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Conduct of Business Rules and their Implementation in the EU Member States

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Abstract

The purpose of this paper is to analyse how the Member States have implemented and put into operation the principles of conduct of business for investment firms as set out in Article 11 ISD into their national legal systems. This should provide some insight into the degree of convergence brought about by Article 11, or, conversely, whether existing disparities between the Member States constitute a barrier to the integration of the markets for investment services in the European Union. After a few general observations on the genesis and legal character of Article 11 ISD, our attention will focus on the different aspects related to the implementation of the rules of conduct in national law, namely: the regulatory techniques used (self-regulation versus hard law or intermediate forms), the level of regulation (implementation of the minimum or additional standard setting), the legal nature and effects of the conduct of business rules in the Member States, the supervision and enforcement of the conduct of business rules, and, finally, the territorial scope of application of the rules and its supervision. A final section will briefly touch upon the prospects for further developments or harmonization of the conduct of business rules in view of recent developments in both the markets and in regulation.

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Conduct of Business Rules and their Implementation in the EU Member States

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Introduction

More than five years after the entry into force of the Investment Services Directive (ISD), the area of rules of conduct, though concentrated into one single provision of the directive (Art. 11) still gives rise to many questions and debates, whether on technical interpretation issues or about more fundamental issues relating to the need for (further) harmonization of conduct of business rules in the European Union.

The purpose of this paper is to analyse how the Member States have implemented and put into operation the principles of conduct of business for investment firms as set out in Article 11 ISD into their national legal systems. This should provide some insight into the degree of convergence brought about by Article 11, or, conversely, whether existing disparities between the Member States constitute a barrier to the integration of the markets for investment services in the European Union. After a few general observations on the genesis and legal character of Article 11 ISD, our attention will focus on the different aspects related to the implementation of the rules of conduct in national law, namely: the regulatory techniques used (self-regulation versus hard law or intermediate forms), the level of regulation (implementation of the minimum or additional standard setting), the legal nature and effects of the conduct of business rules in the Member States, the supervision and enforcement of the conduct of business rules, and, finally, the territorial scope of application of the rules and its supervision. A final section will briefly touch upon the prospects for further developments or harmonization of the conduct of business rules in view of recent developments in both the markets and in regulation.

PART I. THE INCLUSION OF CONDUCT OF BUSINESS RULES IN THE INVESTMENT SERVICES DIRECTIVE AND THEIR IMPLEMENTATION IN THE EU MEMBER STATES

A. Conduct of Business rules in the ISD

I. Rationale of the conduct of business rules in the ISD

The rationale for the inclusion in the ISD of standards relating to conduct of business by investment firms cannot be clearly identified. In view of the legal basis of the directive, namely Art. 57 EC-treaty — now Art. 47 TEU —, the harmonisation of conduct of business rules should logically be regarded as a necessary condition for the realisation of the freedom of establishment and free provision of services by investment firms, which the ISD primarily aimed at. Under this approach, setting minimum standards for obligations incumbing on investment firms and credit institutions in the provision of investment services would create a sound basis for investor confidence needed to stimulate the development of cross-border activities. Hence, the creation of a certain level of investor protection through conduct of business rules cannot be seen as an objective of its own.[2]

[2] The question whether the protection of investors can be regarded as a proper objective of rulemaking at EU level will not be further analysed. The question is debatable, as 'investors' of possible addressees of rules cannot be limited to 'consumers', which do receive proper attention in the context of EU law, whether in the context of general harmonisation measures (cf. Art. 94-95 TEU) or as the subject of specific Community measures (Art. 153 TEU). See for this discussion the report presented by **N.** MOLONEY at this conference; see also KÖNDGEN, J., "Rules of Conduct: Further Harmonisation ?", in *European Securities Markets. The Investment Services Directive and Beyond*, G. FERRARINI (ed.), London, Kluwer, 1998, (115), at p. 118-120; AVGOULEAS, E., "The

The disparities amongst Member States in the degree of development of conduct of business rules were huge: some Member States recognised the existence of general duties of loyalty and care applicable to financial services providers[3], often confirmed in the case law or by specific codes of conduct. Other Member States did not show clear expressions of such duties neither in (soft-)law nor in jurisprudence. Moreover, the general principles which could be derived from the statements of principles or the case law in the former countries did never attain the degree of sophistication of standards which prevailed in the self-regulatory system in the United Kingdom under the Financial Services Act. For the Member States with more developed standards, the liberalisation of cross-border investment business could therefore not lead to a decrease in the protection of domestic investors. The demand for a straightforward initiative at Community level was the more pressing in view of the work done at the level of IOSCO, where the Technical Committee in January 1990 agreed upon a set of seven 'International Conduct of Business Principles', partly under influence of the .[4]

II. Genesis of the Rules of Conduct in the ISD[5]

Initially, the European Commission did not intend to include in the ISD any rules on investor protection, but merely focused on regulating the cross-border mobility of investment firms based on the minimum harmonisation of prudential standards, the same way as had been achieved in the Second Banking Directive. As a consequence, the first draft submitted to the Council of Ministers[6] did not contain any provision on the relation between the investment firm and its client. The negotiations on the draft directive however indicated the demand of several Member States to pay more attention to investor protection in the context of the integration of the national markets. A similar criticism was echoed by the Economic and Social Committee in its advice on the initial draft directive: in particular, the Committee wished to have some of the principles of the 1977 Commission Recommendation on a code of conduct for securities transactions[7] formalised in the directive.[8]

Different approaches to possible harmonisation, reflecting the regulatory traditions of the Member States — or the lack of regulation at all — had to be reconciled by the Commission. Originally, the European Commission proposed to follow a similar regulatory paradigm as for the prudential standards contained in the directive, by elaborating a detailed catalogue of conduct of business rules, inspired on the UK experience, and applying the home country and mutual recognition principles to the enactment and supervision of these rules by the Member States. However, the amended proposal submitted to the Council in 1990 had already abandoned this approach: the Commission was sensitive to the fears expressed by several Member States that

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Harmonisation of Rules of Conduct in EU Financial Markets: economic analysis, Subsidiarity and Investor Protection", *ELJ*, 2000, No 1, (72), at p. 85-87.

3 See for instance in France the 1988 report Brac de la Perrière on 'déontologie financière', which advocated the introduction of several specific conduct of business rules through deontological codes.

4 IOSCO, *International Conduct of Business Principles*, January 1990 (available at http://www.iosco.org/docs-public/).

5 See for more details, *inter alia*, KOLLER, I., in *Wertpapierhandelsgesetz,* H.-D. ASSMANN, U.H. SCHNEIDER (eds.), 2nd ed., Köln, Otto Schmidt, 1999, vor ´§ 31, at p. 652-655; CRUICKSHANK, Ch., "Is there a Need to Harmonise Conduct of Business Rules ?", in *European Securities Markets. The Investment Services and Beyond*, G. FERRARINI (ed.), London, Kluwer, 1998, p. 131-132; BLIESENER, D.H., *Aufsichtsrechtliche Verhaltenspflichten beim Wertpapierhandel*, Berlin, Walter De Gruyter, 1998, p. 10-12.

6 See OJ, C 43/7 of 22 February 1989.

7 Recommendation 77/534/EEC of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities, OJ, L 212/37 of 20 August 1977.

8 See Opinion of the Economic and Social Committee, OJ, C 298/6 of 27 November 1989, at p. 14, para 2.19.5.

applying the mutual recognition approach would enhance the delocalisation of investment activities to the least regulated market and in the end threaten overall market confidence. Instead, the amended proposal allotted regulatory and supervisory powers with respect to conduct of business rules to the host country, as part of its powers under the general good (Art. 16.5). Moreover, the Commission draft did not contain any provision on substantial harmonisation of conduct of business rules. The sole provision having some affinity with conduct of business principles related to conflicts of interests. However, the amended proposal formulated the obligation incumbent on investment firms to avoid conflicts of interests in relation with the clients or between clients as an organisational rule of prudential nature[9], and not as a transactional rule relating to the way the business is conducted. Logically, the rule followed the home country paradigm both with respect to standard setting and supervision and enforcement.

The final outcome of the negotiations between the Member States within the Council of Ministers on the conduct of business rules[10], which clearly points to a compromise between the two opposite approaches put forward by the European Commission. This situation is said to be inspired mainly by pragmatic motives, as the Commission did not want to see the adoption of the ISD slowed down merely by discussions on the 'minor' issue of conduct of business rules.[11]: On the one hand, article 11 ISD only an embryonic degree of harmonisation of conduct of business rules, by enumerating a number of objectives — which in fact are an almost identical copy of the IOSCO principles — which should be attained by the member states in implementing the directive into their national legal orders, but leaving them free to choose the most appropriate means to ensure the effect of the directive.[12] On the other hand, the attribution of powers does not follow the home country paradigm: the competent member state in elaborating and supervising conduct of business rules is the state in which the services are provided. As the wording of several provisions of the ISD suggests, the attribution of powers shows analogies with the (host country) powers under the general good exception (see infra).

B. Implementation of article 11 ISD in the EU Member States -General Overview

The freedom left to the Member States as to the choice of means and methods to attain the objectives prescribed by Article 11 ISD is reflected in the relative diversity of implementing rules in the EU Member States, with respect to both the substance of the rules and the legal instruments used. Table II summarises the legal framework as regards implementation of article 11 ISD in most EU Member States[13] The following general observations can be made in this respect.

