8.

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

7. 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.

8. 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.

9. 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 with regard to transactions undertaken by the branch.

10. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 2 to 9, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which specify the concrete organisational requirements to be imposed on investment firms performing different investment services and/or activities and ancillary services or combinations thereof.

Article 14

Trading process and finalisation of transactions in an MTF

1. Member States shall require that investment firms or market operators operating an MTF, in addition to meeting the requirements laid down in Article 13, establish transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders.

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

3. Member States shall ensure that Articles 19, 21 and 22 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. However, the members of or participants in the MTF shall comply with the obligations provided for in Articles 19, 21 and 22 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.

4. Member States shall require that investment firms or market operators operating an MTF establish and maintain transparent rules, based on objective criteria, governing access to its facility. These rules shall comply with the conditions established in Article 42(3).

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

6. Where a transferable security, which has been admitted to trading on a regulated market, is also traded on an MTF 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.

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

Article 15

Relations with third countries

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

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

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

In the circumstances referred to in the first subparagraph, the Commission may decide, in accordance with the procedure referred to in Article 64(2), at any time and in addition to the initiation of negotiations, that the competent authorities of the Member States must limit or suspend their decisions regarding requests pending or future requests for authorisation and the acquisition of holdings by direct or indirect parent undertakings governed by the law of the third country in question. Such limitations or suspensions may not be applied to the setting-up of subsidiaries by investment firms duly authorised in the Community or by their subsidiaries, or to the acquisition of holdings in Community investment firms by such firms or subsidiaries. The duration of such measures may not exceed three months.

Before the end of the three-month period referred to in the second subparagraph and in the light of the results of the negotiations, the Commission may decide, in accordance with the procedure referred to in Article 64(2), to extend these measures.

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

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

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

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

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

CHAPTER II

OPERATING CONDITIONS FOR INVESTMENT FIRMS

Section 1

General provisions

Article 16

Regular review of conditions for initial authorisation

1. Member States shall require that an investment firm authorised in their territory comply at all times with the conditions for initial authorisation established in Chapter I of this Title.

2. Member States shall require competent authorities to establish the appropriate methods to monitor that investment firms comply with their obligation under paragraph 1. They shall require investment firms to notify the competent authorities of any material changes to the conditions for initial authorisation.

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

Article 17

General obligation in respect of on-going supervision

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

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

Article 18

Conflicts of interest

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

2. Where organisational or administrative arrangements made by the investment firm in accordance with Article 13(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 the general nature and/or sources of conflicts of interest to the client before undertaking business on its behalf.

3. In order to take account of technical developments on financial markets and to ensure uniform application of paragraphs 1 and 2, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to:

(a) define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest when providing various investment and ancillary services and combinations thereof;

(b) establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the clients or potential clients of the investment firm.

Section 2

Provisions to ensure investor protection

Article 19

Conduct of business obligations when providing investment services to clients

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

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

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

— the investment firm and its services,

— financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,

— execution venues, and

— costs and associated charges

so that they 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. 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.

5. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 4, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

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

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

6. Member States shall allow investment firms when providing investment services that only consist of execution and/or the reception and transmission of client orders with or without ancillary services to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 5 where all the following conditions are met:

— the above services relate to shares admitted to trading on a regulated market or in an equivalent third country market, money market instruments, bonds or other forms of securitised debt (excluding those bonds or securitised debt that embed a derivative), UCITS and other non-complex financial instruments. A third country market shall be considered as equivalent to a regulated market if it complies with equivalent requirements to those established under Title III. The Commission shall publish a list of those markets that are to be considered as equivalent. This list shall be updated periodically,

— the service is provided at the initiative of the client or potential client,

— the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability 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,

— the investment firm complies with its obligations under Article 18.

7. 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.

8. The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

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

10. In order to ensure the necessary protection of investors and the uniform application of paragraphs 1 to 8, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those implementing measures 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 financial instruments being offered or considered;

(c) the retail or professional nature of the client or potential clients.

Article 20

Provision of services through the medium of another investment firm

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

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

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

Article 21

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

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

Member States shall require that investment firms provide appropriate information to their clients on their order execution policy. Member States shall require that investment firms obtain the prior consent of their clients to the execution policy.

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

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

5. 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.

