



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

common position of the Council on the adoption of a Directive of the European Parliament and of the Council on markets in financial instruments, markets, 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

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1. BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM(2002) 625 final – 2002/0269 (COD):	19.11.2002
Date of the opinion of the European Economic and Social Committee:	18.6.2003
Date of the opinion of the European Parliament, first reading:	25.9.2003
Date of transmission of the amended proposal:	---
Date of adoption of the common position:	8.12.2003

2. OBJECTIVE OF THE COMMISSION PROPOSAL

The main objectives of this proposal for a Directive are:

1. The protection of investors and market integrity by establishing harmonised requirements governing the activities of authorised intermediaries; and
2. The promotion of fair, transparent, efficient and integrated financial markets: this goal will, in particular, be furthered by the development of ground-rules governing the negotiation and execution of transactions in financial instruments on organised trading systems and marketplaces, and by investment firms.

3. COMMENTS ON THE COMMON POSITION

3.1. GENERAL COMMENTS

The Greek and Italian Presidencies have treated this Commission's proposal for a directive as a matter of priority. The European Council has asked the Council and the European Parliament to adopt the Directive as early as possible. The Council has adopted by qualified majority its Common Position on 8 December 2003. Therefore, the Commission can accept the Common Position.

The common position preserves the essence of the Commission's proposal; therefore, the Commission accepts the text in its main lines.

The common position takes account of an important number of amendments proposed by the European Parliament and accepted by the Commission. Some of them have been directly incorporated, whereas the majority of the European Parliament's amendments included in the common position have been reformulated or included in other parts of the text for reasons of internal coherence (some parts of the text have been restructured) or for reasons linked to legislative drafting rules.

The changes introduced define and clarify more precisely the system proposed by the Commission. Some of them have been inspired by the relevant European Parliament's amendments adopted at the first reading which were accepted by the Commission.

The main changes to the Commission's amended proposal contained in the Council common position are dealt with in the detailed comments that follow.

3.2. Response to Parliament's amendments adopted at first reading

The European Parliament adopted one hundred and forty-six amendments. The Commission accepted the text or spirit of ninety of them, in whole or in part.

3.2.1. Amendments accepted by the Commission and included in the common position

(a) Recitals

Recital 4 of the common position

It specifies that physically settable commodity derivatives are under the scope of the Directive if traded on a regulated market or MTF.

This recital, which relates to Section C of Annex 1 of the common position, takes account of amendment 1.

Recital 6 of the common position

It provides for clarification on the concept of MTF and regulated market. It incorporates part of the Parliament's amendment 3 and 25.

Recital 7 of the common position

The proposal for a Directive only covers undertakings whose regular occupation or business is to perform investment services and/or activities on a professional basis. This Directive should not cover persons who perform investment services and activities on an occasional basis.

This recital, coupled with recital 8, which relates to the scope of the Directive, is an improvement compared to the initial drafting of the Commission's proposal and takes into account part of the Parliament's amendment 4.

Recital 8 of the common position

The Common position includes a new recital to clarify the extent of the exemption of article 2 (1) d). Persons dealing on own account as far as they are not market makers or dealing on own account outside a regulated market or an MTF on an organised, regular and systematic basis, should not be covered by the scope of this Directive. The recital reflects Parliament's amendment 4.

Recital 9 of the common position

This recital clarifies that when using the term "persons" the Directive is referring to natural and legal persons. This issue was raised in the following Parliament's amendment 6, 14, 15, 16 and 130.

Recital 18 of the common position

This recital has been inserted to clarify that credit institutions, authorised under Directive 2000/12/EC, when providing investment services or activities do not need another authorisation under this Directive. This recital reflects article 1 (2) of the text and incorporates part of Parliament's amendment 34.

Recital 48 of the common position

The firms have the possibility to decide to whom they give access for each specific quote, provided this it is done on a non-discriminatory basis. Recital 48 clarifies that the firms restricting access to a specific quote only to retail or only to professional clients is not discriminatory. It reflects article 27 (3) of the text and follows part of Parliament's amendment 88 in this issue.

(b) Substantive provisions

Title I - definitions and scope

Article 1 (2)

This paragraph lists the articles of this proposal which will be applicable to credit institutions when providing investment services, in addition to the provisions of Directive 2000/12/EC. It incorporates part of the European Parliament's amendment 12.

Article 2 (1) (d)

The common position, taking into account the spirit of European Parliament's amendment 4, has introduced a new exemption that excludes from the scope of the Directive those persons which do not provide any investment services or activities other than dealing on own account and which cannot be categorised as market makers or as dealing on own account outside a regulated market or an MTF on an organised, regular and systematic basis.

Article 2 (1) k)

This provision relates to the exemption of persons dealing on own account in commodity and/or commodity derivatives from the scope of the Directive. The common position, inspired by part of Parliament's amendment 15, provides that this exemption will not apply to those persons that are part of a group of whose main business is the provision of other investment services.

Article 2 (1) l)

The common position, inspired by the EP amendment 16, enlarges the scope of this exemption, if compared with the Commission's proposal, since it includes also those dealers that deal on derivatives other than options and futures.

