THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/07-337b

THE PASSPORT UNDER MIFID

Recommendations for the implementation of the Directive 2004/39/EC and Statement on practical arrangements regarding the late transposition of MiFID

May 2007
(updated in October 2007)

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CESR

INTRODUCTION

Background

1. Directive 93/22/EEC of 10 May 1993 on investment services (ISD), adopted the approach of effecting only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems. This made it possible to grant a single authorisation valid throughout the Community and to apply the principle of home Member State supervision. By virtue of mutual recognition, investment firms authorised in their home Member States may provide any or all of the services covered by the ISD for which they have received authorisation throughout the Community by establishing branches or under the freedom to provide services[1].

2. The ISD ensured that investment firms have the same freedom to create branches and to provide services across frontiers as was provided for credit institutions by the Second Council Directive (89/646/EEC) of 15 December 1989.

3. The ISD accepted that 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 that is 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.

4. Directive 2004/39/EC of 21 April 2004 (hereafter MiFID) has adopted the approach of enhancing the degree of harmonisation in order to offer investors a high level of protection and to allow investment firms to provide services throughout the Community on the basis of home country supervision.

5. By way of derogation from this principle, the Directive confers on the host Member State[2] the responsibility for enforcing certain rules in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.

6. In its consultation paper (Ref. CESR/06-413) on its Work Programme, CESR gave priority to those aspects of the Directive that relate to the functioning of the passport of investment firms, including home/host relationships in the authorisation phase, home/host relationships regarding supervision and monitoring of the provision of services/activities by branches, transitional provisions around the passport, and issues regarding the provision of cross-border business by tied agents.

The consultation paper on the passport under MiFID

7. On the 15 December 2006 CESR published a consultation paper on the passport under MiFID This paper presented proposals for and questions on a common approach on the notification procedures set out in Articles 31 and 32 of MiFID and on the future collaboration between the home and host authorities that will be necessary in order to ensure efficient and effective supervision of cross-border activities. The consultation closed on the 9 February 2007. An open hearing took place on the 2 February 2007.

[1] Cf. recital 3 of the ISD.
[2] Cf. Article 32.7 of MiFID.

8. CESR received 36 written answers, mainly from Industry representatives. Overall, respondents mostly agreed with CESR's approach and its proposals. The major theme of the responses concerned the application of article 32 (7) of MiFID. The accent was put on the desire for:
   - certainty regarding the role of home and host regulators and the application of their rules;
   - avoiding overlaps in the supervision of the activities provided through the branch; and
   - consistency and clarity in any practical arrangements, avoiding an individual case by case approach, where possible.

   Specific responses, together with the position of CESR, to detailed issues will be handled under the relevant chapters and recommendations set out within this document

Objective of the recommendations

9. The purpose of the recommendations is to have a common approach on the notification procedures set out in Articles 31 and 32 of MiFID and on the future collaboration between the home and host authorities that will be necessary in order to guarantee efficient and consistent supervision of cross-border activities, taking into account the provisions of the directive included in chapter II of title IV.

10. The main aims of these recommendations can be summarized as follows:

- harmonisation of the notification procedures;
- uniform interpretation of Articles 31 and 32;
- enhancing collaboration between host and home regulators during the authorisation and supervision phases;
- clarifying some aspects regarding the supervision of tied agents, Multilateral Trading Facilities (MTF) and representative offices.;
- elaboration of pragmatic solutions for the transition from the ISD passport to the MiFID passport; and
- prioritisation of those aspects where investment firms need clarity in the short term.

11. CESR recommends to its members that further work is needed to develop a common model of practical cooperation regarding the supervision of branches (as explained in chapter B). CESR also considers that further work is required to help achieve a common approach to address the practical supervisory issues attaching to tied agents.

12. Preparation of these recommendations is being undertaken by the MiFID level 3 Expert Group through the MiFID level 3 Intermediaries Subgroup. The Expert Group has been chaired by Mr Manuel Conthe Gutiérrez, Chairman of Spains's Comisión Nacional del Mercado de Valores (CNMV) and is now chaired by Jean-Paul Servais Chairman of the Executive Management Committee at the CBFA, Belgian's integrated supervisor. The Intermediaries Subgroup has been chaired by Mr Antonio Carrascosa Morales, General Director of Spain's Comisión Nacional del Mercado de Valores (CNMV) and now is chaired by Maria Jose Gomez Yubero, Director at the Comision Nacional del Mercado de Valores (CNMV).

Status of the recommendations

13. The outcome of CESR's work is reflected in the common recommendations set out in this paper, which do not constitute European Union legislation and will not require national legislative action.

14. CESR Members will apply the recommendations in their day-to-day regulatory practices on a voluntary basis.

15. The way in which the recommendations will be applied will be reviewed regularly by CESR. CESR recommendations for the consistent implementation of the Directive 2004/39/EC will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

A. THE TIMETABLE IN THE NOTIFICATION PROCEDURES (ARTICLES 31 (3) AND 32 (6) OF MIFID)

Free Provision of Services (Article 31(3))

Responses on the Consultation paper

16. Some respondents stated that the one month period established in article 31(3) should be considered as a maximum period after which there is an automatic right for an investment firm to commence the relevant cross-border activities irrespective of whether there has been a notification or not.

17. Regarding the application of the timetable under article 32 the respondents were especially concerned about the possibility that in some countries non-MiFID additional commercial requirements could prevent the registration of the branch taking place within the two month period. Respondents asked for clarity to the effect that for the purpose of MiFID, there should be nothing to stop the branch operating at the latest two months after the transmission of the communication by the competent authority of the home Member State.

Recommendations

Recommendation n°1

CESR considers that, once the notification has been dispatched by the home competent authority to a recognised point of contact in the host, this is the date from which the firm may commence cross-border activities. CESR members agree that the home authority will notify the firm that the notification has been forwarded in order for such to know the date from which it may commence cross border activities. The home authority shall also ensure that the notification has been received by the host (a list of contact persons in each CESR Member should be maintained).