6. In order to ensure the protection necessary for investors, the fair and orderly functioning of markets, and to ensure the uniform application of paragraphs 1, 3 and 4, the Commission shall, in accordance with the procedure referred to in Article 64(2), adopt implementing measures concerning:

(a) the criteria for determining the relative importance of the different factors that, pursuant to paragraph 1, may be taken into account for determining the best possible result taking into account the size and type of order and the retail or professional nature of the client;

(b) factors that may be taken into account by an investment firm when reviewing its execution arrangements and the circumstances under which changes to such arrangements may be appropriate. In particular, the factors for determining which venues enable investment firms to obtain on a consistent basis the best possible result for executing the client orders;

(c) the nature and extent of the information to be provided to clients on their execution policies, pursuant to paragraph 3.

Article 22

Client order handling rules

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

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

2. Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. Member States may decide that investment firms comply with this obligation by transmitting the client limit order to a regulated market and/or MTF. Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article 44(2).

3. In order to ensure that measures for the protection of investors and fair and orderly functioning of markets take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing 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 23

Obligations of investment firms when appointing tied agents

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

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

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

Member States shall 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. Member States that decide to allow investment firms to appoint tied agents shall establish a public register. Tied agents shall be registered in the public register in the Member State where they are established.

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

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

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

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

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

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

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

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

Article 24

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 19, 21 and 22(1) in respect of those transactions or in respect of any ancillary service directly related to those transactions.

2. Member States shall recognise as eligible counterparties for the purposes of this Article investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions authorised or regulated under Community legislation or the national law of a Member State, undertakings exempted from the application of this Directive under Article 2(1)(k) and (l), national governments and their corresponding offices including public bodies that deal with public debt, 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 19, 21 and 22.

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

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

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

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

5. In order to ensure the uniform application of paragraphs 2, 3 and 4 in the light of changing market practice and to facilitate the effective operation of the single market, the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which define:

(a) the procedures for requesting treatment as clients under paragraph 2;

(b) the procedures for obtaining the express confirmation from prospective counterparties under paragraph 3;

(c) the predetermined proportionate requirements, including quantitative thresholds that would allow an undertaking to be considered as an eligible counterparty under paragraph 3.

Section 3

Market transparency and integrity

Article 25

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

1. Without prejudice to the allocation of responsibilities for enforcing the provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [1], Member States shall ensure that appropriate measures are in place to enable the competent authority to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

2. Member States shall require investment firms to keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [2].

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

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

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

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

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

[1] OJ L 96, 12.4.2003, p. 16.

[2] OJ L 166, 28.6.1991, p. 77. Directive as last amended by Directive 2001/97/EC of the European Parliament and of the Council (OJ L 344, 28.12.2001, p. 76).

7. In order to ensure that measures for the protection of market integrity are modified to take account of technical developments in financial markets, and to ensure the uniform application of paragraphs 1 to 5, the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which define the methods and arrangements for reporting financial transactions, the form and content of these reports and the criteria for defining a relevant market in accordance with paragraph 3.

Article 26

Monitoring of compliance with the rules of the MTF and with other legal obligations

1. Member States shall require that investment firms and market operators operating an MTF establish and maintain effective arrangements and procedures, relevant to the MTF, for the regular monitoring of the compliance by its users with its rules. Investment firms and market operators operating an MTF shall monitor the transactions undertaken by their users under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

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

Article 27

Obligation for investment firms to make public firm quotes

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

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

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

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

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

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

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

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

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

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

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

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

4. The competent authorities shall check:

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

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

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

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

7. In order to ensure the uniform application of paragraphs 1 to 6, in a manner which supports the efficient valuation of shares and maximises the possibility of investment firms of obtaining the best deal for their clients, the Commission shall, in accordance with the procedure referred to in Article 64(2), adopt implementing measures which:

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

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

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

(ii) through the offices of a third party;

(iii) through proprietary arrangements;

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

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

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

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

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

Article 28

Post-trade disclosure by investment firms

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

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

3. In order to ensure the transparent and orderly functioning of markets and the uniform application of paragraph 1, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which:

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

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

(ii) through the offices of a third party;

(iii) through proprietary arrangements;

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

Article 29

Pre-trade transparency requirements for MTFs

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

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

3. In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures as regards:

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

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

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

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

Article 30

Post-trade transparency requirements for MTFs

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

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

3. In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures in respect of:

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

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

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

CHAPTER III

RIGHTS OF INVESTMENT FIRMS

Article 31

Freedom to provide investment services and activities

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

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

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

(a) the Member State in which it intends to operate;

(b) a programme of operations stating in particular the investment services and/or activities as well as ancillary services which it intends to perform and whether it intends to use tied agents in the territory of the Member States in which it intends to provide services.

In cases where the investment firm intends to use tied agents, the competent authority of the home Member State of the investment firm shall, at the request of the competent authority of the host Member State and within a reasonable time, communicate the identity of the tied agents that the investment firm intends to use in that Member State. The host Member State may make public such information.