First, notwithstanding the freedom left to the Member state with respect to the legal instruments used in implementing Article 11 ISD, most Member States appear to have introduced the catalogue of general principles of Article 11 as a formal legal rule into their securities law or in

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9 Indeed, the (home) Member State had to make sure that the investment firm under his supervision was organised in such a way as to avoid conflicts of interests, for instance by setting up Chinese Walls between different departments of multi-functional financial services providers.

10 The catalogue of conduct of business principles only for the first time appeared in the common Position of the Council of Ministers of 21 December 1992, doc. 10465/1/92.

11 See CRUICKSHANK, Ch., "Is there a Need to Harmonise Conduct of Business Rules ?", in *European Securities Markets. The Investment Services and Beyond*, G. FERRARINI (ed.), London, Kluwer, 1998, p. 131.

12 In fact, the drafting style of Article 11 ISD goes back to the very essence of a directive as legal instrument which only sets the objectives to be attained, leaving member states free as to the choice of means to reach this obligation as to a result: see the definition of a directive in Article 249 EC Treaty.

13 Absent accurate data for Sweden and Greece, these countries have not been included in our survey. Furthermore, the analysis for the United kingdom takes account of the forthcoming legal framework, as created by the Financial services and Markets Act 2000 (FSMA), which is still in the process of further implementation at the level of delegated rulemaking.

regulations taken in execution thereof. Exceptions are the United Kingdom, where the Financial Services and Markets Act 2000 (FSMA) only contains an enabling clause, empowering the Financial Services Authority (FSA) to draw up 'statements of principles', to be further refined in specific codes (section 64 FSMA). Strictly speaking, the mere inclusion of the catalogue of principles of Article 11 ISD into a formal law cannot be considered a sufficient implementation of the ISD, as Article 11 ISD only enumerates the objectives which Member States should attain when drawing up specific rules of conduct in their internal legal order. In many Member States, the formal consecration of the catalogue of principles is accompanied by a provision which allows for further specification of the principles through the formulation of specific rules of conduct. A few Member States, however, do not formally allow for further specification of the 'objectives' as set out in the securities law. In Austria, the *Wertpapieraufsichtsgesetz* of 30 December 1996 roughly copies the principles of Article 11 ISD, adding only a few more detailed rules of conduct with respect to specific transactions[14] In fact, the objectives of Article 11 ISD are transformed into enforceable legal rules. In Luxembourg, article 37 of the Law of 5 April 1993 enumerates the catalogue of principles of Article 11 ISD, specifying that the financial intermediaries should observe these principles as rules of conduct. Recently, however, the supervisory authority (CSSF) has issued a circular letter in which it further translates into specific rules of conduct the 'principles' set out in the law.[15] It is not clear to which extent this circular letter finds a legal basis in the law, or whether it should merely be considered part of the informal supervisory practice.

Second, more diversity seems to appear both in substance (see later) and in the use of legal techniques in the elaboration in the Member States of specific rules of conduct. In the choice of regulatory techniques, many Member States apparently take due account of the need for flexibility in the formulation of specific rules of conduct, in view of the rapid developments in the markets. Indeed, in a majority of Member States, the power to draw up specific rules of conduct is allotted to the supervisory authority, by way of guidelines, regulations or specific codes of conduct. Sometimes, this delegated rulemaking requires prior consultations with the regulated professions (e.g. United Kingdom). In a few Member States, a limited government intervention subsists, by way of formal approval of the rules of conduct of the supervisory authority by the competent minister This is the case in Belgium, where the market rules elaborated by the authority responsible for market supervision require approval by Ministerial Decree.[16] Similarly, the French *règlement général* of the Conseil des Marchés Financiers which further elaborates the rules of conduct, must be homologated by the competent Minister.[17] Surprisingly, not one Member State has taken recourse to purely self-regulatory techniques for the purpose of setting the rules of conduct. Under the UK's Financial Services and Markets Act, the rulemaking powers will lie in hands of the FSA.

Finally, it should be noted that the elaboration of rules of conduct in the individual Member States often results in a mixture of, or even confusion between actual conduct of business rules and requirements on the internal organisation of the regulated firm, which are part of the prudential rules. In the ISD, a clear distinction exists between the organisational rules of Article 10 on the one hand and the conduct of business rules on the other. The former refer, *inter alia* to the segregation of client money or securities from the investment firms' own assets, the obligation to have adequate internal control mechanisms, including in particular rules for personal transactions by the firm's employees, and the need to be structured and organised in such a way as to minimise conflicts of interests. In practice, it might not always prove easy to distinguish between those prudential rules and conduct of business rules, as the rules of internal organisation will necessarily have an impact on the way the transactional business is effected. For instance, the limitations arising from the

[14] See Art. 14 *Wertpapieraufsichtsgesetz*, which prohibit the financial institution from recommending certain transactions which are not in the clients' best interests.

[15] COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER, *Circulaire CSSF 2000/15: Les règles de conduite du secteur financier*, 2 August 2000, 11+5 p.

[16] See Art. 10 Law of 6 April 1995.

[17] See Art. 32 Law No 96-597.

internal control mechanisms on employee transactions (e.g. prior authorisation rules) rest on assumptions that employees should not as a rule effect transactions in which they are personally involved as an employee. Likewise, the obligation to segregate clients' assets from own assets of the investment firm implies necessarily that the latter may not effect any transaction with clients' assets for own account without the client's prior consent. Operating a clear distinction is however critical in view of the different allocation of regulatory and supervisory powers: while the rules promulgated under Article 10 ISD qualify as prudential requirements, they logically fall within the ambit of the home country regime. By contrast, the rules of conduct drawn up under Article 11 ISD are of the competence of the Member State in which investment services are provided, i.e. usually the host state.

It is therefore surprising to notice that the codes of conduct of several Member States do not further differentiate between both sets of rules and obligations. For instance, the French règlement général contains in its chapter 3 on 'règles de conduite' both rules on internal organisation of the firm (e.g. appointment of a 'déontologue', employee transactions) and actual rules of conduct. An explanatory note to the *règlement général* considers the organisational rules to be applicable to branches of foreign EU investment firms[18], which appears manifestly contrary to the home country rule of the ISD.

Concluding on the general overview, it will be clear from the description above that the implementation of Article 11 ISD in general shows large diversity between the Member States, both with respect to the formal techniques used, and in the substance and level of detail of the conduct of business rules elaborated by regulation or, mostly, further specified by the supervisory authorities themselves. It amply illustrates how difficult it would have been, and probably still would be at present, to effectively harmonise the rules of conduct.

PART II. - CHARACTERISTICS OF ARTICLE 11 AND ITS IMPLEMENTATION IN THE EU MEMBER STATES

At close reading, Article 11 ISD may be regarded as an intricate exercise in balancing European lawmaking and national regulatory interests with respect to the 'transactional' regulation of investment business in an internal market (as opposed to 'prudential' regulation, which falls within the ambit of the system of mutual recognition). In this section, we will analyse to what extent Article 11 has effectively brought about more convergence between Member States, or whether, on the contrary, the implementation of Article 11 ISD still points to important disparities between Member States form an impediment to the actual functioning of a unified market for investment services.

In this context, we will focus our attention to several aspects of Article 11 ISD and the way it has been implemented in the EU Member States

A. The legal nature of the conduct of business rules: does Article 11 ISD give any guidance on the legal nature and effects of the rules of conduct to be drawn up by the Member States ? What is the legal nature of the rules of conduct in the individual Member States ?
B. Minimum character of the principles of Article 11: did the Member States make use of the possibility under Article 11 to draw up other principles and rules of conduct than those prescribed by Article 11 ISD ?

[18] On the contrary, EU investment firms passporting in under the regime of free provision of services would not be subjected to the organisational rules. See Conseil des Marchés Financiers, *Note sur l'applicabilité du titre III aux prestataires de services d'investissement intervenant en libre établissement ou en libre prestation de services en France*, s.d. (available at http://www.cmf-france.org/docsword/notetitre3.doc).

C. Supervision of the observance of the rules of conduct. Which arrangements have been made at national level to organise the supervision of the rules of conduct, and who is in charge of effective supervision ?
D. Allocation of powers in cross-border investment services: who is, according to the ISD and in the law of the Member States, responsible for regulation and supervision when an investment firm uses its European passport in other EU countries ?

A. Legal nature and objectives of the Conduct of Business Rules

1. The Investment Services Directive

Article 11 ISD certainly uses a rather uncommon technique of 'harmnoisation' of conduct of business rules. Indeed, one can hardly sustain that the directive effects any 'harmonisation' of the rules of conduct in its present wording.[19] Article 11, as copied from the 1990 IOSCO principles, is merely confined to formulating a catalogue of principles, or more correctly, objectives, which should be attained by the Member States when formulating rules of conduct in their internal legal systems as part of the implementation process. This approach may at a first glance appear perculiar compared to the other provisions of the ISD and of other financial directives in general, which mostly contain highly detailed provisions leaving only limited discretion to the Member States in their implementation. In fact, the result could be regarded as more in conformity with the very essence of the directive as a legal instrument of harmonisation, which should as a rule only formulate an obligation to reach a specific result, leaving Member States free as to the choice of means and methods to reach the prescribed result.[20]

Two main objectives may be assigned to the principles set out in Article 11 ISD: protection of the interests of the clients, i.e. investors, on the one hand, and preservation of the integrity of the markets on the other hand. Both objectives are, in fact, closely interrelated: market integrity cannot be properly achieved if investors are not confident in the fair behaviour of the intermediaries to whom they entrust their transactions.[21] The attractiveness of a financial market to investors highly depends on the perception of the latter as to the fairness and transparency of the operations which are executed through the market and the integrity of the financial institutions which act as intermediaries or counterparties for the investors in the market. This holds the more true with the increasing blurring of the functional segmentation of previously isolated financial activities and the rise of multi-functional financial institutions, which increases the potential for conflicts of interests within one single entity.