18. CESR is of the opinion that there is no requirement in the MiFID to wait for the firm to appear on the host's register before commencing cross border services. However, it is of course open to the firm to check the register of the host itself to see if its entry has been recorded. It is in the interest of the firms to do so. Additionally, this is also of benefit to the host Member State investors who, in preference will visit the host register.

Recommendation n°2

CESR members agree to send the notification set forth in Article 31(3) without delay and, in any case, within one month of receipt of all requisite information. CESR members also agree to update their Registers in a timely manner so as to reduce the possibility of any confusion.

19. Nevertheless, if the home regulator as a result of exceptional circumstances does not forward the information within one month from receiving it, it cannot be deemed that the firm may commence cross-border activities after such month.

Opening of a Branch

20. CESR is of the view that, consistent with the approach to the free provision of services, the decision to approve a branch lies with the home competent authority. Following the dispatch of a notification by the home regulator, the host authority has a maximum period of two months to deal with the notification file.

Recommendation n°3

CESR considers that registration by the host should not have to take place before the branch can commence operations. This is consistent with the proposed approach for the commencement of cross border services under article 31(3). Two months should be sufficient time for the host to have updated its register of firms.

21. In some Member States, the establishment of a branch entails that certain specific domestic provisions related to the filing of branches with the companies' registry also have to be satisfied. As long as these requirements remain unfulfilled, it is impossible for the host regulator to update the appropriate register in order to include a branch that does not exist according to domestic commercial legislation, nor may it be established and commence business.

Recommendation n°4

In order to facilitate the notification procedure, CESR Members may maintain on their website information on additional domestic requirements regarding the filing of branches with the companies' registry. When a notification is received, the home competent authority may refer the firm to the website of the host competent authority. The responsibility to keep any such list of commercial law provisions up to date would rest with each relevant host regulator.

22. In respecting this recommendation the term of the two months may be more easily met.

B. THE DIVISION OF HOME/HOST RESPONSIBILITIES REGARDING BRANCHES

Responses on the Consultation paper

23. This chapter of the CESR consultation paper on Passporting attracted the highest level of response, particularly on the issue of the application of "within its territory" under Article 32(7). Respondents were very strongly in favour of solutions that would achieve legal certainty and an outcome of single supervision of conduct of business requirements for services provided through a branch.

24. Broadly speaking, respondents agreed with the statements and proposals CESR puts forward in this chapter. The overarching concern was in regard to the need for certainty. Many respondents noted that it was imperative to have certainty regarding the division of responsibilities between home and host well prior to the implementation date to give the firms time to adopt the appropriate internal measures. Many respondents defended the "characteristic performance" legal test because this could give to the industry the certainty and the application of a single rulebook to branches that it sought.

25. There was a very clear call for CESR and its members to ensure that regulators deliver practical cooperation arrangements in a common and consistent manner. Underlaps and overlaps in supervision should be avoided.

26. Many respondents were concerned to avoid a case-by-case approach to the treatment of branches if possible, on the grounds that this could be potentially inconsistent, complex, opaque and costly.

27. Other respondents wanted a clear definition of what constitutes the conduct of business rules mentioned in article 32(7) and what constitutes organisational requirements. Some respondents had differing views on the importance of the various criteria in determining the best approach for regulating business conducted through a branch. One possible solution put forth by some respondents would be to grant home states the power to deem compliance with host state rules as compliant with the home's, in order to reduce potential overlapping regulation.

Recommendations

28. CESR has asked the European Commission for an interpretation regarding the meaning of the Level 1 Directive text under Article 32(7). The opinion of the Commission will inevitably shape the precise form of any collaboration model among CESR members. However, CESR believes that whatever the outcome of this will be, members should recognise the necessity to continue to work together to help deliver in practice outcomes consistent with better regulation. There are different models available for such collaboration.

Recommendation n° 5

CESR considers that members should be committed to the on-going work to agree (effective mechanisms of) practical cooperation for the supervision of branches. The results of this work must be transparent to stakeholders. Given the need for operational arrangements to be agreed as soon as possible (and in any event by 1 November 2007 at the latest) CESR members will take all reasonable steps to achieve this goal.

C THE CROSS-BORDER ACTIVITIES OF INVESTMENT FIRMS THROUGH TIED AGENTS

29. MiFID has introduced a regime for tied agents. Operating under the full and unconditional responsibility of only one investment firm, they may promote investment and/or ancillary services to clients or prospective clients, receive and transmit instructions or orders from the client in respect of investment services or financial instruments, place financial instruments and/or provide advice to clients or prospective clients in respect of those financial instruments or services.

30. When an investment firm wishes to perform investment services in a host country, it may use tied agents if its home Member State authorises their use. The investment firm can have recourse to a tied agent to exercise either its right to provide services or its right to free establishment. In both cases, the home authority informs the host authority of the firm's intention to use tied agents, and if available at the time of notification, the identity of prospective tied agents according to the standard notification procedure.

31. When making use of the right to free establishment to provide investment services through a tied agent established in a country where the investment firm has no existing branch, the tied agent will be treated as a branch presence in that country. When the tied agent is established in a country in which the investment firm already maintains a branch, the tied agent is assimilated to that branch.

32. Tied agents benefit from the principle of the single authorisation of the investment firm they are representing. The home authority of the investment firm uses the initial notification procedure for the establishment of a branch to inform the host authority of an investment firm's intention to use tied agents in the host Member State. The home authority of the investment firm informs the host authority of changes in the appointment of tied agents by using the standard procedure for the notification of changes pertaining to the branch of an investment firm.

33. Tied agents can only be admitted to the appropriate public register as specified in Article 23(3) MIFID if it has been established that they are of sufficiently good repute and possess appropriate general, commercial and professional knowledge to be able to communicate accurately all relevant investment service information to clients and potential clients.