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

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

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

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

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

Article 32

Establishment of a branch

1. Member States shall ensure that investment services and/or activities as well as ancillary services may be provided within their territories in accordance with this Directive and Directive 2000/12/EC through the establishment of a branch provided that those services and activities are covered by the authorisation granted to the investment firm or the credit institution in the home Member State. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements save those allowed under paragraph 7, on the organisation and operation of the branch in respect of the matters covered by this Directive.

2. Member States shall require any investment firm wishing to establish a branch within the territory of another Member State first to notify the competent authority of its home Member State and to provide it with the following information:

(a) the Member States within the territory of which it plans to establish a branch;

(b) a programme of operations setting out inter alia the investment services and/or activities as well as the ancillary services to be offered and the organisational structure of the branch and indicating whether the branch intends to use tied agents;

(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.

In cases where an investment firm uses a tied agent established in a Member State outside its home Member State, such tied agent shall be assimilated to the branch and shall be subject to the provisions of this Directive relating to branches.

3. Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of an investment firm, taking into account the activities envisaged, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article 56(1) and inform the investment firm concerned accordingly.

4. In addition to the information referred to in paragraph 2, the competent authority of the home Member State shall communicate details of the accredited compensation scheme of which the investment firm is a member in accordance with Directive 97/9/EC to the competent authority of the host Member State. In the event of a change in the particulars, the competent authority of the home Member State shall inform the competent authority of the host Member State accordingly.

5. Where the competent authority of the home Member State refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the investment firm concerned within three months of receiving all the information.

6. On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the branch may be established and commence business.

7. 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 19, 21, 22, 25, 27 and 28 and in measures adopted pursuant thereto.

The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 19, 21, 22, 25, 27 and 28 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory.

8. 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.

9. 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.

Article 33

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 34

Access to central counterparty, clearing and settlement facilities and right to designate settlement system

1. Member States shall require that investment firms from other Member States have the right of access to central counterparty, clearing and settlement systems in their territory for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

Member States shall require that access of those investment firms to such facilities be subject to the same non-discriminatory, transparent and objective criteria as apply to local participants. Member States shall not restrict the use of those facilities to the clearing and settlement of transactions in financial instruments undertaken on a regulated market or MTF 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:

(a) such links and arrangements between the designated settlement system and any other system or facility as are necessary to ensure the efficient and economic settlement of the transaction in question; and

(b) agreement by the competent authority responsible for the supervision of the regulated market that technical conditions for settlement of transactions concluded on the regulated market through a settlement system other than that designated by the regulated market are such as to allow the smooth and orderly functioning of financial markets.

This assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national central banks as overseers of settlement systems or other supervisory authorities on such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.

3. The rights of investment firms under paragraphs 1 and 2 shall be without prejudice to the right of operators of central counterparty, clearing or securities settlement systems to refuse on legitimate commercial grounds to make the requested services available.

Article 35

Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs

1. Member States shall not prevent investment firms and market operators operating an MTF from entering into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2. The competent authority of investment firms and market operators operating an MTF may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in Article 34(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the national central banks as overseers of clearing and settlement systems or by other supervisory authorities with a competence in such systems.

TITLE III

REGULATED MARKETS

Article 36

Authorisation and applicable law

1. Member States shall reserve authorisation as a regulated market to those systems which comply with the provisions of this Title.

Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in this Title.

In the case of a regulated market that is a legal person and that is managed or operated by a market operator other than the regulated market itself, Member States shall establish how the different obligations imposed on the market operator under this Directive are to be allocated between the regulated market and the market operator.

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

2. Member States shall require the operator of the regulated market to perform tasks relating to the organisation and operation of the regulated market under the supervision of the competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of regulated markets with the provisions of this Title. They shall also ensure that competent authorities monitor that regulated markets comply at all times with the conditions for initial authorisation established under this Title.

3. Member States shall ensure that the market operator is responsible for ensuring that the regulated market that he 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 he manages by virtue of this Directive.

4. Without prejudice to any relevant provisions of Directive 2003/6/EC, the public law governing the trading conducted under the systems of the regulated market shall be that of the home Member State of the regulated market.

5. The competent authority may withdraw the authorisation issued to a regulated market where it:

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has not operated for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;

(b) has obtained the authorisation by making false statements or by any other irregular means;

(c) no longer meets the conditions under which authorisation was granted;

(d) has seriously and systematically infringed the provisions adopted pursuant to this Directive;

(e) falls within any of the cases where national law provides for withdrawal.

