



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION TO THE COUNCIL

**on the operation of certain articles in the directive**

# Investment Services Directive

## Commission report to the Council on the operation of certain articles in the directive

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### 1. Introduction

The Commission is required to report to the Council on the application of a certain number of articles in the Directive and to propose modifications to the text of the directive if these appear necessary and desirable. This report summarises the information the Commission has received from Member States regarding:

- natural persons providing investment services (Article 1)
- exemptions (Article 2 (2))
- concentration of trading on regulated markets (Article 14 (3) and (4))
- membership and access to regulated markets (Article 15 (3))
- regulated markets (Article 16)
- transparency of trading on regulated markets (Article 21)

The Commission is now in a position to report on any difficulties encountered with the application of the above mentioned articles based on replies to questionnaires addressed to Member States. This report does not attempt to summarise purely factual information concerning Member States' implementing rules, but concentrates on any points of difficulty that have emerged.

Where no information in the following tables is given, this is because the Member State in question did not reply on that particular point.

The ISD provided that there should be separate reports in respect of the various articles, to be submitted at different dates i.e. 31 December 1996 for article 16, 31 December 1997 for articles 1 and 21, 31 December 1998 for articles 2, 14 and 15. However, because not all Member States had implemented the directive early enough to have benefited from practical experience with the operation of these provisions it was decided to deal with the six separate articles in a single report.

## 2. Natural Persons (Article 1)

The second and third sub-paragraphs of point 2 of Article 1 set out the circumstances in which natural persons can be included in the definition of "investment firm". The Commission is required to report on the application of these two sub-paragraphs and, if appropriate, could propose their amendment or deletion.

The possibility of authorising persons other than legal persons as investment firms has not been contemplated in most MS. For this reason this question has not given rise to any particular difficulties in those countries.

<b>Country</b>	<b>Can Natural Persons be Investment Firms?</b>
Austria	No
Belgium	No
Denmark	No
Finland	No. Finland proposes that the two subparagraphs of Art.1(2) should be deleted
France	No
Germany	Yes
Greece	
Ireland	
Italy	No
Luxembourg	Firms handling money or securities for third parties must be formed as legal persons. It is possible, however, for "commission agents" (commissionnaires) to be natural persons, although none exist at the moment.
Netherlands	Yes
Portugal	No
Spain	Spanish legislation does not allow natural persons to provide investment services. Spain would like to limit the scope to legal persons.
Sweden	No
UK	The UK has investment firms who are "natural persons". Under UK law, natural persons would include sole-traders and partnerships in England and Wales.

### Conclusion

The Commission sees no current need to amend or delete these sub-paragraphs.

### 3. Exemptions (Article 2 (2))

In Article 2(3) the Commission is required to report on the application of the exemptions in conjunction with Section A of the Annex. The report is due to be made by 31 December 1998 and at regular intervals thereafter.

Country	Difficulties/Remarks
Austria	Austrian legislation has exempted: - point (a) (insurance companies) - point (c) (lawyers, fiduciary-administrators) - point (f) (central bank) - point (h) (UCITS)
Belgium	Problem as regards the activity of reception and transmission of orders. An intermediary who acts exclusively as a "courtier" (=name-passing broker) in respect of financial instruments listed in Section B of the annex is covered by the directive's scope. Some Member States have not interpreted the directive in this sense. In these countries the activity of "courtier" is not covered by the directive, which means that companies only carrying on this activity do not have to respect the directive's requirements. This gives rise to a competitive distortion which is harmful to Belgian "courtiers". All Member States should have the same approach on this point. Belgium has implemented the exceptions contained in Article 2.2 point (a) to (f) and points (h) to (j).
Denmark	DE has transposed the exceptions mentioned in Art.2 (2) point (a) to (f) and points (h) to (k). There are no practical problems and therefore DE does not see any need for amending Art.2(2) of the ISD.
Finland	The provisions have not given rise to any difficulties. Amendments are not necessary.
France	
Germany	Use has been made of exemptions in points (a), (b), (c), (d), (e), (f), (g), (i), (j)
Greece	Interpretative difficulty regarding (g). Do firms which receive and transmit orders constitute "investment firms" for the purpose of Art. 11 (1) of the ISD, i.e. whether their exclusion from the scope of the Directive makes them firms with a specific function which prevents them from meeting the requirements of the definition of "investment firms".