Responses to the consultation paper

34. Respondents noted the need for proper and easily accessible information on tied agents. Some of the respondents suggested that the Member States or CESR should establish an internet-based system of linked registers, possibly on a single template basis, so that the individual information regarding tied agents is accessible at a European level.

35. Most respondents supported the idea of a standardised registration process in all Member States.

36. The proposed coordination between Member State Competent Authorities was welcomed. According to the respondents this cooperation is essential to:

- ensure that the requirements for good reputation and possession of knowledge can be met in practice;
- clarify the responsibilities and tasks of the competent authority of the home and the host in relation to tied agents; and
- ensure a consistent interpretation of the rules across all Member States, in accordance with the provisions on branches and provision on cross-border services.

Recommendations

Recommendation n° 6

Prior to registration, the competent authorities of the Member States where a prospective tied agent is to be established and/or registered and the home Member State of the investment firm cooperate and exchange information with each other to help ensure that the tied agent has the required good repute and knowledge.

37. Article 23 (4) allows registration to be carried out in various manners in the Member States, for example, by the government, the competent authorities, the investment firms and credit institutions, etc.

Recommendation n° 7

CESR considers that it would be helpful if CESR Members study the use of a common template for the registers of tied agents and their linkage through an internet-based system. This would facilitate consultation by clients and prospective clients especially when seeking access to information regarding tied agents conducting business on behalf of a firm operating on a cross-border basis or in a country that does not have a tied agent regime.

38. Tied agents established in a host Member State are subject to the MIFID provisions relating to branches according to Article 32 (2) MiFID. This means that the division of responsibility between home and host authority for authorisation and supervision of their activities and enforcement of obligations relating to investment services and activities corresponds to that defined for branches under the right of free establishment.

39. The investment firm remains fully and unconditionally responsible for any action or omission on the part of its tied agents. The home authority of the investment firm ensures that the firm that appoints a tied agent monitors and controls the compliance of its agent with MiFID requirements.

Recommendation n° 8

CESR Members agree to cooperate and exchange information in order to monitor and supervise effectively the investment firm and its use of tied agents even where a host Member State does not itself have a tied agent regime.

40. Competent authorities are aware that the use of a tied agent as a branch establishment for providing investment services under MiFID will present new challenges to the way in which supervision will be organised. In particular, how Article 32(7) will be applied in the context of tied agents, being considered as unauthorised entities in the host Member State. Another challenge is the application of Article 23(6) that allows Member States to reinforce or add requirements for tied agents registered within their jurisdiction.

41. In resolving the above challenges, the following considerations are relevant:

a) how an investment firm controls the activities of its tied agents;
b) how regulators exercise ongoing conduct of business supervision on an unauthorised entity;
c) how to ensure that a tied agent complies with money laundering obligations;

d) how the regulator of the home Member State of the investment firm verifies that the tied agents in other Member States implement the investment firm's procedures adequately; and
e) how the compensation mechanism of the home Member State operates to cover losses attributable to a tied agent.

42. After November 2008, with one year of practical application of MiFID rules, CESR will be equipped with facts that will allow an informed decision on whether further work should be conducted in this area.

Recommendation n° 9

CESR Members agree to cooperate to address the practical supervisory issues attaching to tied agents.

D. CROSS-BORDER ACTIVITIES OF A MULTILATERAL TRADING FACILITY (MTF)[3]

Background

43. The MiFID establishes a process for investment firms and market operators operating an MTF to conduct cross border activities based on mutual recognition. It allows an investment firm or a market operator operating an MTF authorised in its home Member State to provide that service or activity on a cross border basis in other Member States without seeking authorisation in those host States, provided that the notification requirements of Article 31 are fulfilled.

44. Whereas investment firms may use Article 32 to set up branches in other Member States including the service or activity of operating an MTF, the directive does not include provisions regarding the establishment of a branch for market operators that are not investment firms.

45. Considering the free provision of services Article 31 (5) establishes that Member States shall, without further legal or administrative requirement, allow investment firms and market operators operating MTFs from other Members States to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory.

46. Article 31 (6) establishes that the investment firm or the market operator that operates an MTF shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State of the MTF shall communicate, within one month, this information to the Member State in which the MTF intends to provide such arrangements.

47. The competent authority of the home Member State of the MTF shall, on the request of the competent authority of the host Member State of the MTF and within a reasonable delay, communicate the identity of the members or participants of the MTF established in that Member State.

48. Article 31 (5) and (6) MiFID raise the question of what exactly constitutes providing such arrangements by an MTF so as to facilitate access to and use of their systems by remote users or participants (in other words what constitutes 'passporting' for an MTF).

49. The arrangements referred to in article 31 (5) can take different forms. In most cases, these arrangements will refer to a trading platform that is delivering remote access to participants and users. But according to recital 6 of MiFID an MTF can also be organized only by a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations. The transactions concluded under those rules are considered to be concluded under the systems of the MTF.

Responses to the consultation paper

50. There were only a few reactions on the propositions of CESR regarding MTFs. The most important suggestion from the respondents asked CESR to take into account that there are cases where the MTF is not a trading platform.

Recommendations

[3] The conclusions on this section specifically apply to MTFs.

51. CESR proposes a common approach for its Members to decide whether an MTF is providing such arrangements in the territory of a Member State other than its home Member State, as referred to in Article 31 (5) and (6) MiFID.

> **Recommendation n° 10**
>
> If the MTF comprises an automated IT trading platform CESR considers that an investment firm or market operator operating an MTF who is authorised in a Member State, needs to notify according to Articles 31 (5) and (6) MiFID, where the platform is providing direct access to users or participants in the territory of a Member State other than its home Member State ("connectivity test").