Article 37

Requirements for the management of the regulated market

1. Member States shall require the persons who effectively direct the business and the operations of the regulated market to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management and operation of the regulated market. Member States shall also require the operator of the regulated market to inform the competent authority of the identity and any other subsequent changes of the persons who effectively direct the business and the operations of the regulated market.

The competent authority shall refuse to approve proposed changes where there are objective and demonstrable grounds for believing that they pose a material threat to the sound and prudent management and operation of the regulated market.

2. Member States shall ensure that, in the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of an already authorised regulated market in accordance with the conditions of this Directive are deemed to comply with the requirements laid down in paragraph 1.

Article 38

Requirements relating to persons exercising significant influence over the management of the regulated market

1. Member States shall require the persons who are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable.

2. Member States shall require the operator of the regulated market:

(a) to provide the competent authority with, and to make public, information regarding the ownership of the regulated market and/or the market operator, and in particular, the identity and scale of interests of any parties in a position to exercise significant influence over the management;

(b) to inform the competent authority of and to make public any transfer of ownership which gives rise to a change in the identity of the persons exercising significant influence over the operation of the regulated market.

3. The competent authority shall refuse to approve proposed changes to the controlling interests of the regulated market and/or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

Article 39

Organisational requirements

Member States shall require the regulated market:

(a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;

(b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;

(c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;

(d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;

(e) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems;

(f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

Article 40

Admission of financial instruments to trading

1. Member States shall require that regulated markets have clear and transparent rules regarding the admission of financial instruments to trading.

Those rules shall ensure that any financial instruments admitted to trading in a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.

2. In the case of derivatives, the rules shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

3. In addition to the obligations set out in paragraphs 1 and 2, Member States shall require the regulated market to establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under Community law in respect of initial, ongoing or ad hoc disclosure obligations.

Member States shall ensure that the regulated market establishes arrangements which facilitate its members or participants in obtaining access to information which has been made public under Community 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..... 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. In order to ensure the uniform application of paragraphs 1 to 5, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures which:

(a) specify the characteristics of different classes of instruments to be taken into account by the regulated market when assessing whether an instrument is issued in a manner consistent with the conditions laid down in the second subparagraph of paragraph 1 for admission to trading on the different market segments which it operates;

(b) clarify the arrangements that the regulated market is to implement so as to be considered to have fulfilled its obligation to verify that the issuer of a transferable security complies with its obligations under Community law in respect of initial, ongoing or ad hoc disclosure obligations;

(c) clarify the arrangements that the regulated market has to establish pursuant to paragraph 3 in order to facilitate its members or participants in obtaining access to information which has been made public under the conditions established by Community law.

Article 41

Suspension and removal of instruments from trading

1. Without prejudice to the right of the competent authority under Article 50(2)(j) and (k) to demand suspension or removal of an instrument from trading, the operator of the regulated market may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

Notwithstanding the possibility for the operators of regulated markets to inform directly the operators of other regulated markets, Member States shall require that an operator of a regulated market that suspends or removes from trading a financial instrument make public this decision and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States.

2. A competent authority which demands the suspension or removal of a financial instrument from trading on one or more regulated markets shall immediately make public its decision and inform the competent authorities of the other Member States. Except where it could cause significant damage to the investors' interests or the orderly functioning of the market the competent authorities of the other Member States shall demand the suspension or removal of that financial instrument from trading on the regulated markets and MTFs that operate under their authority.

Article 42

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;

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(c) professional standards imposed on the staff of the investment firms or credit institutions that are operating on the market;

(d) the conditions established, for members or participants other than investment firms and credit institutions, under paragraph 3;

(e) the rules and procedures for the clearing and settlement of transactions concluded on the regulated market.

3. Regulated markets may admit as members or participants investment firms, credit institutions authorised under Directive 2000/12/EC and other persons who:

(a) are fit and proper;

(b) have a sufficient level of trading ability and competence;

(c) have, where applicable, adequate organisational arrangements;

(d) have sufficient resources for the role they are to perform, taking into account the different financial arrangements that the regulated market may have established in order to guarantee the adequate settlement of transactions.

4. Member States shall ensure that, for the transactions concluded on a regulated market, members and participants are not obliged to apply to each other the obligations laid down in Articles 19, 21 and 22. However, the members or participants of the regulated market shall apply the obligations provided for in Articles 19, 21 and 22 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, within one month, this information to the Member State in which the regulated market intends to provide such arrangements.

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

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

Article 43

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 by their members or participants under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require the operators of the regulated markets to report significant breaches of their rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority of the regulated market. Member States shall also require the operator of the regulated market to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse on the regulated market and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through the systems of the regulated market.