The identification of the possible objectives of conduct of business rules and the relative importance of these objectives is not purely academic. The objectives assigned to the rules will also bear on the choice of normative instruments which are suitable to attain these objectives, and, in general, to the legal nature of these rules. As long as the objective of market integrity prevails, and enhancing investor confidence is only regarded as an ancillary objective to promote market integrity, the external effects of the rules of conduct will remain limited. Hence, standard setting in rules of conduct can take place through self-regulation, deontological rules or other forms of professional regulation, while enforcement and supervision of the rules takes place at the level of professional or other bodies exercising deontological powers. Third parties, notably investors, will usually not derive any claim or right of action from these internal rules, and can therefore not rely on the rules of conduct in a civil action in court against the investment firm. If, however, the protection of the (individual) investor is regarded as an autonomous objective assigned to the rules of conduct, which formulate the standards of care and skill which the financial intermediary should observe in relation to its clients, then investors become directly interested parties in the application

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19: See KÖNDGEN, J., "Rules of Conduct. Further harmonisation ?", cited *supra* note 2, p. 120.

20 See the definition of a directive in Article 236 TEU.

21 See also ECJ, 10 May 1995, *Alpine Investments*, case C-384/93, E.C.R., 1995, I-1141. See also KNOBL, P.F., "Wohlverhaltensregeln und Anlageberatung", ÖBA, 1995/10, p. 741. The preamble to the IOSCO International Conduct of Business Principles formulates it as follows: "The formulation of conduct of business principles and the implementation of rules based on such principles can boost investor confidence in the market." (IOSCO, *International Conduct of Business Principles*, cited *supra* note 4, Part One, para 8.

and enforcement of these rules. The rules of conduct then cannot any more be confined to merely self-regulatory or deontological rules, the supervision and enforcement of which is a purely internal matter, but aggrieved interested parties should be allowed to claim enforcement of the rules in court, or to obtain damages for non compliance with the rules by its addressee.

Article 11 ISD itself does not provide conclusive evidence as to the precise identification of the objectives of the conduct of business rules and their interrelation. Copied from the IOSCO principles, which seems to attach a predominant weight to financial market integrity, the objectives of Article 11 ISD refer both to the preservation of market integrity and the protection of the interest of clients. It is however not further specified whether investor protection should be regarded as an objective of its own, or merely in connection to ensuring market integrity. Different recitals in the preamble to the ISD, which in general may be relied upon in the interpretation of its provisions[22] refer to investor protection as one of the objectives of the ISD, without connecting this objective to financial market integrity. This appears most clearly from the 47th recital, which with respect to the conduct of business rules states: Whereas one of the objectives of this Directive is to protect investors." Likewise, the 62nd recital, which refers to the residual host state powers under the general good and with respect to the enforcement of the rules of conduct, refers to financial market stability and investor protection as two separate and equivalent underlying motives for the specified host country powers.[23]

This raises the question whether the drafters of the directive intended solely to underline the protection of investors as an indirect side-effect of the protection offered through the supervision and deontologial enforcement of the rules of conduct, or whether, on the contrary, the directive effectively envisaged to have rules of conduct drawn up by the Member States on which investors could directly rely against the investment firm. In view of the clear wording of the preamble to the ISD, the latter viewpoint must be adhered to. Moreover, it is most likely that the Court of Justice, which is the ultimate judge on the interpretation of Article 11 ISD, will refer to the principle of effectiveness (*effet utile*)[24] in support of the viewpoint that the rules of conduct, in so far as they formulate obligations with respect to clients' interests, must be interpreted as providing enforceable rights upon the latter.[25]

The consequences of this point of view are not negligible. First, although the Member States enjoy wide discretion in the formulation of their rules of conduct, the obligation to achieve the results prescribed under the form of objectives in Article 11, implies that the legal form of the conduct of business rules which refer to the clients' interests, should be chosen so as to enable potentially aggrieved investors to rely on them in court. The Court of Justice has repeatedly, relying on the effectiveness-principle, stressed that Member States should, when implementing a directive which confers rights upon individuals, make an adequate choice of legal instruments so as to satisfy the requirements of clarity and legal certainty.[26] Consequently, the Court systematically rejected implementation of EU directives through non binding administrative circular

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22 See, *inter alia*, ECJ, 11 April 1973, *Michel*, case 76/72, E.C.R., 1973, p. 457; more recently: ECJ, 9 July 1997, *De Agostini*, cases C-34-36/95, E.C.R., 1997, p I-3843.

23 "Whereas the stability and sound operation of the financial system *and the protection of investors* presuppose that a host Member State has the right and responsibility both to prevent and to penalise any action within its territory by investment firms *contrary to the rules of conduct* and other legal or regulatory provisions it has adopted in the interest of the general good and to take action in emergencies." (emphasis added).

24 It should be reminded that in the past the Court of Justice frequently referred to the effectiveness-principle in order to maximise the legal effect of directives in the internal legal order of the Member States.

25 Compare KNOBL, P.F., "Wohlverhaltensregeln und Anlageberatung", cited *supra* note 21, at p. 742, according to whom "there is hardly any doubt that the rules of conduct prescribed in Article 11 ISD qualify as specific private law rules, and not as mere supervisory rules which are rooted in public interests" (own translation). See, on the contrary, KOLLER, I., in *Wertpapierhandelsgesetz,*cited *supra* note 5, p. 665, para 16, who qualifies Art. 11 ISDS as purely supervisory rules.

26 See, *inter alia*, ECJ, *Commission v. Belgium*, case 102/79, E.C.R., 1980, p. 1473

letters.[27]Second, it is true that the catalogue of objectives of Article 11 ISD, absent sufficient degree of precision, lacks direct effect, and therefore cannot directly be relied upon against the Member State by an investor.[28] However, the Member States should make sure that they effectively draw up the rules which adequately attain the objectives set forth by Article 11, and that they moreover put in place or recognise a system of supervision(see later) which allows to effectively monitor the observance by the investment firms of the rules of conduct which apply to them. If a Member State fails to do so, an aggrieved investor could invoke the *Francovich* liability and claim damages from the State for non-fulfilment of its obligations arising of the implementation of the ISD, now that at least some of the rules of conduct are intended to confer rights to investors.

If the proposition that Article 11 ISD, at least in part, confers rights upon investors holds true, one must conclude that Article 11 ISD could more or less revolutionise the legal framework of the relation between an investor and its financial intermediary in the provision of investment services in a number of EU Member States. Though leaving a large leeway to the Member States in specifying the rules of conduct and the sources for possible obligations (contract, tort, or other), Article 11 ISD would result in imposing the very principle that a financial institution owes fiduciary duties of care and diligence towards investors, the general contours of which could be filled in by the Court of Justice through its interpretation of Article 11 ISD.[29]

2. Implementation in the EU Member States

The question whether the rules of conduct introduced pursuant to Article 11 ISD might give right to enforceable rights in favour of investors — at least for those rules which seek to protect the investors' interests — has been the focus of (scholarly) debates in some Member States, while in others the legal nature of the rules of conduct or a specific provision exclude any externalisation of the rules of conduct. The determination of the legal effects of the conduct of business rules in individual countries largely depends on their nature and origins (e.g. professional rules versus general provisions). A (partial) overview of the situation in the individual Member States is provided in the table in Annex II.

The most obvious illustration of 'externalisation' of the rules of conduct is the Austrian law: section 15(1) of the *Wertpapierhandelsgesetz* provides for a right of compensation in the case of infringement of the rules of conduct imposed by the Act.[30] Furthermore, the law (section 15(2)) subjects the possibility for the financial institution to contract out the right for compensation when the investor is a consumer to specific requirements. At the other end of the spectrum, the UK Financial Services and Markets Act expressly excludes the possibility for an investor to rely on the

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[27] See, for instance, ECJ, *Commission v. Belgium*, case 239/85, E.C.R., 1987, 3645; ECJ, 30 May 1991, *Commission v. Germany*, case C-59/89, E.C.R., 1991, □; ECJ, 1 October 1991, *Commission v. france*, case C-13/90, E.C.R., 1991, □. For a general analysis, see TISON, M., "Financial self-regulation and EC directives", *LMCLQ*, 1993, (60), p. 60-66.

[28] The absence of horizontal direct effect of directives would anyway be an obstacle for invoking Article 11 ISD directly against an investment firm.

[29] Compare KÖNDGEN, J., "Rules of Conduct. Further harmonisation ?", cited *supra* note 2, p.120, who concludes that "while harmonisation of rules of conduct may be 'minimum' in terms of specificity, it is 'maximum' with regard to the substantive standards it mandates to implement".

[30] The provision is regarded essentially as a confirmation of general tort liability law: due to the right for compensation the conduct of business rules may be seen as specific expressions of the *culpa in contrahendo* (see KNOBL, P., "Die Wohlverhaltensregeln der §§ 11 bis 18 des österreichischen Wertpapieraufsichtsgesetzes", *Österreichisches Bankarchiv*, 1997, (3), at p. 129; HAGHOFER, TH., MAYER, G., "Die Wohlverhaltensregeln des Wertpapieraufsichtsgesetzes (WAG) aus der Sicht des Konsumentenschutzes", *Österreichisches Bankarchiv*, 1997/8, (583), at p. 591-592..

non-compliance with a statement of principle as a cause of action. Neither would such non-compliance affect the validity of any transaction. Enforcement of the rules thus is clearly an 'internal) matter between the FSA and the regulated.[31] Of course, this statutory provision does not affect the right of action which an investor would find in the common law of contract or tort (e.g. fiduciary duties etc.).