52. The connectivity test mentioned above covers for example the placing of trading screens by the MTF operator concerned in a Member State other than its home Member State, or the delivery by the MTF operator of software so as to facilitate access to the platform, or the physical presence of IT-infrastructure, but may also include the facilitation of direct access via Internet depending upon the particular circumstances.

53.

> **Recommendation n° 11**
>
> In cases other than those covered in Recommendation 10, CESR considers that an investment firm or market operator operating an MTF who is authorised in a Member State needs to notify according to Articles 31 (5) and (6) MiFID, when the MTF facilitates the conclusion of transactions by users or participants established in another Member State under the rulebook of the MTF.

54. CESR considers that facilitating means that the MTF operator provides the user or participant into the territory of the other Member State with the necessary information and material services in such a way that it enables the user or participant to accept the rulebook of the MTF and to start trading on the MTF from this Member State.

The timetable

55. If the investment firm or a market operator operating an MTF regards the arrangements to be provided by the MTF in question as rendering cross border services/activities, as referred to in Article 31 (5) and (6), it shall inform the competent authority of its home Member State who then, in accordance with Article 31 (6), will notify within one month the competent authority of the host Member State in which the MTF intends to provide such arrangements as referred to in Article 31 (5).

56. It is CESR's view that the same rules regarding the timetable are applicable under article 31 (6) as under article 31 (3).

> **Recommendation n° 12**
>
> CESR considers that, once the notification has been dispatched by the home competent authority to a recognised point of contact in the host, this is the date from which the market operator or the investment firm operating an MTF may commence cross-border activities. CESR members agree that the home authority will notify the firm or market operator that the notification has been forwarded in order for such to know the date from which it may commence cross border activities. The home authority shall also ensure that the notification has been received by the host (a list of contact persons in each CESR Member should be maintained). There is no requirement to wait for the firm or market operator to appear on the host's register before commencing cross border services.

E. THE ACTIVITIES OF REPRESENTATIVE OFFICES

Background

57. A representative office is an office that represents the head office of an investment firm in another Member State and does not itself provide investment services or activities. Typically representative offices carry out activities such as market research and promoting the brand of an investment firm.

58. Some Member States have local requirements for representative offices of investment firms authorised and supervised in another Member State and/or local requirements for conducting activities outside the premises of investment firms. Neither the ISD nor MiFID have provided a regime for the activities of representative offices. CESR believes that it has no specific mandate to provide recommendations regarding a regime for representative offices. CESR subscribes nevertheless to the view that no MiFID investment services or activities can be provided through a representative office.

Responses to the consultation paper

59. There were only a few reactions from respondents regarding representative offices. The proposition of CESR according to which a representative office can be qualified in some circumstances as a tied agent was considered inconsistent. CESR agrees with this remark. A representative office will normally be a part of the same legal entity of the investment firm.

Recommendations

60. It is important for the firm to qualify the nature of the activities performed by its office in another Member State. If in fact the office establishment intends to provide investment services or activities, it has to be considered as a branch.

Recommendation n° 13

Where an investment firm establishes a representative office in another Member State solely for promotional purposes, that office should not be qualified as a branch under MiFID

If there is no MiFID investment service or activity taking place through the office itself, then any cross-border MiFID investment service or activity by the firm is the sole responsibility of the home Member State and will necessitate prior notification under article 31 MiFID. In practice, firms should notify under article 31 where they establish representative offices because of the possibility that they might be conducting cross-border business.

Consultation between authorities

61. CESR recognizes that in some cases its members may have difficulty in qualifying the service provided through the representative offices or other entities.

Recommendation n° 14

CESR considers that if there is difficulty qualifying the activities of representative offices or other entities, the authorities of the host and the home Member States shall cooperate to avoid any misunderstanding regarding what is taking place.

F. TRANSITIONAL ARRANGEMENTS

62. To ensure firms can continue to carry out their business activities without interruption, MiFID Article 71(4) provides that passport notifications communicated before implementation for the purposes of the ISD should be deemed to have been communicated for the purposes of MiFID. This means that existing ISD passports will be recognised as MiFID passports following implementation from 1 November 2007. CESR considers that transitional arrangements are necessary to:
    - ensure that the records of the host regulator in respect of existing ISD passports reflect the revised MiFID investment service and activity, and financial instrument definitions; and
    - ensure certainty for passporting firms and users of the relevant public Register(s).

63. Otherwise there is a significant risk that inconsistencies and additional complexities will develop going forward, especially when a firm wishes to expand the scope of its passporting activities, requiring a notification under the revised MiFID definitions. Therefore, CESR has developed an approach to update records to include the new MiFID definitions.

Responses to the consultation paper

64. Respondents welcomed the proposals for common mapping of MiFID investment services, activities and instruments back to those of the ISD. Some respondents asked for particular attention to be given to the MiFID investment service of "investment advice".

Recommendations

Recommendation n° 15

CESR members agree to a common mapping for the purposes of the notification procedures of ISD services and instruments to MiFID services, activities and financial instruments. This mapping is included in Annex 1.

65. Home and host competent authorities will be responsible for updating their own records using the agreed mapping, prior to 1 November 2007, relying on existing ISD records.

66. Although the initial mapping exercise would be completed by relying on existing records, any change to an existing passport, such as the addition of new activities, services or financial instruments (given the wider scope of MiFID compared to the ISD, for example commodity derivatives), would result in a new notification being required under articles 31(4) and 32(9) of MiFID.

Recommendation n° 16

Home competent authorities shall adopt a procedure by which investment firms are invited to review their current passported services, activities and financial instruments and request any additional services, activities and financial instruments that may be required. This should be done in a timely manner to ensure that corresponding notifications may be made by the home competent authority before 1 November 2007, or as soon as practicable thereafter.

Recommendation n° 17

CESR members agree that home competent authorities, when making notification of any additional services, activities and financial instruments to an investment firm's passport, also provide the host authority with an update of the existing passports.