Article 44

Pre-trade transparency requirements for regulated markets

1. Member States shall, at least, require regulated markets to make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares admitted to trading. Member States shall require this information to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours.

Regulated markets may give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first subparagraph to investment firms which are obliged to publish their quotes in shares pursuant to Article 27.

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

3. In order to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures as regards:

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

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

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

Article 45

Post-trade transparency requirements for regulated markets

1. Member States shall, at least, require regulated markets to make public the price, volume and time of the transactions executed in respect of shares admitted to trading. Member States shall require details of all such transactions to be made public, on a reasonable commercial basis and as close to real-time as possible.

Regulated markets may give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first subparagraph to investment firms which are obliged to publish the details of their transactions in shares pursuant to Article 28.

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

3. In order to provide for the efficient and orderly functioning of financial markets, and to ensure the uniform application of paragraphs 1 and 2, the Commission shall, in accordance with the procedure referred to in Article 64(2) adopt implementing measures in respect of:

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

(b) the conditions under which a regulated market may provide for deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed.

Article 46

Provisions regarding central counterparty and clearing and settlement arrangements

1. Member States shall not prevent regulated markets from entering into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2. The competent authority of a regulated market may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established in Article 34(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the national central banks as overseers of clearing and settlement systems or by other supervisory authorities with competence in relation to such systems.

Article 47

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 the Commission. A similar communication shall be effected in respect of each change to that list. The Commission shall publish a list of all regulated markets in the *Official Journal of the European Union* and update it at least once a year. The Commission shall also publish and update the list at its website, each time the Member States communicate changes to their lists.

TITLE IV

COMPETENT AUTHORITIES

CHAPTER I

DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 48

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 this Directive. Member States shall inform the Commission 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 Articles 5(5), 16(3), 17(2) and 23(4).

Any delegation of tasks to entities other than the authorities referred to in paragraph 1 may not involve either the exercise of public authority or the use of discretionary powers of judgement. Member States shall require that, prior to delegation, competent authorities take all reasonable steps to ensure that the entity to which tasks are to be delegated has the capacity and resources to effectively execute all tasks and that the delegation takes place only if a clearly defined and documented framework for the exercise of any delegated tasks has been established stating the tasks to be undertaken and the conditions under which they are to be carried out. These conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. In any case, the 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 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. The Commission shall publish a list of the competent authorities referred to in paragraphs 1 and 2 in the *Official Journal of the European Union* at least once a year and update it continuously on its website.

Article 49

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 50

Powers to be made available to competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Within the limits provided for in their national legal frameworks they shall exercise such powers:

(a) directly; or

(b) in collaboration with other authorities; or

(c) under their responsibility by delegation to entities to which tasks have been delegated according to Article 48(2); or

(d) by application to the competent judicial authorities.

2. The powers referred to in paragraph 1 shall be exercised in conformity with national law and shall include, at least, the rights to:

(a) have access to any document in any form whatsoever and to receive a copy of it;

(b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;

(c) carry out on-site inspections;

(d) require existing telephone and existing data traffic records;

(e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;

(f) request the freezing and/or the sequestration of assets;

(g) request temporary prohibition of professional activity;

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

(i) adopt any type of measure to ensure that investment firms and regulated markets continue to comply with legal requirements;

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

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

(l) refer matters for criminal prosecution;

(m) allow auditors or experts to carry out verifications or investigations.

Article 51

Administrative sanctions

1. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 50.

3. Member States shall provide that the competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Article 52

Right of appeal

1. Member States shall ensure that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right to apply to the courts. The right to apply to the courts shall also apply where, in respect of an application for authorisation which provides all the information required, no decision is taken within six months of its submission.

2. Member States shall provide that one or more of the following bodies, as determined by national law, may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting to protect their members.

Article 53

Extra-judicial mechanism for investors' complaints

1. Member States shall encourage 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.

2. Member States shall ensure that those bodies are not prevented by legal or regulatory provisions from cooperating effectively in the resolution of cross-border disputes.

Article 54

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 48(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Directive.

2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

3. Without prejudice to cases covered by criminal law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Directive shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive and with other Directives applicable to investment firms, credit institutions, pension funds, UCITS, insurance and reinsurance intermediaries, insurance undertakings regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.

Article 55

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 31 of Directive 85/611/EEC or any other task prescribed by law, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which that person has become aware while carrying out that task and which is liable to:

(a) constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of investment firms;

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

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

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

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

CHAPTER II

COOPERATION BETWEEN COMPETENT AUTHORITIES OF DIFFERENT MEMBER STATES

Article 56

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 one single competent authority as a contact point for the purposes of this Directive. Member States shall communicate to the Commission 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.

