



Anlage 2 zur Stellungnahme des Verbandes der Auslandsbanken zum
Entwurf des CRD-UmsG vom 22. Mai 2006:

Working Document ESC/8/2006-rev1 der EU-Kommission zur
MiFID-Durchführungsrichtlinie



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, DRAFT ~~6-0221~~.03.06
[Institutional Reference]

Draft

COMMISSION DIRECTIVE

implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms, and defined terms for the purposes of that Directive

~~(18)~~(21) The outsourcing of investment services and activities or critical and important functions is capable of constituting a material change of the conditions for the authorisation of the investment firm, as referred to in Article 16(2) of Directive 2004/39/EC. If such outsourcing arrangements are to be put in place after the investment firm has obtained an authorisation according to the provisions included in Chapter I of Title II of Directive 2004/39/EC, those arrangements should be notified to the competent authority where required by Article 16(2) of Directive 2004/39/EC.

~~(19)~~(22) Investment firms are required by this Directive to give the responsible competent authority prior notification of any arrangement for the outsourcing of the management of retail client portfolios that it proposes to enter into with a service provider located in a third country, where certain specified conditions are not met. However, competent authorities are not expected to authorise or otherwise approve any such arrangement or its terms. The purpose of the notification, rather, is to ensure that the competent authority has the opportunity to intervene in appropriate cases. It is the responsibility of the investment firm to negotiate the terms of any outsourcing arrangement, and to ensure that those terms are consistent with the obligations of the firm under this Directive and Directive 2004/39/EC, without the formal intervention of the competent authority.

[Conflicts of interest]

~~(20)~~(23) The circumstances which should be treated as giving rise to a conflict of interest should cover cases where there is a conflict between the interests of the firm or certain persons connected to the firm and the duty the firm owes to a client; or between the differing interests of two or more of its clients, to whom the firm owes in each case a duty. It is not enough that the firm ~~stands to~~may gain a benefit if there is not also a possible disadvantage to a client, or that one client to whom the firm owes a duty ~~stands to~~may make a gain or avoid a loss without there being a concomitant possible loss to another such client.

~~(21)~~(24) Conflicts of interest should be regulated only where an investment service or ancillary service is provided by an investment firm. The status of the client to whom the service is provided – as either retail, professional or eligible counterparty – is irrelevant for this purpose.

~~(22)~~(25) In complying with its obligation to draw up a conflict of interest policy under Directive 2004/39/EC which identifies circumstances which constitute or may give rise to a conflict of interest, the investment firm should pay special attention to the activities of investment research and advice, proprietary trading, portfolio management and corporate finance business, including underwriting or selling in an offering of securities and advising on mergers and acquisitions. In particular, such special attention is appropriate where the firm or a person directly or indirectly linked by control to the firm performs a combination of two or more of those activities.

~~(23)~~(26) Investment firms should aim to identify and manage the conflicts of interest arising in relation to their various business lines under a comprehensive conflicts of interest policy. While disclosure of specific conflicts of interest is required by Article 18(2) of Directive 2004/39/EC, an over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be managed is undesirable. Reliance on disclosure alone should be acceptable only in relation to

- (b) the purchase of standardised services, including market information services and the provision of price feeds.

3. [...] [Paragraph 3 moved to Article 14, new paragraph 1.]

Article 14

(Article 13(2) and first subparagraph of Article 13(5) of Directive 2004/39/EC)

Conditions for outsourcing critical or important operational functions or investment services or activities

- 1. Member States shall ensure that, when investment firms outsource critical or important operational functions or any other investment services or activities, the firms remain fully responsible for discharging all of their obligations under Directive 2004/39/EC and comply, in particular, with the following conditions:
 - (a) the outsourcing must not result in the delegation by senior management of its responsibility;
 - (b) the relationship and obligations of the investment firm towards its clients under the terms of Directive 2004/39/EC must not be altered;
 - (c) the conditions with which the investment firm must comply in order to be authorised in accordance with Article 5 of Directive 2004/39/EC, and to remain so, must not be undermined;
 - (d) none of the other conditions subject to which the firm's authorisation was granted must be removed or modified.

Article 14

(first subparagraph of Article 13(5) of Directive 2004/39/EC)

Conditions for outsourcing critical or important operational functions or investment services or activities

- 12. Member States shall require investment firms to exercise due skill and care and diligence when entering into, managing or terminating any arrangement for the outsourcing to a service provider of critical or important operational functions or of any investment services or activities.

Investment firms shall in particular take the necessary steps to ensure that the following conditions are satisfied:

- (a) the service provider must have the ability, capacity, and any authorisation required by law to perform the outsourced functions, services or activities reliably and professionally;
- (b) the service provider must carry out the outsourced services effectively, and to this end the firm must establish methods for assessing the standard of performance of the service provider;
- (c) the service provider must properly supervise the carrying out of the outsourced functions, and adequately manage the risks associated with the outsourcing;
- (d) appropriate action must be taken if it appears that the service provider may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;
- (e) the investment firm must retain the necessary expertise to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and must supervise those functions and manage those risks;
- (f) the service provider must disclose to the investment firm any development that may have ~~an~~ a material impact on its ability to carry out the outsourced functions effectively and in compliance with applicable laws and regulatory requirements;
- (g) the investment firm must be able to terminate the arrangement for outsourcing where necessary without detriment to the continuity and quality of its provision of services to clients;
- (h) the service provider must cooperate with the competent authorities of the investment firm in connection with the outsourced activities;
- (i) the investment firm, its auditors and the relevant competent authorities must have effective access to data related to the outsourced activities, as well as to the business premises of the service provider; and the competent authorities must be able to exercise those rights of access;
- (j) the service provider must protect any confidential information belonging to the investment firm or relating to its clients;
- (k) where applicable, the investment firm and the service provider must establish, implement and maintain a contingency plan for disaster recovery and periodic testing of backup facilities.

2.3. Member States shall require the respective rights and obligations of the investment firms and of the service provider to be clearly allocated and set out in a written agreement.

34. Member States shall provide that, where the investment firm and the service provider are members of the same group, the investment firm may, for the purposes of complying with this Article and Article 15, take into account the extent to which they ~~control~~ the firm controls the service provider or ~~have~~ has the ability to influence its

actions, and the extent to which the service provider is included in the consolidated supervision of the group.

45. Member States shall require investment firms to make available on request to the competent authority all information necessary to enable the authority to supervise the compliance of the performance of the outsourced activities with the requirements of this Directive.

Article 15

(Article 13(2) and first subparagraph of Article 13(5) of Directive 2004/39/EC)

Service providers located in third countries

In addition to the requirements set out in Article 14(1), Member States shall require that, where an investment firm outsources the investment service of portfolio management provided to retail clients to a service provider located in a third country, that investment firm ensures that the following conditions are satisfied:

- (a) the service provider must be authorised or registered in its home country to provide that service and must be subject to prudential supervision;
- (b) there must be an appropriate cooperation agreement between the competent authority of the investment firm and the supervisory authority of the service provider.

Where those conditions are not satisfied, an investment firm may outsource investment services to a service provider located in a third country only if the firm gives prior notification to its competent authority about the outsourcing arrangement and the competent authority does not object to that arrangement within a reasonable time following receipt of that notification.

Competent authorities shall publish a list of the supervisory authorities in third countries with which they have cooperation agreements that are appropriate for the purposes of point (b) of the first paragraph.