Ireland	<p>IRE sees some inconsistency between Art. 2(2)(g)(iv) and Art. 2(2)(h) in exempting certain firms from the ISD.</p> <p>Art.2(2)(g) states that a firm which complies with three specified criteria is exempt from the ISD where it passes orders in a limited range of investment instruments to any of five categories of firms. One of these categories – (iv) – is “collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings”.</p> <p>Art.2(2)(h) exempts from the ISD “collective investment undertakings whether co-ordinated at Community level or not and the depositaries and managers of such undertakings”.</p> <p>It is not clear why in one case the exemption is limited to schemes co-ordinated at Community level whereas in the other it is not. Is this intentionally so and, if so, what is the rationale for the different wording.</p> <p>Regarding Art.2(2)(h), there are occasions where there is no expressly nominated manager e.g. an investment company may appoint an administration company and/or an investment manager to conduct the activities normally carried on by the manager. In such cases are either or both the administrator and the investment manager exempt as they are carrying out the duty of the manager? Is it the intention of the exemption also to exclude from the ISD administrators and service providers to collective investment schemes other than the managers and the depositaries? If not, is it accepted that fund administrators could be conducting activities which would fall under the ISD i.e. receiving and transmitting and/or executing orders in units of collective investment schemes or is the view taken that such entities do not conduct ISD business?</p>
Italy	<p>Use has been made of exemptions in points (a),(b),(c),(f),(i). Italy mentions so-called “enti pubblici che prestano I servizi di investimento previsti da specifiche norme di legge” as an exemption, which does not appear to correspond to any of the exemptions provided in the ISD.</p>
Luxembourg	<p>No difficulties have been encountered with the exemptions.</p>
The Netherlands	<p>According to the Dutch securities legislation, category a,b,c,d,e,f,h,i and j are not subject to the licence requirement for investment institutions</p>
Portugal	<p>The implementation and application of the exclusions caused no problems for the competent authorities (Banco de Portugal and Commissao do Mercado de Valores Mobiliarios).</p>
Spain	<p>Use has been made of the exemptions. No particular difficulties have been encountered with them.</p>
Sweden	<p>The definitions have not caused any implementation problems.</p>
UK	<p>No amendments to Art.2 (2) or Section A are necessary</p>

**Conclusion:** At the present stage no specific amendments to the list of exemptions and the list of services seem necessary. A common interpretation of the “courtier” problem raised by Belgium would be useful, as would replies to the questions raised by Greece and Ireland.

#### 4. Concentration (Article 14)

Article 14 paragraph 5 requires the Commission to report by 31 December 1998 on the operation of paragraphs (3) and (4), which provide that transactions in listed instruments may under certain circumstances be required to be carried out on regulated markets.

Country	Difficulties / Remarks
Austria	AU has not made use of the possibilities foreseen in this article. It sees no need for any amendments.
Belgium	BE has implemented art.14 (3). It formulates its problems as follows: "...However, as regards freedom to provide services a problem of interpretation could arise as to what is meant by "being active in Belgium" (without an establishment there. This problem arises each time a service is provided on a cross-border basis. This concept should be clarified by means of an EU interpretative communication."
Denmark	DE has not made use of the possibilities in art.14 (3) and (4), and has no suggestions for amendments
Finland	The provision has not given rise to any difficulties. Amendments are not necessary.
France	
Germany	This article has been implemented. No changes are necessary.
Greece	The law implementing this Article prohibits over-the-counter trading in securities listed on the Athens Stock Exchange (the principle of concentration of trading), while allowing over-the-counter trading in securities listed on other regulated markets subject to certain conditions. Up to now there has been no need to apply this provision.
Ireland	No difficulties / observations
Italy	
Luxembourg	
The Netherlands	Has not made use of the possibilities in article 14(3) and (4)
Portugal	There is at present no requirement under Portuguese law that trading in securities be concentrated on the regulated market where they are listed, except as far as derivatives are concerned. The Securities Markets Code empowers the Minister of Finance to issue orders requiring that transactions in securities be carried out on a regulated market in accordance with the conditions laid down in Article 14(3) of the ISD. If any such order were to be issued, it would lay down the conditions under which investors could authorise transactions to be carried out away from a regulated market.