Article 3

The Common position has introduced the possibility for Member States not to apply the Directive to persons who 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, provided some conditions are met.

This new article is in line with the Parliament's amendment 156 and 157.

Article 4 (1) 7

The common position has introduced the definition of "systematic internaliser" taking into account the spirit of the Parliament's amendment 33. It does not, however, include in the definition all the elements that were present in the Parliament's amendment. In particular it does not make reference to those elements which were useful only for defining the scope of pre-trade transparency obligations such as the financial instruments and the size of the orders internalised. The Commission agrees with the Council that those elements should not be part of the definition of "systematic internaliser" but should be taking into account when establishing the obligation for investment firms to make public firm quotes under Article 27.

Article 4 (1) 15)

The definition of MTFs has been reformulated, taking into account the Parliament's amendment 25, in order to clarify that MTFs must be authorized and function in accordance with the provision of Title II of the Directive.

Article 4 (1) 10

The definition of "client" has been redrafted in line with Parliament's amendment 22.

Article 4 (1) 11

The definition of "professional client" has been redrafted taking into account Parliament's amendment 23.

Article 4 (1) 12

The definition of "retail client" has been redrafted taking into account Parliament's amendment 23.

Article 4 (1) 16

The definition of "limit order" has been redrafted taking into account part of Parliament's amendment 27.

Article 4 (1) 26

The definition of "branch" has been redrafted taking into account the objective of Parliament's amendment 32.

Article 4 (1) 28) b)

The definition of "transferable securities" has been reformulated. It now includes the depositary receipts in respect of bonds or other securitised debt, reflecting Parliament's amendment 28.

Title II - authorisation and operating conditions for investment firms

Chapter I - conditions and procedures for authorisation

Article 5 (2)

This article clarifies the obligations a market operator operating an MTF has to comply with. It takes into account the Parliament's amendment 35.

Article 13 (2)

In the common position the last sentence of article 12 (2) of the initial Commission proposal has been deleted. Firms are not obliged anymore to demonstrate to the supervisors that they have acted in accordance with the obligations arising from this paragraph. It will be for supervisors to demonstrate the non-compliance of investment firms. It takes into account part of the Parliament's amendment 38.

Article 13 (4)

The provision requires investment firms to "take reasonable steps" to ensure the continuity and regularity in the performance of investment services and activities. In the common position this paragraph has been redrafted following the Parliament's amendment 39.

Article 14 (1)

This paragraph has been reworded by the Council. It has eliminated the need for MTFs' rules and procedures to enable their users to obtain the best price available on or through the MTF. It takes into account part of the Parliament's amendment 149.

Article 14 (2)

The common position incorporates a new obligation for investment firms or market operators operating an MTF. According to this new obligation, they have to provide, or ensure that there is access to, sufficient publicly available information to enable their users to form an investment judgement. In doing so, they have to take into account both the nature of the users and the types of instruments traded. This new paragraph follows the spirit of Parliament's amendment 149.

Article 14 (4)

The limitation on access to MTFs only to eligible counterparties contained in the Commission's proposal has been deleted in the common position. A more flexible regime has been introduced on access to MTFs. It takes into account the Parliament's amendment 44.

Moreover, the spirit of the Parliament's amendment 7 has been accepted through this change, although this amendment is not directly included in the text. This amendment intended to modify recital 21 of the Commission's proposal but the common position eliminated this recital as it was considered superfluous and repeated the text of the Article.

Chapter II - operating conditions for investment firms

Article 19 (1)

This paragraph has been amended in the common position to extend the obligation that investment firms shall 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 of that article, where appropriate, to the provision of ancillary services to clients. It reflects The Parliament's amendment 50.

Article 19 (2)

This provision requires that all the information an investment firm addresses to clients or potential clients to be fair, clear and not misleading and should identify marketing communications. It reflects the spirit of The Parliament's amendment 51.

Article 19 (3)

This article requires investment firms to provide appropriate information in a comprehensible form to clients or potential clients in order to ensure that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered. It reflects part of the spirit of The Parliament's amendment 54.

Taking into account the Parliament's amendment 52, the text also allows investment firms to provide this information in a standardised format.

Article 19 (4)

The common position requires that investment firms providing investment advice or portfolio management services should obtain the necessary information so as to carry out the suitability test. It takes into account the spirit of the Parliament's amendments 8 and 53. Moreover, the spirit of the Parliament's amendment 8 has been accepted, although not directly included in the text. This amendment intended to modify recital 24 of the Commission's proposal but the common position eliminated this recital as it was considered superfluous and repeated the content of the respective Article.

Article 19 (6)

According to the common position, Member States will allow that when investment firms provide investment services which 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 the previous paragraph where some conditions are met. This article is complemented with the new recital 20.

It takes into account the objective of the the Parliament's amendments 8 and 53.

Article 20

This article deals with the provision of services through the medium of another investment firm. The first paragraph has been redrafted in the common provision in order to clarify the text and to take into account the spirit of the Parliament's amendment 60.