In most Member States, however, no specific provisions concerning the possible external effect of the conduct of business rules exist, and the precise qualification will often be a matter of interpretation. In general, it may be submitted that the debates will mainly focus on the legal nature and effects of the general rules or principles contained in the securities laws of the Member States. On the contrary, the further specification of these rules in regulations, guidelines or circular letters issued by the supervisory authority will normally not be considered to produce external effects in favour of the investors. This is not to say, however, that they would be irrelevant if the general statutory rules of conduct would be invoked by an investor before the courts: the specific codes could be referred to as an indication on the interpretation of the obligations and duties of the investment firms arising out of the general rules of conduct.[32]

The relative uncertainty surrounding the legal nature of the (general) rules of conduct can be illustrated with reference to Germany and Belgium. In Germany, most scholars accord to conclude that the rules of conduct contained in the *Wertpapierhandelsgesetz*, even if they are regarded as clearly legal rules[33], nevertheless qualify as purely or mainly supervisory rules.[34] Hence, their enforcement is a matter of the supervisory authority, while third parties, notably investors, cannot derive any right of action from the rules, whether in compensation or in nullity of the transaction.[35] However, the rules are beleived to indirectly influence the extent of obligations and duties which investment firms owe to investors in civil law (so-called 'Ausstrahlungswirkung').[36]
In Belgium, a majority opinion concludes that the catalogue of general principles contained in Article 36 of the Law of 6 April 1995 may form the basis for an action in liability in contract or tort by the investor.[37] The further specification of these rules in the market regulations of the different exchanges cannot, on the contrary, be regarded as providing by themselves rights to investors.[38] A

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31 The same conclusion holds true under the self-regulatory system of the Financial services Act 1986: see section 47A(3)

32 Compare with respect to the situation in the Netherlands: GRUNDMANN-VAN DE KROL, C.M., *Koersen door het effectenrecht*, Tjeenk Willink, 1997, p. 296-297, referring to a judgement of the Dutch) supreme court (Hoge Raad), which accepted that a regulation of the Amsterdam Exchange could be relied upon in support of determining the extent of liability in contract of a party in a securities transaction.

33 See HOPT, K.J., "Self-regulation in Banking and Finance — Practice and Theory in Germany", in *La déontologie bancaire et financière — The ethical standards in banking &* finance, Cahiers AEDBF/EVBFR-Belgium No 8, Brussels, Bruylant, 1998, (53), p. 65-66.

34 See SCHÄFER, F.A. (ed.), *Wertpapierhandelsgesetz. Börsengesetz. Verkaufsprospektgesetz*, Kohlhammer Kommentare, Stuttgart, 1998, Vor § 31 WpHG, at p. 350, parta 8, with further references.

35 For an extensive analysis, see BLIESENER, D.H., *Aufsichtsrechtliche Verhaltenspflichten beim Wertpapierhandel*, cited *supra* note 5, p. 140-161; in the same sense: HOPT, K.J., "Self-regulation in Banking and Finance", cited *supra* note 33, p. 66-67. See, on the contrary, KOLLER, I., in *Wertpapierhandelsgesetz*, cited *supra* note 5, p. 666-667, para 17-18.

36 SCHÄFER, F.A. (ed.), *Wertpapierhandelsgesetz*, cited *supra* note 34, p. 351, para 8.

37 See mainly WYMEERSCH, E., "Les règles de conduite relatives aux opérations sur instruments financiers", *Revue de la Banque (Belgium)*, 1995/10, (574), p. 575-576. *Contra:* CORNELIS, L. PEETERS, J., "Gedragsregels van bemiddelaars bij transacties in financiële instrumenten, getoetst aan het aansprakelijkheidsrecht", in *Financieel recht tussen oud en* nieuw, E. WYMEERSCH (ed.), Antwerp, Maklu, 1996, (621), p. 673-681, who defend the point of view that most of the rules of conduct enumerated in the Law do not by themselves provide a cause of action in contract or in tort.

38 See however FYON, M., "Les obligations déontologiques des intermédiaires financiers au regard des règlements de marché", *Revue de la Banque (Belgium)*, 1997/6, (400), at p. 401, who considers that the specifications as to the obligations of financial intermediaries brought about by the market rules could possibly form the basis for an

similar situation arises form the French legal framework: the general rules in article 58 Law No 96-567 which literally copy the principles of Article 11 ISD, are considered to have external effects, and could be relied upon by investors against the investment firm.[39] It is however less clear to which extent the same holds true for the specific rules enacted by the Conseil des Marchés Financiers or the Commission des Opérations de Bourse.

B. Minimum harmonisation of Rules of Conduct

1. The Investment Services Directive

As is well known, the enumeration in article 11 ISD of principles to be translated into rules of conduct by the Member States is not exhaustive. By stating that the Member states should draw up rules of conduct which implement 'at least' the principles, Article 11 consecrates only a minimum which does not preclude Member States from enacting either more stringent rules of conduct or rules in other areas than those corresponding to the principles of Article 11 ISD. These powers are only limited by the Treaty freedoms in primary EC law: the promulgation of additional rules of conduct may not lead to illegitimate restrictions to free movement of investment services and investment firms (see later).

One major area which is not directly covered by Article 11 ISD concerns the marketing and advertising of investment services. In fact, the principles of Article 11 generally only refer to the contractual or precontractual relations with well-defined clients with whom a business relation is (being) set up, with the exclusion of all activities which are prior to the establishment of a client-professional relationship, such as marketing or advertising. The ISD only refers to these matters in Article 13, where, by analogy to the Second Banking Directive, the right for investment services to advertise their services is confirmed, subject however to compliance with the regulation in the host Member States which are justified by the general good reservation.

The minimum clause of Article 11 ISD also applies to its personal and material scope of application: Article 11 ISD only obliges Member States to draw up rules of conduct applicable to investment firms and credit institutions providing investment services, and, where appropriate, to the non-core services. Member States are entitled to go further, and for instance apply similar rules of conduct to other financial intermediaries which only supply non-core investment services (e.g. depositories of financial instruments, investment advisers), which might be considered necessary to create a level playing field between the different professionals.

2. Implementation in the EU Member States

Member States have in varying degrees made use of the minimum clause of Article 11 ISD, either to broaden the number of principles to be further refined in rules of conduct, to extend the scope of application of the rules of conduct to situations which are not covered by the directive, or by formulating rules of conduct in areas which are not covered by Article 11 ISD (e.g. marketing techniques).

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action in tort by a investor. This conclusion in our view does not take due account of the mainly professional nature of the market rules as internal professional rules, subjected to the deontological supervision of the market supervisor.

[39] In this sense DE VAUPLANE, H., BORNET, J.-P., *Droit des marchés financiers*, Paris, Litec, 1998, p. 918-919, para 1083.

The result of the minimum clause of Article 11 ISD is that in substance large differences exist between the rules of conduct of the Member States, though at least part of them are devised to serve a similar purpose.

First of all, some Member States have made additions compared to the directive in the formulation of the general principles. The Belgian law, for instance, added a phrase in the principle concerning compliance by the firm with all regulatory requirements with the effect that the principle of compliance also extends to all codes of conduct which apply to that firm. This extension in reality results in 'upgrading' all, even mere voluntary codes of conduct to formal legal obligations which may possibly be invoked by third parties.[40]

Several Member States apply the rules of conduct to a wider spectrum of financial intermediaries than investment firms and credit institutions. As mentioned, motives of competitive equality ('level playing field') in the conduct of business by different categories of financial institutions will usually inspire such extension in comparison to the directive. By way of example, the Luxembourg principles contained in article 37 of the Law of 5 April 1993, which in substance are identical to the principles of Article 11 ISD, are applicable to al professionals of the financial sector ('PSF' or '*professionels du secteur financier'*), including distributors of units of collective investment undertakings, investment advisors, depositories of financial instruments and currency traders.

In the further translation of the principles into rules of conduct, several Member States do not substantially go into detail, but rather closely stick to the text of the general principles or the objectives of Article 11 ISD, as is the case for the Belgian rules.[41] At the other extreme, some supervisors have elaborated extensive codes of conduct specifying in utmost details which rules apply to investment firms, for each kind of investment service, and further differentiated along the kind of investor to whom the services are provided (small versus professional investor). The most obvious illustration are the UK codes of conduct, which at present still are dispersed over several selfregulatory bodies, but under the Financial Services and Markets Act will be included in one single volume, the Conduct of Business Sourcebook. The draft of this Sourcebook[42], comprising more than 400 pages, lists and provides more guidance on approx. 540 rules. Compared to the present separate rule books of the self-regulatory organisations, the Sourcebook would nevertheless lead to a substantial reduction of volume.[43] Though far more modest in size, also the recent Irish Code of Conduct[44], the French *Règlement général* and, to a lesser extent, the Italian rules edicted by the Consob reach a relatively high degree of detail in the specification of the rules of conduct.

The structure and contents of codes of conduct in different Member States are also illustrative of the difficulties to delimit the material scope of 'conduct of business' rules. As far as the rules protecting the clients' interests are concerned, several codes contain detailed rules on the precontractual

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40 In this sense WYMEERSCH, E., ""Les règles de conduite...", cited *supra* note 37, at p. 583-584, para 23.

41 At least as concerns the rules of the Brussels Stock Exchange not dealing with transactions in derivative instruments: see Art. 104 Market rules of the Brussels Stock Exchange (as approves by Ministerial Decree of 16 April 1996, *Mon.*, 30 April 1996).