2. When, taking into account the situation of the securities markets in the host Member State, the operations of a regulated market that has established arrangements in a host Member State have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the home and host competent authorities of the regulated market shall establish proportionate cooperation arrangements.

[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).

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 this in as specific a manner as possible to the competent authority of the other Member State. The latter authority shall take appropriate action. It shall inform the notifying competent authority of the outcome of the action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the competent authority that has forwarded the information.

5. In order to ensure the uniform application of paragraph 2 the Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures to establish the criteria under which the operations of a regulated market in a host Member State could be considered as of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State.

Article 57

Cooperation in supervisory activities, on-the-spot verifications or in investigations

A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation. In the case of investment firms that are remote members of a regulated market the competent authority of the regulated market may choose to address them directly, in which case it shall inform the competent authority of the home Member State of the remote member accordingly.

Where a competent authority receives a request with respect to an on-the-spot verification or an investigation, it shall, within the framework of its powers:

(a) carry out the verifications or investigations itself; or

(b) allow the requesting authority to carry out the verification or investigation; or

(c) allow auditors or experts to carry out the verification or investigation.

Article 58

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 56(1) shall immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities, designated in accordance to Article 48(1), set out in the provisions adopted pursuant to this Directive.

Competent authorities exchanging information with other competent authorities under this Directive may indicate at the time of communication that such information must not be disclosed without their express agreement, in which case such information may be exchanged solely for the purposes for which those authorities gave their agreement.

2. The competent authority having been designated as the contact point may transmit the information received under paragraph 1 and Articles 55 and 63 to the authorities referred to in Article 49. 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 49 as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles 55 and 63 may use it only in the course of their duties, in particular:

(a) to check that the conditions governing the taking-up of the business of investment firms are met and to facilitate the monitoring, on a non-consolidated or consolidated basis, of the conduct of that business, especially with regard to the capital adequacy requirements imposed by Directive 93/6/EEC, administrative and accounting procedures and internal-control mechanisms;

(b) to monitor the proper functioning of trading venues;

(c) to impose sanctions;

(d) in administrative appeals against decisions by the competent authorities;

(e) in court proceedings initiated under Article 52; or

(f) in the extra-judicial mechanism for investors' complaints provided for in Article 53.

4. The Commission may adopt, in accordance with the procedure referred to in Article 64(2), implementing measures concerning procedures for the exchange of information between competent authorities.

5. Articles 54, 58 and 63 shall not prevent a competent authority from transmitting to 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 59

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 57 or to exchange information as provided for in Article 58 only where:

(a) such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of the State addressed;

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

(c) 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 accordingly, providing as detailed information as possible.

Article 60

Inter-authority consultation prior to authorisation

1. The competent authorities of the other Member State involved shall be consulted prior to granting authorisation to an investment firm which is:

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

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

(c) controlled by the same natural or legal persons as control an investment firm or credit institution authorised in another Member State.

2. The competent authority of the Member State responsible for the supervision of credit institutions or insurance undertakings shall be consulted prior to granting an authorisation to an investment firm which is:

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

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

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

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.

Article 61

Powers for host Member States

1. Host Member States 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 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 32(7). Those requirements may not be more stringent than those which the same Member State imposes on established firms for the monitoring of their compliance with the same standards.

Article 62

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 competent authority of the host Member State, after informing the competent authority of the home Member State shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. This shall include the possibility of preventing offending investment firms from initiating any further transactions within their territories. The Commission shall be informed of such measures without delay.

2. Where the competent authorities of a host Member State ascertain that an investment firm that has a branch within its territory is in breach of the legal or regulatory provisions adopted in that State pursuant to those provisions of this Directive which confer powers on the host Member State's competent authorities, those authorities shall require the investment firm concerned to put an end to its irregular situation.

If the investment firm concerned fails to take the necessary steps, the competent authorities of the host Member State shall take all appropriate measures to ensure that the investment firm concerned puts an end to its irregular situation. The nature of those measures shall be communicated to the competent authorities of the home Member State.

If, despite the measures taken by the host Member State, the investment firm persists in breaching the legal or regulatory provisions referred to in the first subparagraph in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to penalise further irregularities and, in so far as necessary, to prevent that investment firm from initiating any further transactions within its territory. The Commission shall be informed of such measures without delay.

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

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the said regulated market or the MTF persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State, after informing the competent authority of the home Member State, shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. This shall include the possibility of preventing the said regulated market or the MTF from making their arrangements available to remote members or participants established in the host Member State. The Commission shall be informed of such measures without delay.

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.