Article 21

Article 21 (1) requires investment firms that they take all reasonable steps to obtain, when executing orders, the best possible result for their clients. To do so, they shall establish and implement effective arrangements, in particular an order execution policy, for complying with this obligation. They are also obliged to monitor the effectiveness of their order execution arrangements and execution policy. The common position has been redrafted while maintaining the main lines of the Commission's proposal and takes into consideration the spirit of the Parliament's amendments 63 and 64. It also takes into account part of amendment 61.

Paragraph 4 includes an obligation for investment firms to notify their clients any material changes to their order execution arrangements or execution policy. This paragraph takes into account part of the Parliament's amendment 69.

Paragraph 5 includes for investment firms an obligation 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. This paragraph follows the spirit of the Parliament's amendment 9.

Article 21(6) a) states that comitology measures should take account of the nature of the client taking into account the objective of the Parliament's amendment 65.

Article 22 (2)

This paragraph has been redrafted in the Common position. It establishes that the obligation to make public a limit order only applies for orders in respect of shares admitted to trading on a regulated market. It also allows member States to consider that investment firms comply with this obligation when transmitting the order to a regulated market and/or MTF. The provision takes into account the spirit of The Parliament's amendment 70.

Article 24

The common position has introduced some amendments to the initial Commission proposal in relation to the transactions executed with eligible counterparties. The text of the common position allows the counterparty regime in respect of the services of reception and transmission to modify the procedure for obtaining the express confirmation from prospective counterparties to enlarge the list of eligible counterparties and gives the possibility to third country firms to be treated as eligible counterparties. This article incorporates The Parliament's amendment 78 and part of amendments 75, 76 and 77.

Article 25 (5)

Some changes have been introduced in order to include the possibility for firms to make their reports available to the competent authority by a trade matching or reporting system. It takes into account part of The Parliament's amendment 80.

Article 26 (1)

The common position has introduced some changes with respect to the obligation for investment firms and market operators operating an MTF, to establish and maintain arrangements for regular monitoring of compliance with its rules. The intention of the changes is to include some flexibility to the Commission's initial proposal. It takes into account part of the spirit of The Parliament's amendment 84.

Article 27 (1)

The common position, in line with The Parliament's amendment 86, restricts the application of the quote disclosure rule to "systematic internalisers".

The common position proposes to enlarge the scope of transactions covered by the pre-trade transparency obligation to those that are not large in scale compared to normal market size. In this respect the common position takes into account the spirit of the The Parliament's amendment 88 although the scope of the pre-trade transparency obligation is somehow narrower in the amendment which proposes to apply the rule to "standard market size transactions". The Commission considers that the spirit enshrined both in the common position and in the Parliament's amendment is acceptable: the pre-trade transparency obligations is defined in both cases in a more proportionate way than the initial proposal by ensuring a higher degree of investor protection and market efficiency.

Article 27 (2)

According to this paragraph, the quote will be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis, and not free of charge as requested by the Commission proposal. This corresponds to part of The Parliament's amendment 88 – which has been slightly redrafted.

This paragraph also includes an exemption from the obligation to trade at the quoted prices in respect of transactions where execution in several securities is part of one transaction. This corresponds with part of the Parliament's amendment 33.

Article 27 (3)

The firms have the possibility to decide to whom they give access to their quotes, provided this is done on a non-discriminatory basis. It follows The Parliament's amendment 88 in this issue.

Article 28 (1)

This paragraph has been reworded in the common position in order to introduce more flexibility on the time period within which investment firms have to make public the post-trade information. According to the Common position, this information will be made public "*as close to real time as possible*" and not "*immediately*" as requested by the Commission's proposal. It follows the Parliament's amendment 151.

Article 30 (1)

The common position provides that requirements for post-trade transparency for MTFs do not apply where the trades are made public under the rules of a regulated market. It incorporates the Parliament's amendment 95.

Chapter III - rights of investment firms

Article 34 (1)

This article deals with the right of the investment firms to have access to a central counterparty, clearing and settlement facilities and to designate settlement systems. In the common position the term "possibility" used in the Commission's proposal has been replaced by the term "right" incorporating the Parliament's amendment 99.

Title III - regulated markets

Article 36 (1) third sub-paragraph

A new sub-paragraph has been introduced in the common position to clarify the obligations laid down in the directive in those cases where the regulated market is a legal person and is managed or operated by a market operator other than the regulated market itself. It reflects the Parliament's amendments 11, 158 and part of 80 and 112.

Article 36 (1) fourth sub-paragraph

A new sub-paragraph has been introduced in the common position replacing article 33 (4) of the initial Commission's proposal. According to the new formulation, the responsibility lies to the operator of the regulated market to 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. Consequently, the market operator will also be responsible for notifying the competent authority of any intended change to the conditions or programme of operations of the regulated market. This paragraph takes into account the Parliament's amendment 103.

Article 36 (2)

This paragraph has been redrafted in the common position in order to **require market operators** to perform tasks relating to the organisation and operation of the regulated market. It incorporates therefore the Parliament's amendment 101.

Article 39 (d)

The requirements of the trading rules and procedures of regulated markets have been simplified in the common position taking into account the objective of the Parliament's amendment 108.

Article 40 (1)

New drafting has been introduced with respect to the rules regarding the admission of financial instruments to trading, following the Parliament's amendment 109.