Spain	Concentration applies. No need to change the text of paras. (3) and (4).
Sweden	The possibility in this article to require that certain transactions be executed on a regulated market has not been provided for. SW does not see any need for amendments.
UK	It would be helpful to re-confirm that Art.14 (3) and 14 (4) mean that a Member State can require transactions to be carried out on a regulated market – as opposed to off-market, and subject to the “opt-out” in Art.14(4) – but do not permit a Member State to require transactions to be carried out on a particular national regulated market.

**Conclusion:**

The Commission sees no present need to propose amendments to paragraphs (3) and (4) of article 14. It shares the interpretation of paragraph (4) held by the UK delegation.

## 5. Membership and access to other regulated markets (Article 15 (3))

In Article 15(3) a transitional period is allowed to Spain, Greece and Portugal to defer direct access by credit institutions to regulated markets until 31 December 1999. This period could be extended further on the basis of a Commission proposal. An updated list of regulated markets is given in the Annex.

Country	Difficulties / Remarks
Austria	None
Belgium	None
Denmark	
Finland	None
France	
Germany	None-Germany suggests amending article 15(4) so that when screens are installed in other Member States the competent authorities of the other Member State are notified.
Greece	
Ireland	None
Italy	None
Luxembourg	Even companies from the EEA can become remote members of the Luxembourg stock exchange
The Netherlands	None
Portugal	None
Spain	There is a transitional period for access by credit institutions (until 1 January 2000)
Sweden	
UK	None

### Conclusion:

The Commission believes that there have been no problems with direct access by credit institutions which would justify an extension of the transitional period for Spain, Greece and Portugal.

The German suggestion concerning article 15(4) seems to merit further study, as it is unclear whether remote membership requires notification under article 18.



## **6. Regulated markets (Article 16)**

### **6.1 Current list**

The Member States have indicated to the Commission the markets they have chosen to designate as "regulated markets" for the purposes of the Directive. The list of "regulated markets" was published in Official Journal of the European Communities No C 203 of 3 July 1997. A draft updated list is given in the Annex.

### **6.2 Problems with the definition of a "regulated market"**

#### **6.2.1 Italy**

The Italian supervisory authority has recently looked into the implications of a transaction whereby commodity derivatives as well as financial instruments referred to in Section B of the Annex to Directive 93/22/EEC are traded on a regulated market established in another Member State and appearing on the list referred to in Article 16 of the Directive. The derivative instruments in question are not listed in Section B of the Annex to the Directive and the market segment in which they are traded consequently does not figure among the regulated markets notified under Article 16 of the Directive. This creates uncertainty as to whether or not that market segment qualifies for the mutual recognition established by Community legislation.

#### **6.2.2 Spain**

The Spanish authorities have expressed a similar point of view.

### **Conclusion:**

The difficulties of application of the definition of "regulated market" reported by Italy and Spain do not appear to call into question the way in which the definition itself is worded. The Commission does not believe that it is necessary to propose an amendment to the definition.

## 7. Transparency (Article 21)

Article 21(4) requires the Commission to report on the transparency regime and envisages possible amendments to that regime.

Most Member States that submitted written responses to the Commission's questionnaire indicated that they had no particular difficulty with the implementation of Article 21.

<b>Country</b>	<b>Difficulties / Remarks</b>
Austria	None
Belgium	None
Denmark	None
Finland	None, the competent authorities have the intention to apply the ISD transparency rules even to the markets not notified as regulated markets.
France	As regards the MATIF the open outcry system does not allow all the information required by article 21 to be given. This is particularly true for the volume at which each price is traded, which is only available on the day following the trade.
Germany	None
Greece	Greece indicated that their exchange believes that the information to be published throughout the session, which is described in Article 21(2)(b), unjustifiably increases the demands made on an electronic system of dealing. As long as the electronic dealing system puts investors in a position to see the prices of shares in reasonable time, the Exchange does not think it necessary to publish the weighted average price and the highest and lowest prices every twenty minutes; the change of software involved would also require additional spending. The same view has been put forward by a majority of European exchanges at the meetings which they have held on the subject of Directive 93/22.
Ireland	
Italy	
Luxembourg	None
The Netherlands	None
Portugal	None
Spain	None
Sweden	None
UK	None

**Conclusion:**

The transparency regime does not appear to have given rise to any particular difficulties, despite the controversy surrounding this topic during the negotiations. No amendment appears necessary.