G. FURTHER HARMONISATION BY WAY OF A PROTOCOL AND FURTHER RECOMMENDATIONS BETWEEN COMPETENT AUTHORITIES

Responses to the consultation paper

67. Respondents approved the propositions of CESR regarding the protocol. Some respondents suggested that the protocol should also cover the allocation of supervisory responsibility for branches; CESR would refer back to the recommendation on this matter under chapter B of this document.

Recommendations

68. CESR seeks to enhance the collaboration among competent authorities in cross-border activities and to harmonise and facilitate the notification procedure under Articles 31 and 32 of the Directive. CESR seeks likewise to improve the information about investment firms provided to the public. Therefore CESR will produce a protocol among the various authorities.

Recommendation n°18

CESR considers that this protocol will have to treat the following topics:

a) harmonisation of the notification procedure

- use and elaboration of standardised forms for the notifications;
- arrangements regarding the time schedule of notifications;
- exchange of information regarding problems concerning passport notification;
- the home authority to promptly advise the host authorities of the Member States in whose territories an investment firm carries on activities in terms of Articles 31 and/or 32 of MiFID of any decision by the home authority to withdraw the authorisation of that firm;
- methods of communication (e.g. use of email).

b) collaboration among authorities

- appointment within each authority of the person(s) responsible for all notification issues;
- exchange of contact lists among authorities;

c) improvement of information to and the contact with the public

- facilitating client contact with the investor compensation schemes in the different Member States, by making available a list of all the relevant addresses.

69. CESR considers furthermore that Members should agree on standards regarding the contents of public registers.

Recommendation n° 19

The registration requirements should apply to both natural and legal persons. Given the fact that this register can be consulted from any Member State, the headings of the public register should be in the national language or in a language which is common in the sphere of international finance and accepted by the competent authority.

The following minimum information should be contained in the register of the competent body in the home state:

- Name of investment firm, its address, registration number (if any) and contact details
- Services and Activities and Financial instruments (if applicable) for which the investment firm is authorised in the home Member State;
- Member States for which the investment firm has notified its intention to undertake business by way of freedom to provide services (although it is acceptable for this information to be located at another section of the authority's website);
- Member States for which the investment firm has notified its intention to undertake business by way of freedom of establishment (although it is acceptable for this information to be located at another section of the authority's website).

In the case of a tied agent carrying out investment services or activities for and on behalf of an investment firm, and who acts under the full responsibility of that investment firm, it is recommended that either

- the name of the tied agent is included in the investment firms details on its register; or,
- the name of the investment firm which the tied agent represents should be contained in a separate tied agents register (if the home Member State allows tied agents).

70. Article 53 MiFID requires the setting up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms. This would include provisions for handling cross-border complaints received by investment firms.

Recommendation n° 20

Without prejudice to the FIN-NET network, members should cooperate to facilitate/enable consumers to contact any extra-judicial bodies established in their Member State of residence about complaints concerning investment firms established in another Member State.

Therefore CESR Members should communicate to the Secretariat of CESR the names and addresses of the national bodies entitled to register consumers' complaints. A list of these national bodies shall be published afterwards on CESR's webpage.

In case Member States have set up procedures for out-of-court settlement of complaints and/or have charged a different body with this kind of settlement, they also communicate to the CESR Secretariat the names and addresses of such bodies.

H. STATEMENT ON PRACTICAL ARRANGEMENTS BETWEEN CESR MEMBERS REGARDING THE LATE TRANSPOSITION OF MIFID

MiFID does not seem to explicitly provide for a transitional passport regime in the event that there is late transposition of the Directive by the home Member State. Therefore where some Member States do not have the full MiFID regime in place from 1 November there is a risk of disruption to the continuity of cross-border business.

In the July ESC, the Commission tabled the working document ESC/28/2007 that is attached to this paper (annex 2), on the functioning of the MiFID passport after 1 November 2007. The paper focuses on the legal issues of late implementation and consequences arising from it. Moreover, the Commission set out a description of the cases where late implementation of MiFID would cause legal and practical problems and advanced potential solutions.

CESR has been tasked with developing practical solutions to the problem of late transposition. The outcome is to define practical arrangements to provide for business continuity in the event that some Member States will be late in transposing MiFID. The outcomes should aim to address the concerns of competent authorities and investment firms themselves.

MiFID is driven by the objective of opening up European markets in financial instruments and facilitating cross-border business and services. CESR works to ensure that late implementation of the Directive is not allowed to undermine this purpose. Consequently arrangements developed by CESR are guided by the principle that business continuity to the extent possible should be maintained after 1 November and the CESR principles of cooperation between competent authorities.

The following statement contains the agreement and the conditions under which all CESR members will be able to ensure continuity to the current ISD passports from late transposing Member States.

From the 1st of November 2007 and for the period necessary to the full transposition of MIFID by Member States to be completed, CESR members agree to proceed on the basis that:

1. The authorisation and passport granted before the 1st of November under the Investment Services Directive (ISD) to firms established in Member States that have not transposed MiFID at the date of 1st of November 2007, will continue to be valid, on the understanding that the firm's ISD authorisation was subject to conditions comparable to those set out in Articles 9 to 14 of MiFID;

2. The firms established in Member States that have not transposed MiFID at the date of 1st of November 2007 that have a valid authorisation and a passport as in 1 above, may continue to provide investment services in other Member States provided that, depending on the case, the following conditions are met:

- **a. Where the firm provides investment services through a branch, the branch complies with host state rules implementing Articles 19, 21, 22, 25, 27 and 28 of MiFID; and**
- **b. Where the firm provides investment services under the freedom to provide services, the firm complies with home Member State provisions comparable to the operating conditions of MiFID. Compliance with the relevant CESR Standards could be an assumption of comparability.**

3. This is without prejudice to the right of host competent authorities to take other precautionary measures under Article 62(1) of MiFID.