Article 40 (5)

This paragraph requires the regulated market to inform the issuer of the fact that its securities are traded on that regulated market. It also requires compliance with the relevant provisions of the Prospectus Directive. It reflects the spirit of the Parliament's amendment 112.

Article 40 (6) c)

This indent states that comitology measures should clarify the arrangements that Regulated markets are to put in place in order to facilitate their members access to the information which has been made public in the conditions established under Community law. It takes into account the Parliament's amendment 114.

Article 42

Article 39 (2) of the Commission's proposal (access to the regulated market) has been modified in the common position. The limitation on access to regulated markets only to eligible counterparties has been deleted. A more flexible regime on access to regulated market has been included in the text of the common position. It takes into account of the Parliament's amendment 116.

Article 43 (2)

The common position has introduced some changes to the initial Commission proposal in relation to the obligations of the market operators. The text of the common position obliges them 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. Market operators will not be obliged to provide details of insignificant rule breaches. This change takes into account the Parliament's amendment 117.

Article 44

This article provides for pre-trade transparency requirements for regulated markets. Paragraph 3 which is a comitology provision takes into account the Parliament's amendment 118 and provides that the implementing measures should define the size or type of orders for which pre-trade disclosure may be waived.

Title V final provisions

Article 67 (3)

This Article amends Directive 93/6/EEC by including, inter alia, a modification in relation to the guarantees required to certain investment 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. These persons will be able to choose either to hold capital or professional indemnity insurance or a combination or both. It reflects the Parliament's amendment 134 and part of 36.

By establishing a particular regime for those investment firms carrying out both the services abovementioned and the activity of insurance mediation, this new provision implicitly recognises that the investment firms considered can cumulate the two activities. This provision is in line with the spirit of the Parliament's amendment 133.

Article 68

This article introduces a new paragraph in Annex I of Directive 2000/12/EC according to which the services and activities considered in the ISD, when referring to the financial instruments provided for there, are also subject to mutual recognition according to the

Banking Directive. Therefore the passport granted to credit institutions under the Banking Directive may cover the services and activities of the ISD. It takes into account the Parliament's amendment 135.

3.2.2. Amendments accepted by the Commission and not included in the common position

Parliament's amendment 20

The intention of the amendment is to clarify that the service of order execution also includes acting on behalf of clients on a regulated market, MTFs or any other comparable third country system. Although the Council's common position does not include the wording proposed in the amendment, the Commission considers that the current wording is sufficiently broad and flexible.

Parliament's amendment 62

The amendment specifies that best execution shall take into account the type and size of order and the nature of the client.

The Commission considers that the common position is still acceptable, pursuant to article 21 (6) a), these factors will be taken into account in the implementing measures on the application of the best execution requirements. They are contained in the concept of best execution.

Parliament's amendment 68

The amendment proposes to include flexibility to the "time of reception rule", by adding a particular reference to the aggregation policy or to the agreement of the client;

The Commission agrees that a reference to the aggregation policy of the firm could be included in the text since it reflects current market practice. Although the Council's common position does not refer explicitly to it, the Commission considers it can be dealt through the implementing measures following article 22 (3) a).

Parliament's amendment 74

The amendment aims at introducing some changes to the tied agents' regime. It gives the possibility to investment firms to directly appoint tied agents. The Common position allows Member States to grant that possibility to firms. The Commission considers it is more reasonable to leave the option to Member States to decide whether they recognise the activity of tied agent in their territory in a coherent manner – and establish national rules and practices which will regulate this activity if they wish to– than leave this option at the discretion of each individual firm.

In relation to paragraph 2 of the amendment, the Commission considers there is no need to introduce such a change in article 23 as the guarantees requirements are adequately covered in Article 67 taking this point into account.

In relation to Paragraph 7 the Commission considers that the requirements of this proposal are already aligned with the ones provided for in the Insurance mediation Directive – thus there is no addition to include an express reference in this text.

Parliament's amendment 87

According to this amendment, pre-trade transparency obligation should not apply to those systematic internalisers that do not represent an important provider of liquidity for the share in question on a regular or continuous basis.

The common position does not contain such a provision. Even if the absence of this provision does not substantially affect the scope of the obligation, the Commission considers that it could be useful, in terms of market efficiency, to explore the possibility to include the spirit of the European Parliament's amendment.

Parliament's amendment 89

The amendment provides for comitology when defining what standard market size is. The Common position uses the term "normal market size". The Commission accepts that comitology is needed in order to define this term (standard market size) if used in the Directive.

Parliament's amendment 92

The intention of the amendment is to specify that where the information contained in the transaction is of little or no use it should not be disclosed.

The Commission considers that the spirit of this amendment is already contained in the current text. In particular it is implicit in the comitology provisions of article 28.

Parliament's amendment 96

The aim of the amendment is to eliminate the need for investment firms to wait for the home member State to notify the host before exercising the freedom to provide services.

According to the Common position, investment firms may only start their activities after such notification. The Commission can also agree with it as this approach is in line with the Life Insurance Directive.

Parliament's amendment 97

The aim of the amendment is to avoid the application of host country rules to branch operations of credit institutions.