42 The draft is current in the stage of being put to consultation with the financial sector. It is availabe on line at http://www.fsa.gov.uk.

43 The following citation taken from the introduction to the Sourcebook upon its publication for consultation, is significant: "We would also aim to make our requirements more concise. It is difficult to estimate precisely the extent to which Conduct of Business Rules represents a reduction in volume of text compared with the rule books and other provisions which it replaces. In broad terms, however, we have achieved a cut of over 30%." (see FINANCIAL SERVICES AUTHORITY, *The Conduct of Business Sourcebook*, consultation Paper 45a, February 2000, at p. 9. Available at http://www.fsa.gov.uk/pubs/cp/cp45.pdf).

44 CENTRAL BANK OF IRELAND, *Handbook for Investment and Stockbroking Firms. Requirements Issued under Section 37 of the Investment Intermediaries Act, 1995. Code of Conduct*, September 2000.

obligations incumbent on the investment firm and the contractual relationship between investment firm and investor, requiring for instance a written contract and detailing which terms should expressly be agreed upon in the contract. The Dutch[45] and Italian rules may illustrate this. Furthermore, some codes of conduct include under the heading of conduct of business specific obligations or prohibitions with respect to marketing of investment services, such as cold calling or door-to-door selling of financial instruments (e.g. the Dutch regulations and the Austrian law). The inclusion of these provisions under the conduct of business rules implies that their enforcement will be guaranteed — at least in part — through the supervisory authorities. This clearly illustrates the orientation of at least some regulators to empower the supervisory authorities with far-reaching duties with a view to ensuring a high degree of (small) investor protection through monitoring of the contractual relations. By contrast, Article 11 ISD leaves the area of marketing of investment services untouched. Hence, several Member States still operate a distinction between rules of conduct *sensu stricto* and other rules of contract law or pertaining to advertisement and marketing. A practical implication of this separation often resides in the latter rules being enforced mainly through private enforcement mechanisms, and not through a system of continuous supervision.

As far as the rules of conduct aim at protecting market integrity, the specific rules of conduct in the Member States, if any, mainly refer to practices such as misleading information supply, market manipulation or insider dealing. In most cases, the Member States have followed the approach of the ISD in assembling the client protection and market integrity conduct of business rules into one body of texts. The UK approach however is clearly one of separating both categories: beside the Sourcebook on conduct of business rules, which exclusively are targeted at the protection of the interests of the investors, a separate rulebook on Market conduct rules is being elaborated, which will detail — both for investment firms and unreguated persons — the rules to be observed in order to prevent market abuse, i.e. insider dealing, market manipulation or market distortion[46] Though some of these practices are already the object of specific legislation[47], their inclusion in the conduct of business rules allows the supervisory authorities to make use of their power to investigate and possibly sanction the financial institution adequately.

C. Supervision and enforcement of the Rules of Conduct

1. Obligations arising out of Article 11 ISD

As was the case for credit institutions under the Second Banking Directive, the harmonisation realised by the ISD mainly touches upon rules on the taking up of business in other member states, but leaves the conditions of exercise of the activity largely untouched. In the context of the ISD, the general harmonisation of conduct of business rules attenuates this principle. As indicated above, the compromise reached at EU level resulted in formulating only general objectives to which the elaboration of conduct of business rules should conform, and leaving the path of home country control for allocation of regulatory and supervisory powers to the benefit of the member state where the service is provided.

Though the Member States enjoy large discretion in shaping the rules of conduct, Article 11 ISD must reasonably be interpreted in the sense that it obliges Member States to introduce a system of contiuous supervision on the compliance by investment firms with the conduct of business rules. Not only does Article 11 generally state that investment firms shall observe the conduct of business rules 'at all times', which assumes some form of continuous monitoring. Moreover, Article 11.2,

[45] See Article 27 and Annex 5 to the *Nadere Regeling Toezicht Effectenverkeer 1999*, issued by the STE.

[46] See FINANCIAL SERVICES AUTHORITY, *Market abuse. A Draft Code of Market Conduct*, Consultation Paper No 59, July 2000, 127 p

[47] E.g. insider dealing, which in itself goes back to a European directive.

in deciding on the territorial competence, explicitly mentions both the implementation of the rules of conduct (regulatory power) and the supervision of compliance with them. Finally, Member States must, according to Article 22 ISD, designate the competent authorities which are to carry out the duties provided for in the ISD. The combination of these provisions implies that Member States should introduce a system of continuous supervision by a body which is specifically empowered with this task. Leaving the 'supervision' exclusively to the courts at the initiative of interested parties (notably investors) would not be a sufficient implementation sine 'enforcement' by the courts may not be assimilated to 'supervision', which is a function traditionally exercised by the executive, possibly supplemented by means of enforcement by the judiciary.

The organisation of supervision relating to conduct of business rules is entirely left to the Member States, which may put this duty on either a public body, or a private body recognised either by law or by a public authority (Article 22.2). The Directive thus leaves room for the subsistence of self-regulatory regimes, provided however certain minimum standards are met. First, the supervisory body should be invested with its powers by way of delegation by the public authorities. This requirement must guarantee that the rules and decisions of the body thus designated obtain a binding effect upon the regulated as a result of an at least indirect act of the public authorities. Giving expression to the effectiveness principle, the Directive furthermore underlines the necessity of the supervisory body to have the necessary powers to effectively exercise its supervisory duties, *inter alia* in terms of means of supervision and enfocrement. The legal foundation of these powers (either public authority or contractual submission) are irrelevant provided they are adequate. Hence, basing the supervision on mere moral suasion will not satisfy the effectiveness-test. Finally, Article 26 ISD requires the Member States to ensure that decisions of the supervisory bodies are open to scrutiny by the courts. Here again, it implies that organising supervision through pure self-regulation will not prove sufficient, but that the self-regulatory frame for supervision must be at least backed by arrangements which enable to challenge the decisions of the supervisory body in court.[48]

2. Implementation in the EU Member States

In general, the organisation of the supervision and enforcement of the conduct of business rules applicable to investment firms and credit institutions in the EU member states is closely connected with the financial market reforms induced by the ISD and the growing competition between exchanges. Without entering into details on the market supervision structures[49], mainly two patterns of organisation of 'transactional' supervision can be discerned from the situation in the different Member States.

A first approach consists of separating prudential supervision over investment firms and credit institutions from transactional supervision on the activities of these financial services providers. The latter aspect of supervision, including the conduct of business rules, is generally brought closer to the markets. In some Member States, the actual supervision of conduct of business rules is dispersed over several bodies, according to either the market in which the investment firm operates or the kind of investment services which are at stake. An example of the former organisation model

[48] Hence, while 'pure' self-regulation would be unacceptable as a means of implementing Article 11 ISD, mixed systems which provide for a 'juridisation' of the self-regulation would have passed the effectiveness test under the ISD. At the time of the adoption of the ISD, the issue was critical for the subsistence of the UK three-tier system of financial regulation, and the powers allotted to the self-regulatory organisations (SROs) under the Financial Services Act 1986. See in general about the relation between self-regulation and the effectiveness principle under primary EC law: TISON, M., "Financial self-regulation and EC directives", cited *supra* note 27, at p. 72-77.

[49] See in this respect the description of the different market supervisory structures post-ISD by WYMEERSCH, E., "The Implementation of the ISD and CAD in National Legal Systems", in *European Securities Markets. The Investment Services and* Beyond, G. FERRARINI (ed.), London, Kluwer, 1998, (3), at p. 15-30.

is Belgium, where the supervision of conduct of business rules is entrusted to the independent 'market authorities' organised within the company structures of the different regulated markets from which the investment firm or credit institution is a member (Brussels Exchange, Easdaq or the secondary government bonds market). Hence, a financial services provider can be subjected to different sets of conduct of business rules within one Member State in case of multiple market membership. The latter organisation model exists in France, where the newly created independent public body responsible for supervision of the regulated markets, the *Conseil des Marchés Financiers* (CMF) is also designated as competent authority for the supervision of conduct of business rules to be observed by investment firms and credit institutions, except for the activites involving portfolio management. Rulemaking and supervisory powers for the latter are of the competence of the *Commission des Opérations de Bourse*.[50]

In most Member States however, the separation of prudential and transactional supervision goes along with the attribution of supervisory powers on the rules of conduct to a single (public) body, having jurisdiction for all activities for which the rules apply and irrespective of the (regulated) markets in which the intermediaries operate. This is for instance the case in Germany, where the *Bundesaufsichtsamt für den Wertpapierhandel* (BAWe) is competent for supervising the conduct of business rules of investment firms and credit institutions offering investment services[51], which supplement its competencies in the field of financial market supervision, notably with respect to insider dealing, *ad hoc* information by listed companies and the notification of significant holdings in listed companies. Similarly, the Spanish law entrusts the *Commision Nacional del Mercado de Valores* with the supervision of conduct of business rules and other aspects of market integrity supervision. Austria entrusts supervision of the conduct of business rules and other market integrity rules to the *Bundeswertpapieraufsicht*, an independent public body. Italy divides the exercise of supervisory powers between the *Banca d'Italia*, responsibe for prudential supervision of credit institutions and securities intermediaries (so called SIMs), while the *Consob* functions as market supervisor, including the compliance by financial intermediaries with the rules of conduct.[52]

A few Member States do not proceed to a separation between prudential and transactional supervision. Here again, different variations exist: the most far-reaching approach is the fully integrated supervision of all financial services providers (credit institutions, investment firms, possibly life insurance undertakings) by one single body encompassing both authorisation requirements, prudential supervision and transactional supervision. This situation not only occurs in the United Kingdom once the system set up by the Financial Services and Markets Act will be in operation. Less known examples of Member States which moved towards more integrated supervisory structures are Luxembourg and Ireland. In Luxembourg, the *Commission de Surveillance du Secteur Financier* (CSSF) is, in its capacity of prudential authority, responsible for supervision of all financial institutions in the banking and securities field, taking over the functions formerly performed by the *Institut Monétaire Luxembourgeois* (IML), which was both prudential supervisor and central banker. In addition, the CSSF is designated as 'competent authority' for the supervision of financial markets[53], which includes the duty to supervise the application of the trading rules, and the rules on reporting and transparency imposed by the ISD. The law does not explicitly determine who is competent for supervising the conduct of business by investment firms, which might give rise to uncertainty[54]. It is however stipulated that the CSSF may withdraw the

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50 See Art. 58 and Art. 4 Loi n° 96-597 of 2 July 1996.