ANNEX 1 – MAPPING OF ISD SERVICE AND INVESTMENT ACTIVITIES TO MIFID INVESTMENT SERVICES AND ACTIVITIES

ISD	MIFID
Section A: Core Services	**Section A: Investment services and activities**
1. a) Reception and transmission, on behalf of investors, of orders in relation to one or more of the instruments listed in Section B.	(1) Reception and transmission of orders in relation to one or more financial instruments
1. b) Execution of such orders other than for own account.	(2) Execution of orders on behalf of clients
2. Dealing in any of the instruments listed in Section B for own account.	(3) Dealing on own account
3. Managing portfolios of investments in accordance with mandates given by investors on a discriminatory, client-by-client basis where such portfolios include one or more of the instruments listed in Section B.	(4) Portfolio management
(moved from ISD Non-Core services to MiFID Investment services and activities)	(5) Investment advice *(moved from ISD Non-Core Services to MiFID Investment services and activities. For transition see ISD Section C: 6. investment advice….)*
4. Underwriting in respect of issues of any of the instruments listed in Section B and/or the placing of such issues.	(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and; (7) Placing of financial instruments without a firm commitment basis
(new activity)	(8) Operation of Multilateral Trading Facilities
Section C: Non-core Services	**Section B: Ancillary services**
1. Safekeeping and administration in relation to one or more of the instruments listed in Section B.	(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management
2. Safe custody services.	
3. Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the instruments listed in Section B, where the firm granting the credit or loan is involved in the transaction.	(2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction
4. Advice to undertakings on capital structure, industrial strategy and related matters and advice and service relating to mergers and the purchase of undertakings.	(3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings
5. Services related to underwriting.	(6) Services related to underwriting
6. Investment advice concerning one or more of the instruments listed in Section B.	*Section A: Investment services and activities* - (5) Investment advice
(new activity)	(5) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments
7. Foreign-exchange service where these are connected with the provision of investment services.	(4) Foreign exchange services where these are connected to the provision of investment services
(new activity)	(7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under Section C – 5, 6, 7 and 10 - where these are connected to the provision of investment or ancillary services

Section B: Instruments	Section C: Financial Instruments
1. a) Transferable securities.	(1) Transferable securities
1. b) Units in collective investment undertakings.	(3) Units in collective investment undertakings
2. Money-market instruments.	(2) Money-market instruments
3. Financial-futures contracts, including equivalent cash-settled instruments.	(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash
4. Forward interest-rate agreements.	
5. Interest-rate, currency and equity swaps.	
6. Options to acquire or dispose of any instruments falling within this section of the Annex, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates.	
new financial instrument	(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event)
new financial instrument	(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF
new financial instrument	(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls
new financial instrument	(8) Derivative instruments for the transfer of credit risk
new financial instrument	(9) Financial contracts for differences
new financial instrument	(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls

CESR

Annex 2

EUROPEAN COMMISSION
Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS
Securities markets

Brussels, 6 July 2007
MARKT/G/3/MV D(2007)

Working document ESC/28/2007
Subject: Functioning of the MiFID passport after 1 November 2007

1. The issue at stake

1. 1. Legal context

Article 5(1) of Directive 2004/39/EC on Markets in Financial Instruments ("MiFID") provides that Member States may only allow firms to carry on investment services if they have been authorised in accordance in MiFID in their home Member State. The passporting procedure required before a firm can provide services or establish branches on the basis of this authorisation in host States is based on the notification of prescribed information, provided by the firm, between the home and host State competent authorities (art. 31 par. 2-4 and 6, art. 32 par. 2-6). The procedures for the operation of the passport, the conduct of business in host States and the supervision of passporting firms in Articles 31 and 32 of MiFID work only if both the home and the host State have transposed the Directive, i.e. have the full MiFID regime in place in their national law. Both provisions assume that a firm that wishes to provide services or establish a branch in a host State will be authorised and supervised in accordance with MiFID by the properly designated competent authority in its home Member State. Article 32 also assumes that rules transposing the obligations mentioned in Article 32(7)[4] are in force in the host State. Finally, host authorities also have the power under Article 62 to take precautionary measures if a firm providing services in its territory is in breach of its obligations under the MiFID in the host State.

1. 2. Problems of late transposition

If some Member States do not have the full MiFID regime in place from 1st November 2007 there is a considerable risk of disruption to the continuity of cross-border business. The Directive does not provide for a transitional passport regime in the event of late transposition by either State.

On the basis of the information provided by Member States, there is a risk that transposition will not be complete in all Member States by 1st November 2007. The consequences of non-transposition for the State itself in terms of infringement action and possible claims for damages, and for their firms and their markets in terms of loss of business opportunities, could be considerable:

[4] That is, Articles 19, 21, 22, 25, 27 and 28: obligations relating to conduct of business, best execution, client order handling, transaction reporting, and pre- and post-trade transparency.

- The Commission will continue to pursue infringement proceedings vigorously against late-transposing Member States.

- Those Member States that fail to transpose by 1st November 2007 risk being subject to actions for damages before national Courts by firms that have sustained losses caused by the State's failure by implement MiFID by the legal deadline. Similar problems could arise, if implementing rules are in force by 1st November 2007, but have been adopted after 31st January 2007: firms might have considerable difficulties and finally not be able to adopt the necessary systems and structures in time to fully comply with the MiFID requirements by 1st November 2007. Therefore firms could have sufficient grounds to ask for compensation before national courts.

- Firms themselves might incur liability vis-à-vis their clients for not complying with the obligations in the MiFID in case Member States have transposed later than 31St January 2007 but before November 2007, but firms did not have the time to put in place the necessary arrangements in order to become MiFID compliant by that same date.

- Regulators in those Member States which are late transposing and which tolerate operation of non-compliant MiFID firms might be responsible for damages as well by individuals or the firms (detailed analysis of this aspect follows under 2.).