According to the common position, both credit institutions and investment firms will be subject to the same rules when providing investment services or performing investment activities through branches. The Commission considers this approach will ensure a level playing field between these entities.

Parliament's amendment 111

The first subparagraph of the amendment proposes a drafting change so as to clarify the scope of the obligation for regulated markets when admitting financial instruments to trading.

The Commission considers that the substance of part of this amendment, which is a mere drafting suggestion, is already included in article 40.3.

Parliament's amendment 121

The aim of the amendment is to avoid restricting the possibility for Regulated markets to use third countries' clearing systems.

The Commission considers that this is an important issue, however taking into account that targeted actions in the field of clearing and settlement are about to be launched, the Commission could accept with the Common position.

Parliament's amendment 123

The amendment intends to ensure the cooperation between extra-judicial mechanisms for investor complaints in order to identify, share and encourage best practices. The Commission favours this approach that was not taken on board on the Council's common position. Nevertheless the approach finally followed by the Council is in line with the approach followed in other Directives in the field of investment services.

Parliament's amendment 125

The amendment intended to stress that the intervention by the host competent authorities should only occur in exceptional circumstances.

The Commission considers that, although this amendment has not been included in the common position, according to the text host competent authorities will in practice only intervene in exceptional cases.

Parliament's amendment 126

The amendment states that the Commission should take into account the impact of the implementing measures on the market participants and their proportionality to the regulatory goals. The Commission would have this amendment incorporated in a recital as a reminder of a generally accepted principle governing the legislative activity of EU institutions, but not in the text of the Directive. In this context, though such a recital has not been proposed by the Council, the substance of the Directive is not affected.

Parliament's amendment 129

The amendment proposes to extend to five years the deadline established for the Commission to report to the European Parliament and Council on different issues.

The Council's common position has agreed on a deadline of 30 months. To ensure better monitoring of the effectiveness of the provisions of the Directive, the Commission can also agree with this deadline.

Parliament's amendment 140

The intention of the amendment is to include charitable trusts as possible professional investors.

The Commission considers that those charitable trusts, when holding significant funds to invest, will usually be included in this category of clients that, according to number 2 of Annex II, may be treated as professional on request. This solution provides a more flexible regime than that proposed by the European Parliament amendment.

Other amendments

A series of amendments which had been accepted by the Commission, in their entirety or partly or in spirit, have not been included in the common position. Some of those amendments provided for clarification or explicative guidance or were substantial or linguistic improvements to the text without affecting the substance of the text. Although the Commission would have preferred these improvements in the text, it can still accept the common position since the main lines are the same in all three texts, i.e. the initial Commission proposal, the EP amendments and the Council common position. The amendments referred to are amendments 2, 56, 110, 115, 124, 139, 143 and 144. Along the same lines amendments 7 and 8 have not been literally incorporated in the common position; they were intended to modify respectively recitals 21 and 24 of the initial proposal which were finally deleted from the text of the common position because they were redundant to the text of the Articles of the Directive. Nevertheless, the substance of the text is not affected since the parallel amendments (44 and 53) to the Articles of the Directive – Art 14 (4) and 19 (4) - were included in the common position; we consider that Amendments 7 and 8 are still accepted in spirit in the common position. Amendment 26 refers to the definition of "market order"; it has not been introduced because that definition has been deleted.

3.3. New provisions introduced by the Council

A number of new elements have been introduced in the common position compared to the initial Commission proposal and the amendments proposed by the EP. The majority of those new elements complete or make clearer the text of the initial proposal or add nuances to the initial text to take account of the different types of instruments, services and activities covered by this Directive. The main new provisions are dealt with in the detailed comments that follow. These comments do not refer to those changes introduced by the Council that only relates to the internal structure of the text, such as part of the modifications introduced in articles 4, 16, 17, 18, 19, 20, 21, 22, 48 and 49.

The common position is largely in line with the Commission proposal and the new provisions introduced by the Council do not alter its substance.

Recitals

The recitals have been amended in line with the changes to the enacting terms of the Directive set out below.

Recital 16

It makes clear that the person concerned has to comply on a continuous basis with the conditions laid down in Article 2 in order to benefit from the exemptions.

Recital 19

It clarifies that investment firms providing one or more investment services not covered by their authorisation, or performing one or more investment activities not covered by its authorisation, on a non-regular basis do not need an additional authorisation.

Recital 20

In relation with the definition of "reception and transmission of orders", the common position has introduced a recital in order to clarify that it also includes bringing together two or more investors thereby bringing about a transaction between those investors.

Recital 26

In relation to Article 13 (7) and (8), the common position has introduced this recital to make it clear that where a client, in line with Community legislation and in particular the Financial Collateral Directive, 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 shall no longer be regarded as belonging to the client.

Recital 29

In relation to article 19 (6), the Council has introduced a new recital that clarifies one for the conditions for not carrying out the suitability test, i.e. that the service is provided at the initiative of the client or potential client.

Recital 33

The text includes a recital on the need to remove obstacles that may prevent the consolidation at the European level of the relevant information and its publication in order to ensure fair competition and allow investors to compare the prices of different trading venues.

Recital 34

It clarifies that investment firms might ask the client or potential client to consent at the same time to their execution policy as well as to the possibility that its orders may be executed outside a regulated market or an MTF.