51 See § 35 Wertpapierhandelsgesetz, as modified by Law of 22 October 1997.

52 See Art. 5 Legislative decree 58 of 24 February 1998 (for the English translation, see: http://www.consob.it/produzione/docum/english/Regulations/fr_decree58.htm).

53 See Art. 2 Law 23 December 1998 'portant création d'une commission de surveillance du secteur financier', *Mémorial*, 24 December 1998.

54 Art. 37 Law 5 April 1993, as modified by Law of 12 March 1998, *Mémorial*, 25 March 1998, enumerates, in line with Art. 11 ISD, the conduct of business rules to which investment firms and credit institutions should conform in the exercise of their activities. Art. 42 of the same law designates, however, the IML - now the CSSF

authorisation of an investment firm in the event of serious and systematic non-compliance with the conduct of business rules.[55] Moreover, the recent publication of a circular letter by the CSSF which further specifies the rules of conduct to be observed[56], seems to confirm that the CSSF effectively is vested with the power to supervise the rules of conduct. In Ireland finally, the Central Bank of Ireland has overall supervisory competence for both credit institutions and investment intermediaries. Prudential as well as transactional supervision are included in the duties of the Central Bank.

D. Territorial allocation of supervisory powers over rules of conduct

1. Principles contained in Article 11 SD

Article 11.2 ISD attributes, as already mentioned, regulatory and supervisory competence for the rules of conduct to the 'Member State where the investment service is provided'. Initially, this was generally understood as a reference to the host state, i.e. the Member State where an investment firm or credit institution offers investment services through a branch or under the regime of free provision of services to investors which reside in that state.

Under influence of the discussions on the interpretation of the Second Banking Directive, and in particular on the issue which criteria should serve to determine when a credit institution is acting 'in the territori' of another Member State, doubts also started to rise as to the assimilation of the Member state where an investment service is provided with the 'host state' for the purpose of determining who exercises supervision. This assimilation is increasingly being criticised and rejected as over-simplifying the reality of international transactions. [57] In reality, more than one member state could legitimately claim competence for applying its conduct of business rules in view of the connection of a transaction with its jurisdiction. An obvious example is the situation an investment firm authorised in Member State A executes an order in a financial instrument for a customer with residence in Member State B on a (regulated) market in Member State C. All three Member States could claim to be the Member State where the investment service is provided, depending on the criteria to be used to localise the place of service supply: the head office of the investment firm (A), the place of residence of the client (B) or the market in which the transaction is executed (C). The possibility that an investment firm will be subjected to divergent of even conflicting conduct of business rules in a cross-border context and the legal uncertainty about which conduct of business rules to apply, are substantial. In the end, this situation is likely to discourage the use of the European passport by investment firms, in view of the possible liabilities which the investment firm could suffer.

It has been suggested that the allocation of supervisory powers to the Member State where the investment service is provided, could be determined with reference to the 'characteristic performance': only when the 'characteristic performance' of the service is effectively supplied in the host Member State, could the latter take up competencies with respect to rules of conduct. The approach is inspired on the European Commission's Interpretative Communication with respect to the interpretation of the Second Banking Directive, which applies this criterion in order to determine

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- as competent authority for the supervision of *prudential* rules. As the law makes a clear distinction between prudential rules (Art. 36) and conduct of business rules (Art. 37), it could be argued that not the CSSF is to be considered competent for the supervision of conduct of business rules, but that this forms part of the supervision exercised by the Stock Exchange over its members.

55 Art. 23(4) Law 5 April 1993, as modified by Law of 12 March 1998.

56 Cited *supra*, note 15.

57 See *inter alia* DAX, D., "L'impact de la communication interprétative pour le secteur des services d'investissement", *Bulletin Droit & Banque*, No 28, June 1999, p. 10-11.

whether a credit institution should run through the notification procedure of Article 20 of the directive prior to the supply of its first service 'on the territory' of the host Member State. We submit that this criterion is not only inadequate for the application of the Second Banking Directive in view of the proper objectives of the notification procedure.[58] There is, moreover, no indication whatsoever for the usefulness of a similar criterion in the ISD for the purpose of the allocation of competence under Article 11 ISD.

An alternative solution to this issue rests in our view on the basic assumption that Article 11 ISD does not necessarily point to one single member state as being the member state where an investment service is provided: when significant connections exist with several member states, as in the example given above, it does not appear contrary to the wording of Article 11 ISD to attribute competence to different member states. The critical question will then to determine which rules can be applied. The need to comply with primary EC law in the exercise of the powers under Article 11 ISD will provide the frame to solve the issue (see later).

2. Implementation in the EU Member States

The territorial scope of the laws in the different EU Member States which implement Art. 11 ISD, confirm the risk of duplication of regulatory and supervisory jurisdiction in a cross-border setting.

On the one hand, most Member States seem to apply their conduct of business rules to the activities of domestic investment firms and credit institutions in general, irrespective of the localisation of their activities in the home country or abroad, and for the latter situation without specifying whether the rules also apply for activities undertaken through foreign branches. The Dutch law, for instance, considers the rules of conduct binding for the investment firms constituted under Dutch law, without further specification about the activities directed abroad.[59] The Luxembourg law goes even further, as it does not only expressly applies the conduct of business rules to the foreign branches of Luxembourg investment firms, but even extends their application to foreign subsidiaries.[60] The UK draft conduct of business rules on the contrary operate further refinements, distinguishing not only between the prudential (e.g. client asset rules) and genuinely transactional rules, the former not being applied to incoming firms from another EU Member State. On the other hand, activities undertaken abroad by a UK firm will generally only have to comply with the UK rules when the client is a British resident.[61]

On the other hand, all member states take up jurisdiction for conduct of business rules in relation to incoming investment firms and credit institutions authorised in another EU member state, in their quality of 'member state where the investment service is provided'. The only exceptions relate to those conduct rules in the Member States which in reality give effect to prudential requirements imposed by Article 10 ISD, such as rules on segregation of client assets . None of the national implementation laws makes any reference to a limitation of host country jurisdiction with reference to the general good reservation (see Part III). When such reference appears, it is under the assumption that the application of the host country rules of conduct *de plano* satisfies the general good test.

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58 See more extensively TISON, M., "La Communication interprétative de la Commission européenne relative à la Deuxième Directive bancaire. Lecture critique de la Communication interprétative", *Revue de la Banque* (Belgium)*, 1998/3.*

59 See Artt. 34-39 Besluit Toezicht Effectenverkeer.

60 Though applied in an indirect manner, as the addressee of the obligation is the Luxembourg investment firm, which should make sure that the rules of conduct are complied with by its subsidiaries. See Art. 35(2) Law 5 April 1993, as amended by Law of 12 March 1998, *Mémorial*, 25 March 1998.

61 See FINANCIAL SERVICES AUTHORITY, *The Conduct of Business Sourcebook,* cited *supra* note 43, Annex A, *Table* 1.4R under rule 1.4.1.

The picture emerging from the territorial scope of conduct of business rules is likely to severely impede the development of cross-border business, as the investment firms will be confronted with the need to comply with multiple rules and codes of conduct, which sometimes might contain conflicting provisions. The latitude left to Member States in the elaboration of rules of conduct, in conjunction with the apparently unlimited jurisdiction which 'host countries' can exercise over incoming investment firms, leads to a high degree of fragmentation of national markets at the level of the substance of the investment services: An investment firm wishing to 'go European' will have to adapt its (standardised) contractual arrangements, and possibly marketing methods to the rules of conduct in force in each individual Member State. One can in this context hardly speak of an actual unification of the national markets for investment services, as an investment firm will often not be allowed to exploit cost advantages and scale economies derived from the Community -wide supply of standardised financial products. This raises the question to which extent these obstacles to market integration should be alleviated through further harmonisation, or whether the interplay with primary EC law can be an alternative remedy.

PART III. RULES OF CONDUCT AND THE PRINCIPLES OF FREE MOVEMENT UNDER PRIMARY EC LAW

A. The place of the Rules of Conduct in the Regulatory Paradigm of the ISD

The compromisory solution reached in the ISD with respect to the rules of conduct in Article 11 deliberately deviates form the regulatory paradigm of minimum harmonisation and mutual recognition which applies to the rules on access to the markets and prudential regulation. The discordance between the two contrasting approaches to harmonisation between on the one hand, the authorisation requirements and prudential regime for investment firms, and the conduct of business rules on the other, give rise to specific difficulties when it comes to determine the respective relation of both regulatory paradigms to the Treaty freedoms, which constitute the quasi-constitutional foundation of all secondary Community legislation.

