

Special Provisions for Investment Companies

Current as of 28 December 2007

Preamble

The Special Provisions for Investment Companies¹ constitute an integral part of the new modular Standard Compliance Code (SCC) of the Austrian Banking Industry and have been integrated into its structure as a separate module. As history shows, the Special Provisions for Investment Companies have always been part of the SCC, with the amendment of these Special Provisions becoming absolutely necessary given the implementation of the *Markets in Financial Instruments Directive* (MiFID)². This is mainly due to the fact that both MiFID and the Austrian Securities Supervision Act clearly distinguish between investment companies with a single license as per sec. 1 (1) no. 13 and no. 13a Banking Act and those with an extended license as per sec. 1 (1) no. 13 in conjunction with sec. 3 (2) Securities Supervision Act of 2007.

Substantially this means that investment companies with a single license – as in the past – are exclusively subject to the UCITS rules, which have been implemented as national law by virtue of the Austrian Investment Fund Act. Investment companies with an extended license, however, are covered by MiFID as far as their activities subject to an extended license are concerned; thus, they are also partially covered by the Austrian Securities Supervision Act of 2007.

This SCC module has been designed such that it applies to activities in the framework of an extended license and a non-extended license.

SCC modules 4 *Conflicts of Interest* and 5 *Order Execution* apply only to activities reserved for an extended license, unless expressly provided otherwise in this SCC module.

This means that the clear distinction made both by the legislator of the directives as well as by the national legislator between the UCITS and the MiFID regime is also reflected in the SCC, providing consistency in the contents of the provisions.

1. Standard Compliance Code

As investment companies are Austrian credit institutions performing transactions and services related to financial instruments based mainly in asset and fund management, investment companies – on the basis of sec. 2 Investment Fund Act and sec. 18 Securities Supervision Act – have introduced the Standard Compliance Code as part of SCC module *Special Provisions for Investment Companies*.

¹ In principle, investment companies are investment companies as defined in sec. 2 Investment Fund Act and real estate investment companies are to be understood as defined in sec. 2 Real Estate Investment Fund Act, with the main distinction between investment companies with a single and those with an extended license being observed when applying the Securities Supervision Act.

² RL 2004/39/EC and Implementing Directive 2006/73/EC and Directive (EC) No. 1287/2006 2.

This is associated with the fact that investment companies act honestly and fairly in the best interests of the funds they manage and the integrity of the market, and in so doing comply with all provisions applicable to the performance of their business activities to serve the best interests of investors and the integrity of the market, while contributing the due skill, care and diligence, trying to avoid conflicts of interest and generally having and effectively using the resources and procedures that are necessary for the proper performance of its business activities.

An investment company's management is required – in light of the principle of proportionality clearly apostrophized in the Austrian Securities Supervision Act of 2007 – to ensure the establishment of an independent compliance organisation, placing special emphasis on the independence and discretion of this compliance organisation. The compliance officer, who – as long as the discretion and independence are guaranteed – may be part of an organisational unit that is independent from fund management, shall report exclusively to the management acting as one single body. Thus the compliance officer – if established and required in the organisation – heads the compliance organisation of the investment company, acting in the best interests and the integrity of the investment company and the market.

The compliance officer and compliance department shall report directly to the full management board as one single body; line reporting to the chairman of the management board is recommended.

Within the investment company, the compliance officer plays a central role, as is demonstrated by his responsibility to communicate compliance-relevant aspects to the Financial Market Authority and by his decision-making authority with regard to the applicability and interpretation of compliance-relevant standards. Due to this central role within the investment company, the compliance officer and his subordinated compliance department - to the extent necessary for the adequate performance of this activity - shall be authorised at any time and without any limitations to inspect, access and obtain information including any relevant documents, books, records, personnel data and available sound recordings. Any act in opposition to the compliance officer shall constitute a serious disciplinary and hence punishable offence.

It is decisive that the activities of the compliance officer and compliance department differ from those of the internal audit and risk management departments. However, this does not necessarily rule out cooperation between such organisational units; it is possible, for instance, to delegate – for the sake of efficient control – the verification of compliance with the provisions of the Austrian Securities Supervision Act to the internal audit department.

For the sake of the apostrophised principle of proportionality it must be underscored that the organisational structure of an investment company is usually very lean. The role of the compliance function within an investment company should be seen in the same light, with the outsourcing of compliance activities – similar to other divisions – being possible in principle under sec. 25 Securities Supervision Act or possible in the context of the investment company organisation.

In this way, the first module of the *Standard Compliance Code* (SCC) is applicable to activities of the extended and non-extended license of investment companies.

2. Insider rules & market manipulation

For the sake of an expedient and efficient implementation of the Standard Compliance Code, investment companies as well as their employees and third parties acting on their behalf on the basis of sec. 2 Investment Fund Act and sec. 18 Securities Supervision Act or the market abuse provisions of the Stock Exchange Act must comply with the statutory provisions regarding market abuse which include prohibitions of both insider and market manipulation.

In this way, the second module of the *Standard Compliance Code* (SCC) is applicable to activities of the extended and non-extended license of investment companies.

3. Guidelines for Transactions by Employees in Credit Institutions

The Stock Exchange Act, the Securities Supervision Act and the SCC of the banking industry contain relevant provisions to warrant adequacy and fairness in trading in financial as well as other instruments and, in particular, fair treatment of all capital market participants. As part of their usual business activities, investment companies shall guarantee that provisions regarding personal employee transactions are enacted; such an obligation is met upon enactment of the present rules and their implementation, which affects all employment relationships, and constitutes a minimum requirement for rules internally applied by the investment companies.

It must be noted that any violation of these rules by employees of investment companies may result in permanent damage to the reputation of the investment company and entail consequences under labour, civil and/or criminal law for the relevant employee(s).

The general scope of SCC Module 3 *Guidelines for Transactions by Employees in Credit Institutions* includes all trading with financial instruments as defined in the Austrian Securities Supervision Act of 2007, targeting, in particular, transactions in securities, derivatives, currencies and precious metals performed by employees of the investment company outside the scope of their official responsibilities for their own account, for third party account or in the interest of third parties or performed by third parties for the account or in the interest of the investment company's employee.

In this way, the third module of the SCC *Guidelines for Transactions by Employees in Credit Institutions* is applicable to activities of the extended and non-extended license of investment companies.

4. Financial analysts

The preparation of financial analyses in the meaning of sec. 36 Securities Supervision Act is not included in the permitted scope of activities of investment companies. As in the normal business operations of investment companies, analyses always and without exception are to be regarded in close context with the respective own product, and since publication of such analyses is treated as a marketing notification in accordance with sec. 40 (6) Securities Supervision Act and must be identified accordingly, SCC Module 6 *Austrian Analysis Standards* is not applicable to activities in the framework of extended and non-extended licenses of investment companies.