Recital 35

It clarifies that persons providing 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.

Recital 38

Following the approach taken on investment firms, Member States' competent authorities should only register those tied agents which intend to carry on their activities or carry out the greater part of their activities in their territories.

Recital 39

This recital is linked to the changes introduced in article 24 and provides that eligible counterparties should be considered as acting as clients. The Commission considers that this modification was necessary in order to take account of the modifications that the common position introduced in respect of the scope of the eligible counterparty regime.

Recital 41

This recital refers to new Article 24 (1) and explains that the obligation to disclose client limit orders only applies in the case that the counterparty is explicitly sending a limit order to an investment firm for its execution.

Recital 42

A new recital has been introduced to remind the obligation for Member States to protect the right to privacy of natural persons.

Recital 44

This recital explains the cases where Member States may decide to apply the pre- and post-trade transparency requirements laid down in this Directive to financial instruments other than shares.

Recital 47

It comments on the scope of the authorisation of regulated markets. It also provides further explanations on which transactions should be considered as concluded within the system of a regulated market.

Recital 49

This recital explains that the minimum capital requirements with which regulated markets should comply in order to be authorised under this Directive will be fixed through the revision of Directive 93/6/EEC and not through comitology as initially foreseen in the Commission's proposal.

Recital 52

A new sentence has been included to remind that Member States (obligations cannot be included in recitals), in accordance with national law, should ensure appropriate financing of the competent authority.

Recital 56

It recalls that 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.

Substantive provisions

Title I - definitions and scope

Article 2

The common position has introduced one additional exemption in Article 2 (1) (j) for those 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.

Article 4

The definition of investment advice (article 4.1.4) has been complemented to clarify that this kind of service can be provided either upon clients' request or at the initiative of the investment firm.

A new definition on "market maker" (article 4.1.8) has been introduced as it was considered necessary for the correct delimitation of the exemptions.

The definition of portfolio management (article 4.1.9) which was previously included in the Annex I has been moved to this article.

The definition of Host Member State (article 4.1.21) has been complemented to consider regulated markets.

Title II - authorisation and operating conditions for investment firms

Chapter I - conditions and procedures for authorisation

In **article 9** (Persons who effectively direct the business) the common position has introduced a new subparagraph in paragraph 1 in order to avoid duplication of work when the market operator of a regulated market seeks authorisation to operate an MTF.

In paragraph 1 of **Article 10** the common position clarifies the functions of the competent authorities and paragraph 4 has been amended to include also authorised management companies of UCITS.

In **article 14** (Trading process and finalisation of transactions in an MTF), the Council eliminated the comitology provision as it did not consider it necessary.

Chapter II - operating conditions for investment firms

The common position has eliminated **Article 17** of the Commission proposal (On-going capital endowment) as it was considered superfluous.

In **Article 19**, the common position has introduced the following changes

- A new paragraph (number 5) on the information investment firms have to obtain when providing services other than investment advice or portfolio management. It also sets up the obligation of the investment firms to warn the client or potential client if the investment firm considers, on the basis of the information received, that the product or service is not appropriate or if the client does not provide the information or where he provides insufficient information
- a new paragraph (number 9) to clarify that the obligations set out in that Article do not apply in case 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 requirement.

On tied agents (**Article 23**), the common position provides that Member States may allow 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. In the case of a cross-border operation, these tied agents authorised to handle clients' funds and/or financial instruments may continue with this practice in the territory of another Member State only if this allows their tied agent to handle them.

In **Article 24 (transactions executed with eligible counterparties)**, the Council's common position has introduced some changes. This regime will not only cover the execution of orders but also its reception and transmission and ancillary services directly related to those transactions. It also provides that only paragraph 1 of article 22 shall not apply in transactions between eligible counterparties.

Some persons have been automatically considered as eligible counterparties, namely UCITS, pension funds and their management companies, commodities dealers and national governments.

The article includes now a paragraph, number 4, on third country entities. Comitology provision is more precise and takes into account of above changes.

The main changes in **Article 25** relate to the reporting obligation. The reports must be sent to the competent authority of the home Member State, except in the case of branches where, in accordance with Article 32 (7), reports are transmitted to the competent authority of the host Member State. This authority will transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide they do not want to receive this information.

Other changes relate to the need for competent authorities to 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

Article 26 has been redrafted to clarify that investment firms and market operators operating an MTF should only report to the competent authorities significant breaches of their rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. The provision on implementing measures has been deleted.

Article 27 allows for the possibility to improve quoted prices in respect of transactions undertaken with professional investors provided that the improvement falls under a public spread and provided that the investment firm complies with the conditions established in that provision.

On **Article 28** (post-trade disclosure by investment firms) the main changes refer to the introduction of the term "at least" so as to make clear the minimum nature of the provision (i.e. Member States may go beyond this minimum requirement) and the replacement of the term "immediately" by "as close to real time as possible" to provide for more flexibility for investment firms.