It is well known that the Court's case law at present interprets the fundamental Treaty freedoms as prohibiting all rules and practices in the Member States which impede free movement, irrespective of their formal appearance as a discrimination or a neutral rule. A Member State is allowed to uphold its rules and practices which amount to a restriction to free movement only when it demonstrates that they find a reasonable justification in a legitimate interest of non-economic nature (so called 'general good reservation'). Conversely, the *Cassis de Dijon* case made it clear that the restriction-based approach to the Treaty freedoms results in the mandatory recognition of rules and standards under which an undertaking operates in its country of origin in the other Member States to which that undertaking directs its economic activities. The material scope of this principle of mutual recognition of rules and standards is not limited to specific areas of law, but can encompass all areas of public and private law regulation, as far as the mandatory application of host country rules to a foreign undertaking qualifies as a restriction to free movement.[62] Mutual recognition under primary EC law is however not absolute, as it finds an exception in the general good reservation to the benefit of the host Member State. It may therefore receive the qualification 'imperfect': mutual recognition of home country rules and controls only applies as long as the host state does not apply its own rules on basis of an overriding interest.

[62] See in particular ECJ, 1 July 1993, case C-20/92, *Hubbard*, E.C.R., 1993, p. I-3777.

The 'new approach' to harmonisation set forth in the 1995 White Book of the European Commission on the completion of the internal market, which built on the *Cassis de Dijon* principle, transforms the 'imperfect' mutual recognition principle existing under primary law into an absolute rule: the minimum harmonisation of rules and standards realised through secondary Community law provides, in view of the Community legislator, the degree of protection of public interests deemed necessary but sufficient to impose their mutual recognition by the Member States as a mandatory rule bearing no exceptions, except where Community legislation expressly provides for. In effect, the minimum harmonisation is thus functionally equivalent to, and results in a substitution of the general good which a Member State could invoke absent the harmonisation. As a consequence, the (host) Member State competence to invoke the general good as an exception to mutual recognition is exhausted, and mutual recognition becomes 'perfect'.

While it is clear that the ISD has applied the latter regulatory paradigm as far as authorisation requirements and prudential supervision is concerned, it is less clear where to place article 11 in the picture, in particular when it comes to define the extent and limits of regulatory and supervisory powers of the Member states in applying their conduct of business rules to foreign investment firms offering investment services in that Member State using their 'European passport' under the ISD.

First of all, it goes without saying that the Member States are entitled to invoke their powers under Article 11 ISD only as far as their exercise is in conformity with the Treaty freedoms. In other words, the host Member State, which according to the text of Article 11.2 ISD often will be the competent regulatory and supervisory authority as Member state in which the investment services are supplied, cannot find in article 11 ISD an alibi for unduly restricting free movement of foreign investment firms. In other words, when the application of host state rules of conduct amount to a restriction to free movement of the foreign investment firm, by reason of the latter being subjected to similar conduct of business rules in its country of origin, the host country must demonstrate that the application of its rules satisfies the general good test. The latter member state will have to demonstrate that the conduct of business rules of the home state do not, in its view, sufficiently protect the investors or the integrity of the market. This conclusion seems now to be widely accepted not only amongst scholars[63], but also within the European Commission[64]. The normative hierarchy of primary and secondary Community law thus theoretically leads to a mitigation of the allocation of regulatory and supervisory powers with respect to rules of conduct to the Member State where investment services are supplied. In reality however, we have observed that the implementation of Article 11 ISD in the Member States does not at all take account of this consideration.

Setting the theoretical framework for the application of Article 11 ISD proves far more easy than effectively putting it into practice. The main practical difficulty originates in the circumstance that the application of the general good-test in order to elude restrictions to free movement rests on the assumption of absence of sufficient Community harmonisation of the rules at stake. It thus becomes critical to determine which weight should be attributed to the substantive rules of Article

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63 See, *inter alia,* WOUTERS, J., "Rules of Conduct, foreign investment firms and the ECJ's case-law on services", *Comp. Lawy.*, 1993, p. 195; LASTENOUSE, P., "Les règles de conduite et la reconnaissance mutuelle dans la directive sur les services d'investissement", *R.M.U.E.*, 1995/4, p. 101-102 THEIL, L.R., "The EC Investment Services directive: a critical time for Investment Firms", *JIBFL*, 1994, p. 64; ALCOCK, A., "UK implementation of European Investment Services Directives", *Comp. Lawy.*, vol. 15, 1994, p. 299 WYMEERSCH, E., "Les règles de conduite relatives aux opérations sur instruments financiers", *Rev. Banque*, 1995/10, p. 591 O'NEILL, N., "The Investment services Directive", in *The Single Market and the Law of Banking*, R. CRANSTON (ed.), 2nd ed., London, LLP, 1995, p. 201-202; LOUIS, P.-M., "Le concept de passeport européen dans la directive 93/22/CEE du Conseil, du 10 mai 1993, concernant les services d'investissement dans le domaine des valeurs mobilières", in *De hervorming van de financiële markten en bemiddelaars*, Cahiers AEDBF/EVBFR-Belgium, No 5, Brussels, Bruylant, 1997, p. 57, no. 74.

64 See, for instance, CRUICKSHANK, C., "The Investment Services Directive", in *Further Perspectives in Financial Integration in Europe*, E. WYMEERSCH (ed.), Berlin, De Gruyter, 1994, p. 73; CRUICKSHANK, Ch., ., "Is there a Need to Harmonise Conduct of Business Rules ?", cited *supra* note 5, at p. 134.

11 ISD against the background of the general good test. Different possibilities could be considered, which each bear importance for the extent to which a Member State may apply its rules of conduct to foreign investment firms.

A minimalist approach could build on the assertion that Article 11 ISD does not actually realise any 'harmonisation' of conduct of business rules, and that the allocation of regulatory and supervisory powers under article 11 ISD suffers no limitation at all from primary Treaty law. By allocating full competence with respect to enactment and supervision of conduct of business rules to the Member State in which the investment service is provided, the Community legislator assumes that all rules of conduct imposed by the latter Member state do effectively satisfy the general good test if their application to foreign investment firms would result in a restriction to free movement. This conclusion could be supported by several provisions of the ISD.[65], while other provisions, on the contrary, seem to point to the need to subject the application of conduct of business rules individually to the general good test. It is, however, hard to reconcile with the normative hierarchy of Community law, as it is not up to the lawmaking institutions of the Union to determine when national or secondary Community law is compatible with the Treaty principles on free movement and the general good reservation. The final decision on this issue lies with the Court of Justice, as it concerns the interpretation of the (scope of the) Treaty freedoms. As a consequence, the assertion that the rules of conduct drawn up by the Member States do *de plano* satisfy the conditions of the general good test, does not prejudice the eventual scrutiny by the Court of Justice and the application of the general good test in a specific case.

At the other end of the spectrum, the maximalist approach consists of accepting the equivalence of the rules of conduct which are drawn up by all Member States in implementation of Article 11 ISD, and which at least attain the objectives enumerated in the latter provision. This proposition would *de facto* lead to the same result as the minimum harmonisation-'perfect' mutual recognition paradigm, as the host Member State could no longer rely on the general good reservation in order to apply its own rules of conduct to foreign investment firms within the confinements of the objectives enumerated in article 11 ISD. Indeed, the assumption that all rules of conduct in the different Member States, by pursuing similar objectives, should be considered equivalent, implies that all investment firms should be allowed to rely on their home country rules, and, conversely, that the existence of harmonised objectives at Community level prevents the host Member State to invoke the general good as justification for the application of its own conduct of business rules..[66] The practical importance of the general good clause would then be limited to the rules of conduct outside the scope of Article 11, for instance with respect to marketing of investment services.[67]

Although appealing in a perspective of market integration, the latter approach to Article 11 ISD goes far beyond the intentions of the drafters of the ISD: the mere enumeration of 'objectives' in Article 11 ISD precisely was intended to preserve a large autonomy for the Member States in elaborating their conduct of business rules, both in substance and in the use of regulatory techniques to achieve the prescribed results. At most could one build upon the objectives of Article 11 ISD a — refutable — presumption of equivalence of rules of conduct in different Member States which wish to achieve on of the enumerated objectives. The host Member State could set aside the *de facto* home state rule by demonstrating the existence of an overriding interest which allegedly is

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65 See mainly Article 11.2 ISD, which contains no reference at all to the general good test, contrary to article 13.

66 In support of this point of view: CARBONE, S.M., MUNARI, F., "The Enforcement of the European Regime for Investment Services in the Member States and its Impact on national Conflict of Laws", in *European Securities Markets. The Investment Services Directive and Beyond*, G. FERRARINI (ed.), London, Kluwer, 1998, (317), at p. 342-343. *Contra:* CARDON DE LICHTBUER, M., "The Investment Services Directive. An Analysis", in *Further Perspectives in Financial Integration in Europe*, E. WYMEERSCH (ed.), Berlin, De Gruyter, 1994, p. 96, who rejects this conclusion as purely academic.

67 See CARBONE, S.M., MUNARI, F., "The Enforcement of the European Regime for Investment Services...", cited *supra* note 66, p. 343.

not (sufficiently) protected by the conduct of business rules of the home Member States. In practice, it may be expected that the presumption of equivalence will have the largest impact on those rules of conduct which relate to the preservation of market integrity, and to the protection of the professional investor, where, in general, the quantity and diversity in instruments of protection is relatively limited.[68] By contrast, when it comes to protecting investors at the retail level, it may be submitted that Member States could more easily appeal on the general good clause in order to impose their own — by assumption stricter — rules of conduct to foreign investment firms for reasons of consumer protection. In view of the growing complexity of financial products and markets, Member States with a more consumerist approach to investor protection will enjoy large discretion in applying their conduct of business rules, as long as all conditions of the general good test, in particular the proportionality requirement, are satisfied.