CHAPTER III

COOPERATION WITH THIRD COUNTRIES

Article 63

Exchange of information with third countries

1. Member States 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 54. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

Member States may transfer personal data to a third country in accordance to Chapter IV of Directive 95/46/EC.

Member States may also conclude cooperation agreements providing for the exchange of information with third country authorities, bodies and natural or legal persons responsible for:

(i) the supervision of credit institutions, other financial organisations, insurance undertakings and the supervision of financial markets;

(ii) the liquidation and bankruptcy of investment firms and other similar procedures;

(iii) carrying out 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;

(iv) overseeing the bodies involved in the liquidation and bankruptcy of investment firms and other similar procedures;

(v) overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions,

only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 54. Such exchange of information must be intended for the performance of the tasks of those authorities or bodies or natural or legal persons.

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 V

FINAL PROVISIONS

Article 64

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC [1] (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof, provided that the implementing measures adopted in accordance with that procedure do not modify the essential provisions of this Directive.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of that period.

Article 65

Reports and review

1. Before..... (*), the Commission shall, on the basis of public consultation and in the light of discussions with competent authorities, report to the European Parliament and Council on the possible extension of the scope of the provisions of the Directive concerning pre and post-trade transparency obligations to transactions in classes of financial instrument other than shares.

2. Before..... (**), the Commission shall present a report to the European Parliament and to the Council on the application of Article 27.

3. Before..... (***), the Commission shall, on the basis of public consultations and in the light of discussions with competent authorities, report to the European Parliament and Council on:

(a) the continued appropriateness of the exemption under Article 2(1)(k) for undertakings whose main business is dealing on own account in commodity derivatives;

(b) the content and form of proportionate requirements for the authorisation and supervision of such undertakings as investment firms within the meaning of this Directive;

(c) the appropriateness of rules concerning the appointment of tied agents in performing investment services and/or activities, in particular with respect to the supervision on them;

(d) the continued appropriateness of the exemption under of Article 2(1)(i).

4. Before..... (***), the Commission shall present a report to the European Parliament and the Council on the state of the removal of the obstacles which may prevent the consolidation at the European level of the information that trading venues are required to publish.

5. On the basis of the reports referred to in paragraphs 1 to 4, the Commission may submit proposals for related amendments to this Directive.

6. Before..... (****), the Commission shall, in the light of discussions with competent authorities, report to the European Parliament and Council on the continued appropriateness of the requirements for professional indemnity insurance imposed on intermediaries under Community law.

Article 66

Amendment of Directive 85/611/EEC

In Article 5 of Directive 85/611/EEC, paragraph 4 shall be replaced by the following:

'4. Articles 2(2), 12, 13 and 19 of Directive 2004//EC [1] of the European Parliament and of the Council of..... on markets in financial instruments (*), shall apply to the provision of the services referred to in paragraph 3 of this Article by management companies

[1] OJ L 191, 13.7.2001, p. 45.
(*) 2 years after the entry into force of this Directive.
(**) 3 years after the entry into force of this Directive.

[1] OPECE to insert reference to this Directive.
(*) OJ L'.

(***) 30 months after the entry into force of this Directive.
(****) 1 year after the entry into force of this Directive.

Article 67

Amendment of Directive 93/6/EEC

Directive 93/6/EEC shall be amended as follows:

1) Article 2(2) shall be replaced by the following:

'2. Investment firms shall mean all institutions that satisfy the definition in Article 4(1) of Directive 2004//EC [1] of the European Parliament and of the Council of..... on markets in financial instruments (*), which are subject to the requirements imposed by the same Directive, excluding:

(a) credit institutions,

(b) local firms as defined in 20, and

(c) firms which are only authorised to provide the service of investment advice and/or receive and transmit orders from investors without in both cases holding money or securities belonging to their clients and which for that reason may not at any time place themselves in debit with their clients.

[1] OPECE to insert reference to this Directive.
(*) OJ L'

2) Article 3(4) shall be replaced by the following:

'4. The firms referred to in point (b) of Article 2(2) shall have initial capital of EUR 50 000 in so far as they benefit from the freedom of establishment or to provide services under Articles 31 or 32 of Directive 2004/39/EC.';

3) In Article 3 the following paragraphs shall be inserted:

'(4a) Pending revision of Directive 93/6/EC, the firms referred to in point (c) of Article 2(2) shall have:

(a) initial capital of EUR 50 000; or

(b) professional indemnity insurance covering the whole territory of the Community or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 1 000 000 applying to each claim and in aggregate EUR 1 500 000 per year for all claims; or

(c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b).