Draft updated list of regulated markets

**AUSTRIA**

- Wiener Börse AG (official market and semi-official market)

**BELGIUM**

- De eerste, de tweede en de nieuwe markt van de Effectenbeurs van Brussel/Le premier, le second marché et le nouveau marché de la Bourse de valeurs mobilières de Bruxelles
- De Belgische Future- en Optiebeurs, afgekort Belfox/La Bourse belge des futures et options, en abrégé Belfox
- De secundaire buiten-beursmarkt van de lineaire obligaties, de gesplitste effecten en de schatkistcertificaten/Le marché secondaire hors bourse des obligations linéaires, des titres scindés et des certificats de trésorerie
- EASDAQ (European Association of Securities Dealers Automated Quotation)

**DENMARK**

- Københavns Fondsbørs A.S

**FINLAND**

- HEX Oy, Helsingin Arvopaperi- ja johdannaispörssi, selvitysyhtiö/HEX Ab, Helsingfors Värdepapper- och derivativbörs, clearingbolag

**FRANCE**

- Le MATIF
- Le premier marché et le second marché de la bourse de Paris
- Le nouveau marché
- Le MONEP

**GERMANY**

- Berliner Wertpapierbörse (Amtlicher Handel, Geregelter Markt)
- Wertpapierbörse in Bremen (Amtlicher Handel, Geregelter Markt)
- Rheinisch-Westfälische Börse zu Düsseldorf (Amtlicher Handel, Geregelter Markt)
- Frankfurter Wertpapierbörse (Amtlicher Handel, Geregelter Markt, Neuer Markt)
- Eurex Deutschland
- Hanseatische Wertpapierbörse Hamburg (Amtlicher Handel, Geregelter Markt)
- Niedersächsische Börse zu Hannover (Amtlicher Handel, Geregelter Markt)
- Bayerische Börse (Amtlicher Handel, Geregelter Markt)
- Baden-Württembergische Wertpapierbörse zu Stuttgart (Amtlicher Handel, Geregelter Markt)

**GREECE**

- Athens Stock Exchange (AES)
- Thessaloniki Stock Exchange Center (TSEC)

**IRELAND**

- Irish Stock Exchange

**ITALY**

- Borsa Italiana S.p.A.
- mercato ristretto
- mercato di borsa per la negoziazione degli strumenti previsti dall'art. 1, comma 1, lettere f) e i), del d.lgs n. 415/1996 (IDEM)
- mercato all'ingrosso dei titoli di Stato di cui al decreto del Ministro del tesoro 24 febbraio 1994 (MTS)
- mercato dei contratti uniformi a termine sui titoli di Stato di cui al decreto del Ministro del tesoro 24 febbraio 1994 (MIF)

**LUXEMBOURG**

- Société de la Bourse de Luxembourg SA

## **NETHERLANDS**

- Amsterdam Exchanges (AEX), including the following markets:
  - AEX-Stock Exchange (including NMAX – New Market Amsterdam Exchanges)
  - AEX-Options Exchange (including financial futures)

## **PORTUGAL**

- Mercado de Cotações Oficiais da Bolsa de Valores de Lisboa
- Segundo Mercado da Bolsa de Valores de Lisboa
- Mercado sem Cotações da Bolsa de Valores de Lisboa
- Bolsa de Derivados do Porto

## **SPAIN**

- Las Bolsas de Valores de Barcelona, Bilbao, Madrid y Valencia
- Los mercados oficiales de futuros y opciones de Meff Sociedad Rectora del Mercado de Productos Financieros Derivados de Renta Fija, SA y Meff Sociedad Rectora del Mercado de Productos Financieros Derivados de Renta Variable, SA
- AIAF, Mercado de Renta Fija, SA
- Mercado de Deuda Pública en Anotaciones

## **SWEDEN**

- Stockholms Fondbörs AB
- Penningmarknadsinformation PmI AB
- OM Stockholm AB

## **UK**

- The following four of the markets comprising the London Stock Exchange Limited:
  - i. The Domestic Equity Market
  - ii. The European Equity Market
  - iii. The Gilt Edged and Sterling Bond Market
  - iv. The Alternative Investment Market
- The London International Financial Futures and Options Exchange (“LIFFE”)
- OMLX, The London Securities & Derivatives Exchange Limited
- Tradepoint Financial Networks plc