Articles 29 and 30 on pre-and post-trade transparency requirements for MTFs have been aligned with Articles 44 and 45 (transparency requirements for regulated markets). Council has also introduced a comitology provision clarifying that, 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 and 45 respectively for regulated

markets. Amendment 95 of the European Parliament has been incorporated as proposed and amendment 94 has been partially included in the common position.

Chapter III - rights of investment firms

Chapter III follows largely the approach of the Commission proposal.

Articles 31 and 32 on free provision of services and establishment of a branch make it clear that ancillary services may only be provided together with an investment service and/or activity.

Both articles also include a new paragraph obliging home member State competent authorities to communicate the identity of the tied agents when requested by the host authorities.

A new paragraph has been included in article 31 obliging investment firms or market operators to provide information when intending to arrange for access and use of their systems by users established in a host Member State.

On article 32, the main change compared to the Commission's proposal is that the scope of Article 32(7) is extended to cover articles 21, 22, 25, 27 and 28, and that it has been made clear that the competent authority of the host Member State of the branch shall only assume responsibility regarding services provided by the branch within its territory. Services provided by the branch outside the Member State in which the branch is located, remain under the responsibility of the home Member State. This paragraph shall apply both to investment firms and credit institutions.

In **Article 33** Council has eliminated the reference to indirect access as it was unnecessary. Paragraph 3 has also been deleted. It was redundant with article 42 (1).

In **Article 34** the main changes refer to the replacement of the term "possibility" by "right" to provide for more flexibility for investment firms.

The article includes a new paragraph clarifying the competences of the national central banks as overseers of settlement systems or other supervisory authorities on such systems. The comitology provision has been eliminated to avoid interferences on any future measures on clearing and settlement arrangements;

A new **article 35** on provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs has been introduced.

Title III - regulated markets

Article 36

The common position has aligned this article on authorisation and applicable law following the corresponding provisions on investment firms. It also provides further clarity on the distinction between the market operator and the market.

Article 37

The common position has reworded Commission's proposal to clarify these requirements for the management of the regulated market. The issue of financial resources are now included in Article 39(f) and will not be established through comitology but on the revision of the Directive 93/6/EEC (Capital Adequacy Directive).

Article 38

The Common position has replaced the term "effective control of the regulated market" used in the Commission proposal by "significant influence over the management of the regulated market". In paragraph 2 it refers to the operator of the regulated market and not the regulated market itself.

Article 39

Paragraph d) has been redrafted and eliminates the need for prior approval by the competent authorities of the rules of the regulated market. As mentioned above, it also includes the financial requirements for regulated markets.

Article 40

The common position has eliminated the need for prior approval by the competent authorities of the rules regarding the admission of financial instruments to trading. It also has added in Paragraph 6 a new indent concerning the arrangements that the regulated market has to establish in order to facilitate its members or participants in obtaining access to information which has been made public in the conditions established under Community law.

Article 41

The Council common position has added a provision stipulating the competent authorities of Member States, other than the one which has demanded the suspension or removal of an instrument, upon being informed the suspension or removal, shall in turn demand the suspension or removal of that financial instrument from trading on the regulated markets and MTFs that operate under their authority.

Article 42

In paragraph 2, the common position has replaced the limits for access to regulated markets to the concept of eligible counterparties proposed by the Commission with a more flexible regime.

It has also eliminated unnecessary references to indirect members or participants.

A new paragraph on the provision by the regulated markets of arrangements in the territory of other Member States has been introduced. It follows the approach adopted for investment firms.

Article 43

The common position has amended this article on monitoring of compliance with the rules of the regulated market and with other legal obligations. Now the monitoring should focus on the compliance by its members or participants with the rules of the market and not on the transactions undertaken by the members.

The text has been amended to clarify that the authority competent for the investigation and prosecution of market abuse may be different from the competent authority of the regulated market.

The text only requires reporting to the authority significant breaches of the rules.

Article 44 and 45

The text allows regulated markets to charge systematic internalisers for the access to their arrangements for the publication of prices.

Paragraph 2 of article 44 has been broadened and allows pre-trade transparency to be waived based on the market model and the type and size of orders. Paragraph 2 of article 45 has also been modified and allows deferred publication of the details of transactions not only on the basis of their size but also on their type.

The comitology provision has been simplified.

Articles 46

The article on central counterparty and clearing and settlement arrangement includes a new paragraph, like article 35, aiming at avoiding duplication of control.

Article 47

According to the change introduced by the Council, the Commission is obliged to update its website each time a Member State communicates changes to its list of regulated markets.

Title IV - competent authorities

This Title IV has been restructured in three Chapters. The first one refers to their designation, their powers and redress procedures. It also establishes the obligation for these authorities to cooperate on a national level and the rules of professional secrecy. The second one sets out the rules on cooperation between competent authorities of different Member States, including provisions on cooperation and cross border exchange of information. The last chapter deals with the cooperation with third countries.

Chapter I - designation, powers and redress procedures

Article 48

The common position has reworded the provision on delegation in a more precise manner. Any delegation of tasks to entities other than the authorities referred to will not involve either the exercise of public authority or the use of discretionary powers of judgement.

Article 49

It replaces Article 45 (3) of the Commission's proposal. The obligation has been extended to also include cooperation between competent authorities for the supervision of pension funds, UCITS and insurance and reinsurance intermediaries.