In conclusion, the place of Article 11 ISD in the regulatory system of the ISD and the Treaty principles may be summarised as follows: The mere enumeration of 'objectives' to attain by the Member States in drawing up rules of conduct in their internal legal systems cannot be assimilated to the existence of sufficient harmonisation, which would deprive the Member States from applying their conduct of business rules to foreign investment firms. On the other hand, Article 11 does effectively oblige Member States to draw up rules which at least achieve a number of 'harmonised' objectives, resulting in a certain degree of equivalence of rules of conduct among Member states. Therefore, Article 11 ISD, read in conformity with the Treaty principles of free movement, may be considered to lay down a refutable presumption of equivalence of rules of conduct drawn up by the Member States within the confines of the objectives which Article 11 enumerates. The actual exercise of regulatory and supervisory competencies by the Member State where the investment services are provided, pursuant to Article 11.2 ISD, will, if any restriction to free movement arises out from the exercise of this competence, be subjected to the additional demonstration by the latter Member State that the conditions of the general good test are satisfied. Only when this test fails will the foreign investment firm be able to effectively rely on the observance of its home state rules of conduct when supplying investment services abroad.

B. Rules of Conduct and Conflicts of Laws

An additional difficulty when trying to reconcile Article 11 ISD with primary EC law, arises from the legal nature of the conduct of business rules. From the analysis of the legal nature of the conduct of business rules provided *supra*, it appeared that, at least in a number of Member States, the conduct of business rules could possibly influence the duties and obligations of investment firms in contract or in tort in relation to investors. Beside their application as part of (transactional) supervisory law, the territorial scope of which is determined by own criteria of delimitation (*règle de délimitation*), the rules of conduct could also make part of the contractual relationship between investment firm and investor. The territorial application of rules of contract (or tort) law is however determined through the technique of conflicts of law in private international law, which purports to designating the law which will govern a certain situation (*règle de rattachement*). With respect to contracts, the 1980 convention of Rome lets the freedom of choice of applicable law prevail. Relevant exceptions in the context of the present analysis concern contracts with consumers (Art. 5), and the application of mandatory laws (Art. 7). These principles will also determine to which extent rules of conduct might interfere in the *lex contractus*. To the extent that the rules of conduct actually receive the attribute of rules of contract law — a proposition which is not accepted in all Member States — Article 5 of the Rome convention will enable to give priority to the rules of

[68] Compare HERTIG, G., "Imperfect mutual recognition for EU financial services", in *European Economic and Business Law*, R.M. BUXBAUM, G. HERTIG, A. HIRSCH, K.J. HOPT (eds.), Berlin, De Gruyter, 1996, (218), at p. 225

conduct of the Member state of residence over the law chosen by the parties.[69] [70]Even when no straightforward contractual rules are derived from the rules of conduct, the latter can nevertheless be given precedence over the law chosen by the parties under the heading of mandatory laws (Article 7 Rome convention).

The possible application of the rules of conduct in the contractual relationship does not take away the necessity to take into consideration the EC Treaty freedoms. When one or another provision of the Rome convention points to application of certain conduct of business rules in the contractual relationship, the actual application of these rules still will have to satisfy the general good test when it leads to a restriction to free movement for the foreign investment firm.

FURTHER PROSPECTS AND CONCLUSIONS

One cannot deny that the diversity of rules of conduct between the EU Member States still considerably impedes the creation of a true internal market for investment services. For some time now, the debate on the usefulness and feasibility of further harmonisation has been going on. The present situation seems to point to the development of a two tier system of rules of conduct, as different European instances are discussing the way to agree on a common approach to the distinction between professional and retail investors. The result of such an agreement will probably be that the rules of conduct which concern professional investors will undergo a movement of convergence, mainly under the form of a substantial reduction of rules for this category which does not need extensive protection, while the *status quo* will remain for the rules which aim at protection of the small retail investor.

The question should then be raised whether further harmonisation efforts are really necessary or useful. Some have argued that the present situation, in view of the difficulties to reach a political consensus on further harmonisation measures, could be considered a 'second best solution' which in the end would prove more efficient than trying to further harmonise. The present situation of 'imperfect' mutual recognition in the area of conduct of business rules would not create substantial barriers to market access compared to other obstacles (e.g. fiscal barriers), while allowing for regulatory competition in the design of the rules.[71]

We do not share this point of view. It is true that, at least at the wholesale level, disparities of the conduct of business rules are limited, but they are all the more important at the retail level. The present regulatory environment for application of the rules of conduct, where Member States consider their rules applicable to all incoming investment firms, reduces regulatory competition to an illusion. The possible incompatibility with primary EC law apparently is never raised in practice, neither by the regulated firms themselves, nor by the European Commission itself. Regulatory competition would certainly be enhanced if Member States were induced to have more consideration for the need to effectively scrutinise their conduct of business rules under the general good test. Lacking any transparency on what could be accepted under the general good clause, and in absence of any active monitoring by the European commission of the Member States' obligations, one can hardly sustain that the present situation is satisfactory.

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69 Assuming, as imposed by Article 5, that the law of the residence of the consumer offers more protection than the law chosen by the parties.

70 In the same sense KNOBL; P., "Die Wohlverhaltensregeln ...", cited *supra* note 30, p. 14.

71 See HERTIG, G., "Imperfect mutual recognition ...", cited *supra* note 68, at p. 218-222; LASTENOUSE, P., "Les règles de conduite et la reconnaissance mutuelledans la directive sur les services d'investissement", *Revue du Marché Unique européen*, 1995/4, p. 113.

The recent wave of alliances between and mergers of stock exchanges could however change the picture. The creation of common trading floors and the cross-membership of regulated markets which are a common feature of most integration moves, could possibly lead to more bottom-up harmonisation by the markets. Indeed, it is difficult to conceive an integrated financial market structure with large disparities at the level of the conduct of business rules which apply to the market intermediaries. Market intermediaries could easily shift their 'entry point' in the integrated market to the less regulated jurisdiction, while continuing to enjoy cross-membership of the other markets which are part of the integrated structure. The markets will therefore probably put their regulators under pressure to achieve more convergence on the conduct of business rules.

Annex I.

Comparison between Article 11 ISD and the IOSCO International Conduct of Business Principles

Principle	ISD	IOSCO
Honesty and Fairness	'act honestly and fairly in the best interests of its clients and the integrity of the market	'act honestly and fairly in the best interests of its customers and the integrity of the market
Diligence	act with due skill, care and diligence, in the best interests of its clients and the integrity of the market	'act with due skill, care and diligence, in the best interests of its customers and the integrity of the market
Capabilities	'have and employ effectively the resources and procedures that are necessary for the proper performance of its business activities'	have and employ effectively the resources and procedures which are needed for the proper performance of its business activities'
Information about customers	'seek from its clients information regarding their financial situation, investment experience and objectives as regards the services requested'	'seek from its customers information about their financial situation, investment experience and investment objectives relevant to the services to be provided
Information for customers	'make adequate disclosure of relevant material information in its dealings with its clients'	'make adequate disclosure of relevant material information in its dealings with its customers
Conflicts of interest	'try to avoid conflicts of interests and, when they cannot be avoided, ensure that its clients are fairly treated'	'try to avoid conflicts of interests and, when they cannot be avoided, ensure that its customers are fairly treated'
Compliance	'comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of its clients and the integrity of the market	'comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of customers and the integrity of the market

* Italics indicate differences in wording between the ISD and the IOSCO principles

Annex II
Implementation of Article 11 ISD in the EU Member States - General Overview

	Austria	***Belgium***	***Denmark***	***Finland***	
Principles	Art. 13-14 Law 30 Dec. 1996 (WAG)	Art. 36 Law 6 April 1995	Art. 5(2-3) Act No 591 of 13 July 1999	Chapter 4 Securities Markets Act 495/89	Ar of
Specific rules	-	Market rules of regulated markets	Rules of the *Finanstilsynet* (Danish Financial supervisory Authority)	Guidelines of the Financial Supervisory Authority (Guideline 203.1)	- F 0 m - (g o
Supervision	Bundeswertpapieraufsicht	- Market authorities of Regulated Markets - Banking and Finance Commission (foreign investment firms)	Finanstilsynet (Financial Supervisory Authority)	Financial Supervisory Authority	- m - C
External effect of Principles	Yes (art. 15(1) WAG)	(yes)	??	??	(Y

	Ireland	***Italy***	***Luxembourg***	***Netherlands***	
Principles	S. 37 Investment Intermediaries Act 1995	Art. 21 Legisl. Decree 58/1998 of 24 Febr. 1998	Art. 37 Law 5 April 1993	art. 24 Besluit Toezicht Effectenverkeer 1995	Ch
Specific rules	Central Bank of Ireland: Handbook for investment and stockbroking firms. code of conduct (Sept. 2000)	Consob regulation 11522/1998 of 1 July 1998 (art. 26 et.seq.)	CSSF: Circular letter No 2000/15 of 2 Aug 2000	Art. 20-29 Nadere Regeling Toezicht Effectenverkeer 1995 (promulgated by STE)	Go
Supervision	Central Bank of Ireland	Consob	Commission de Surveillance du Secteur Financier (CSSF)	Stocting Toezicht Effectenverkeer (STE)	CN
External effect of Principles	??	??	(No)	(Yes)	??