- Firms and regulators might incur liability even in those cases where the firm limits its activity in its home Member State, in case this Member State has not transposed on time and/or the firm is not MiFID compliant after 1st November 2007. The obligations established by the MiFID apply to all EU firms wishing to provide the services covered by the MiFID, irrespective of whether they make use of the passport or not.

There is, therefore, a cascade of possible liability issues that could cause significant problems[5].

2. Description of possible cases

The legal and practical problems that would arise may vary depending on whether the home or host State is late in implementing, as well as whether the delay of transposition goes beyond November 2007.

2. 1. Late transposition by home Member State

Under this scenario one can distinguish two situations:

2. 1. 1. Continuing provision of ISD services

Different issues emerge under this assumption depending on (i) whether the home Member State has not transposed on 1st November 2007 or (ii) transposition is in force on that date, but firms did not have the time to adapt to the new rules because the Member State "absorbed" the extra nine month period granted to firms in order to adapt themselves to the new MiFId requirements.

(i) No transposition by 1st November 2007

It is clear from Article 5.1 that Member States must require firms carrying on investment services to be authorised in accordance with MiFID. Nevertheless, if an investment firm is already providing services in a host Member State before 1st November 2007 under the ISD

[5] Of course, the problems are most acute for 'pure' investment firms. UCITS management companies and credit institutions have independent passporting rights under the UCITS directive and the Banking Directive (2006/48/EC) respectively that will not be affected by late implementation of MiFID.

regime and wishes to continue providing the same services under the MiFID passport, it may not have a MiFID authorisation and it is not subject to the full range of MiFID rules since its home member State has not transposed. Article 71(1) 'grandfathers' pre-MiFID authorisations for investment firms. Firms already authorised in their home MS to provide investment services are deemed to have a MiFID authorisation for the same services, provided that the pre-MiFID laws of the State under which the authorisation was granted required the firm to comply with conditions comparable to those under Articles 9 to 14 of MiFID[6]. This may need to be examined on a case-by-case basis, Member State by Member State, to ensure that the ISD rules, as transposed, were comparable. Along the same lines, Article 71(4) 'grandfathers' passporting notifications made under the ISD, so that no further notification is required under Articles 31 and 32 of MiFID.

Nevertheless, two issues arise in this context:

(a) There is a question as to whether these provisions are only effective if the home Member State of the firm in question has actually implemented MiFID.

It could be argued that compliance with the MiFID systems and controls is a necessary precondition to MiFID passporting rights in all cases. If this view is correct, then grandfathering under Article 71(4) of the ISD passport of any firm already carrying on business in a host State could not operate until the home Member State of that firm had implemented MiFID.

(b) Under the assumption that the authorisation granted under the ISD remains valid, Article 16(1) of MiFID requires firms to comply at all times with the conditions for their initial authorisation, including operating conditions (art. 13 of MiFID and …of the implementing Directive). This provision obviously requires transposition before it can be binding on firms. If transposition has not taken place in the home Member State, the competent authority of this Member State cannot request compliance with these provisions.

This gives the right to the host Member State competent authority to take precautionary measures under Article 62 par. 1 and 2 of the MiFID. Indeed, if the competent authority does not take those measures it might face issues of responsibility for not complying with its own obligations under Article 62 to make sure that irregularities committed on its territory are put to an end.

(ii) Late transposition – firms are not ready by 1st November 2007

Under this assumption, the legal doubts about the possibility of grandfathering of authorisations is no longer an issue since the home Member State has transposed by the date of entry into force of the MiFID. Nevertheless, "grandfathered' firms need to respect MiFID authorisation conditions under Article 16, even though authorisation was originally granted under the ISD.

In case the MiFId has been transposed with delay and firms did not have time to adapt to the new requirements, under a strict application of MiFID, under Article 8 d) of MiFID, competent authorities should withdraw authorisations from firms that do not meet the MiFID

[6] Grandfathering of ISD authorisations under this provision will only be effected if the less-detailed ISD requirements in these areas were 'comparable to' those under MiFID. The ISD contains requirements relating to management (Article 2(3)), control (Article 4), regulatory capital (Article 8), and organisational requirements (administrative and accounting procedures, internal control mechanisms including for personal transactions, safeguarding of client assets, record-keeping, conflicts of interests etc. - Article 10) which, if not as detailed as those in MiFID and its implementing measures, are based on similar high-level principles.

operating conditions. However, the firm may be able to challenge that decision in the national courts on the grounds that its breach was caused by the delay of the State in failing to meet the transposition deadline.

The problems would be exacerbated if firms that were not fully MiFID-compliant wished to exercise the passport to provide services in other Member States. In such cases the host State might, as a result of its lack of compliance with MiFID standards might face the need to take precautionary measures under Article 62.

If the host State competent authority does not take those measures it could face issues of responsibility for not complying with its own obligations under Article 62. (see also under i).

In the context of provision of services in the host Member State through a branch, the situation is less problematic, taken into consideration that firms that have established branches in host States will be subject for certain aspects to host State supervision and host State conduct of business rules, etc. in accordance with Article 32(7). However, these concerns remain valid as far as organisational requirements are concerned (art. 13) – which in any case fall within the competence of the home Member State.

Nevertheless, there are some obligations under the MiFID where certain regulatory forbearance would be conceivable: this would be the case with respect to certain obligations imposed upon firms where there is no "client facing" (e.g. transaction reporting), and therefore less risk for regulators to incur liability. This applies in both cases, i.e. with respect to the home regulator and its obligation to withdraw authorisations in case the conditions set in Article 8 d) are present as well as for the host regulator with respect to the use of precautionary measures under Article 62. On the contrary, with respect to obligations related to the relationship between the investment firm and its clients (e.g. conduct of business rules, best execution etc) regulators would bear the risk of incurring liability if they tolerate non compliance by investment firms.