Article 50

The Council has aligned this article with Article 12 of Directive 2003/6/EC on insider dealing and market manipulation.

A new competence, the right to allow auditors or experts to carry out verifications, has been added in (m) as a necessary complement to the powers and rights set out in the Commission proposal.

Paragraph 2 of article 46 of the Commission's proposal, on the need for competent authorities to have adequate resources, has been replaced by a new sentence in Recital 52, following Directive 2003/6/EC on insider dealing and market manipulation.

Article 53

Member States are no longer obliged to set up redress procedures but to encourage its setting.

Article 54

The common position has added three new paragraphs

Paragraph 3 and 4 regulate the use of confidential information received. Paragraph 3, which imposes the rule of professional secrecy, is largely aligned to Article 16(2) last subparagraph of Directive 2003/6/EC (market abuse).

Paragraph 4 stipulates to which extent information may be transmitted, and sets out in a more clear and coherent manner than in Article 54 of the Commission proposal. The drafting has been adapted to the new structure, in particular Article 48 (Member States may designate more than one competent authority) and Article 56 (Member States shall designate a contact point for the purposes of cooperation and exchange of information).

Paragraph 5 makes it clear that 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.

Chapter II - cooperation between competent authorities of different Member States

Article 56

The Council has introduced an obligation for Member States to designate one single competent authority as a contact point in order to facilitate and accelerate cooperation, and more particularly exchange of information.

New paragraph 2 obliges host and home competent authorities to ensure cooperation between in cases of cross-border regulated markets, where the operations of a regulated market authorised in its home Member State has established arrangements in a host Member State which have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State. New paragraph 6 provides for implementing measures in order to determine the criteria in which to establish when operations of a regulated market in a host Member State could be considered of substantial importance.

Article 53 of the Commission proposal has been divided into two articles, **Article 57** and **Article 59**, in order to make the text more clear. Article 57 allows the competent authority of a regulated market to address remote members of that market directly.

Article 58 has been restructured. It only deals with exchange of information between Member States through the contact points. The Commission may adopt implementing measures concerning procedures for the exchange of information between competent authorities.

In Article 62, Council has extended precautionary powers for host competent authorities for the cases of branches and regulated markets and MTFs.

Chapter III - cooperation with third countries

Article 63

Changes in this article reflect the new structure of Title IV.

Title V final provisions

Article 65

In paragraph 1 the common position has brought forward by two years the date of the report.

A new paragraph 2 has been introduced requesting the commission to report on the application of Article 27 (pre-trade transparency).

In paragraph 3, the common position requests the Commission to report on the following additional subject issues:

- 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,
- the continued appropriateness of the exemption under Article 2(1)(i),

New paragraph 4 requires the Commission to report on the state of the removal of obstacles which may prevent the consolidation at European level of the relevant information and its publication. In this respect it is recalled that recital 33 states that fair competition requires that market operators and investors are able to compare the prices that trading venues (i.e. regulated markets, MTF 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,

New paragraph 5 requires the Commission to report on the continued appropriateness of the requirements for professional indemnity insurance imposed on intermediaries under Community law.

On the basis of those reports, the Commission may, where relevant, submit proposals for related amendments to this Directive.

Article 66

The text of Article 61 of the Commission proposal remains unchanged.

Article 67

The common position modifies Article 62 of Commission's proposal. The necessary technical amendments have been made to Article 3(4) Directive 93/6/EEC, and the capital requirements for the 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 have a particular regime under Article 3(4) Directive 93/6/EEC.

These firms may choose between a minimum initial capital requirement, professional indemnity insurance or a combination thereof. These persons will have a less stringent regime, if they are also registered under Directive 2002/92/EC on insurance mediation and subject to the requirements of that Directive as well.

Articles 68

The common position amends annex I of the Banking Directive in a different manner than the Commission's proposal. Instead of introducing in it references to new activities or financial instruments, it adds a new paragraph stating that the services and activities provided for in Section A and B of Annex I of this Directive when referring to the financial instruments provided for in Section C of Annex I of that Directive are subject to mutual recognition according to the Banking Directive.

Articles 69 and 70

These articles remain broadly in the same line as the Commission's proposal. The transposition period has been extended from 18 to 24 months.

Article 71

The Council has introduced a technical transitional provision to facilitate the smooth entry into force of the new directive.

ANNEX I

Section A

The common position has simplified the drafting of the investment services as some definitions have been included in article 4. It has also split number 6 in two.

Section B

A new service has been introduced: Services related to underwriting.

Section C

The list of financial instruments has been reworded in order to provide further clarity, in particular in relation to the commodities derivatives.

ANNEX II

The common position has introduced some minor amendments in the categories of clients who are to be considered to be professional by including locals and other institutional investors.

4. CONCLUSION

The Commission considers that the Common Position adopted by the Council on 8 December 2003 is faithful to the objectives and the spirit of the Commission proposal of 29 November 2002.

The Commission also considers that the Common Position meets the main concerns of the European Parliament and follows some of the key elements of the Parliament's amendments.

The Commission believes that the Common Position achieves a good balance.

The Commission therefore recommends this Common Position to the European Parliament.