The amounts referred to in this paragraph shall be periodically reviewed by the Commission in order to take account of changes in the European Index of Consumer Prices as published by Eurostat, in line with and at the same time as the adjustments made under Article 4(7) of Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation (*).

(4b) When an investment firm referred to in Article 2(2)(c), is also registered under Directive 2002/92/EC it has to comply with the requirement established by Article 4(3), of that Directive and in addition it has to have:

(a) initial capital of EUR 25 000; or

(b) professional indemnity insurance covering the whole territory of the Community or some other comparable guarantee against liability arising from professional negligence, representing at least EUR 500 000 applying to each claim and in aggregate EUR 750 000 per year for all claims; or

(c) a combination of initial capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b).

(*) OJ L 9, 15.1.2003, p. 3.'

Article 68

Amendment of Directive 2000/12/EC

Annex I of Directive 2000/12/EC shall be amended as follows:

At the end of the Annex I the following sentence is added:

'The services and activities provided for in Section A and B of Annex I of Directive 2004//EC [1] of the European Parliament and of the Council of..... on markets in financial instruments (*) when referring to the financial instruments provided for in Section C of Annex I of that Directive are subject to mutual recognition according to this Directive.

[1] OPECE to insert reference to this Directive.
(*) OJ L'

Article 69

Repeal of Directive 93/22/EEC

Directive 93/22/EEC shall be repealed with effect from (*). References to Directive 93/22/EEC shall be construed as references to this Directive. References to terms defined in, or Articles of, Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive.

(*) 24 months after the entry into force of this Directive.

Article 70

Transposition

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by..... (*) at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 71

Transitional provisions

1. Investment firms already authorised in their home Member State to provide investment services before the..... (*), shall be deemed to be so authorised for the purpose of this Directive, if the laws of those Member States provide that to take up such activities they must comply with conditions comparable to those imposed in Articles 9 to 14.

2. A regulated market or a market operator already authorised in its home Member State before the..... (*), shall be deemed to be so authorised for the purposes of this Directive, if the laws of such Member State provide that the regulated market or market operator (as the case may be) must comply with conditions comparable to those imposed in Title III.

3. Tied agents already entered in a public register before the..... (*), shall be deemed to be so registered for the purposes of this Directive, if the laws of those Member States provide that tied agents must comply with conditions comparable to those imposed in Article 23.

4. Information communicated before the..... (*), for the purposes of Articles 17, 18 or 30 of Directive 93/22/EEC shall be deemed to have been communicated for the purposes of Articles 31 and 32 of this Directive.

5. Any existing system falling under the definition of an MTF operated by a market operator of a regulated market, shall be authorised as an MTF at the request of the market operator of the regulated market provided it complies with rules equivalent to those required by this Directive for the authorisation and operation of MTFs, and provided that the request concerned is made within 18 months of the date referred to in Article 70.

6. Investment firms shall be authorised to continue considering existing professional clients as such provided that this categorisation has been granted by the investment firm on the basis of an adequate assessment of the expertise, experience and knowledge of the client which gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understands the risks involved. Those investment firms shall inform their clients about the conditions established in the Directive for the categorisation of clients.

Article 72

Entry into force

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

Article 73

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 April 2004

For the European Parliament	*For the Council*
The President	*The President*
P. COX	D. ROCHE

(*) 24 months after the entry into force of this Directive.

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.

Section B

Ancillary services

(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;

(2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;

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

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

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

(6) Services related to underwriting.

(7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under Section C – 5, 6, 7 and 10 - where these are connected to the provision of investment or ancillary services.

Section C

Financial Instruments

(1) Transferable securities;

(2) Money-market instruments;

(3) Units in collective investment undertakings;

(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences.

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

ANNEX II

PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS DIRECTIVE

Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered a professional client, the client must comply with the following criteria:

I. **Categories of client who are considered to be professionals**

The following should all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the Directive.

(1) Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a non-Member State:

(a) Credit institutions

(b) Investment firms

(c) Other authorised or regulated financial institutions

(d) Insurance companies

(e) Collective investment schemes and management companies of such schemes

(f) Pension funds and management companies of such funds

(g) Commodity and commodity derivatives dealers

(h) Locals

(i) Other institutional investors

(2) Large undertakings meeting two of the following size requirements on a company basis:

— balance sheet total: EUR 20 000 000,

— net turnover: EUR 40 000 000,

— own funds: EUR 2 000 000.

(3) National and regional governments, public bodies that manage public debt, 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 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 500 000,

— 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.

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.

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編　者　　証券取引法研究会

発行者　　財団法人 日本証券経済研究所

東京都中央区日本橋茅場町 1-5-8

東京証券会館内　　〒 103-0025

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