2. 1. 2. New provision of services

(i) No transposition by 1st November 2007

The analysis of Article 71(1) and (4) set out above applies only in relation to the grandfathering of existing authorisations under the ISD. If an investment firm wishes to expand the scope of its former ISD authorisation to encompass new services after 1st November 2007, then those new services would not be subject to the grandfathering provisions under Article 71. By the same logic, a firm which was not authorised under the ISD cannot be authorised under MiFID if its home State has not yet implemented that Directive, and accordingly it will not be able to provide services or establish branches in other Member States until such a time as its home State transposes the Directive and its competent authority is able to grant a MiFID authorisation and give the necessary notification under the Directive.

Accordingly, if a home Member State fails to implement by 1st November, its firms will not be able to provide services for the first time in a host State (either remotely or through a branch), or to expand the scope of existing 'ISD' services.

The problem is more acute in those cases where an investment firm from a Member State which has not transposed has been carrying out in a host Member State services in financial instruments (for instance derivatives) that were not covered by the ISD but will be now covered by the MiFID. Before the entry into force of the MiFID, the provision of those services was taking place on the basis of national law. After the entry into force of the MiFID

this type of business could be challenged and would, most probably, need to be suspended on the territory of the host Member State since the firm will not have the appropriate authorisation anymore. Even if the competent authority of the host Member State accepts these firms to continue their activities on its territory it might face problems of legal responsibility for not complying with art. 62 of the MiFID as well as be subject to further civil law challenges before the national courts.

(ii) Late transposition – firms are not ready by 1st November 2007

The same concerns as explained above under 2. 1. 2. point (i) are present when the firms are not compliant with the new MiFID requirements: the home Member State is not in a position to grant them a new MiFID authorisation or expand their existing ISD licence in order to allow them to provide services in new MiFID financial instruments.

The risk of having their authorisations suspended by the host competent authority is also present in this case.

2. 2. Late transposition by host Member State

The failure of a host State to transpose the Directive does not allow it to refuse to accept notification from the home competent authority of an incoming firm, or to prevent the firm from carrying on business in the territory of that State in accordance with its passporting rights either remotely or through a branch. In addition, a host State cannot use its failure to transpose MiFID as a justification for imposing requirements on incoming firms, or taking any action in relation to such firms, that is inconsistent with MiFID.

Certain rights under MiFID, and aspects of the MiFID passport in particular, might be found to have direct effect[7]. It is established by ECJ case law that, even in the absence of national implementation, provisions of directives which are unconditional and sufficiently precise may be relied upon by individuals before national courts against any provision of domestic law which is incompatible with the directive. Individuals (including legal persons) may also rely on directly effective provisions of an unimplemented directive where they define rights which the individual is able to assert against the State or other public bodies. If a provision of a directive is capable of having direct effect, the competent authority should not apply any conflicting national law in the specific case: the directly effective EC law would prevail[8]. Moreover, Member States and their national authorities have a legal obligation - long established by the ECJ[9] – to give effect as far as possible to rights envisaged by a non-transposed Directive once the transposition deadline has expired by using the most appropriate tools that they have available to them under the applicable legal framework ("indirect effect").

In the context of the MiFID passport to offer services remotely, this would mean that host Member States cannot impose or apply any national requirements to the activities of those firms, or otherwise interfere with the right that they have by virtue of Article 31 of MiFID.

The issue is slightly more complex in the case of firms which are exercising the passport by establishing a branch in accordance with Article 32. Unlike Article 31, Article 32 allocates

[7] Case 26/62 *Van Gend en Loos* is the leading judgment on the direct effect of Treaty provisions Case 9/70 *Franz Grad:* a decision which is unconditional, clear and precise can have direct effect; Case 41/74 *Van Duyn*

[8] Of course, direct effect cannot be decided by the Commission. It is a remedy which can only be determined in the circumstances of a particular case, and is a question for national courts and, ultimately, the ECJ.

[9] See Case C-106/89, *Marleasing*, confirmed in many subsequent cases, notably *Case C-168/95 Arcaro*

some specified supervisory functions, in respect of investment business carried on within the territory of the host State, to the host competent authority, and it has been agreed by Member States that the host State rules implementing the obligations mentioned in Article 32(7) should apply for the purposes of that business. If the host State has not yet implemented those obligations, the division of supervisory functions that is envisaged in Article 32(7) cannot function entirely as intended by the co-legislators.

However, this cannot be allowed to deprive authorised firms of their clear rights under MiFID to provide services through a branch because local firms would not be subject to properly implemented MiFID obligations either.

A further issue is linked to the absence of a competent authority in charge of receiving notifications for cross-border provision of services or establishment of branches by the competent authority of investment firms in a Member State which has transposed. An obvious practical step that should be taken by those Member States, is to ensure that their competent authority can accept passport notifications.

This may mean that, before 1st November, such States should, if necessary, designate the competent authorities by separate laws or under any available executive powers or urgent legislative procedures, and specify their powers, so that those competent authorities are not prevented from giving effect to rights conferred by EC law, even if MiFID is not fully implemented.

2. 3. Cases where neither the home State nor the host State has transposed

There may also be cases where neither the home nor the host State of an investment firm has implemented by 1st November. As explained above there are concerns on the validity of ISD authorisations under art. 71. In this context, the 'indirect effect' doctrine could apply, i.e. an obligation on both home and host Member States to give effect, as far as possible within the framework of their existing laws, to the rights intended by MiFID. Moreover, competent authorities should adopt practical arrangements for notification and reception of passports. This of course does not relieve the concerns with respect to liability that both the home and the host Member State competent authorities might incur.

3. Conclusions

If full MiFID compliance by that date cannot be ensured, Member States should put in place transitional measures that will allow the MiFID passport to function. However, such solutions would not exclude that regulators might be judged liable vis-à-vis individuals or firms. We therefore urge Member States to finalise transposition before 1st November 2007.