

Consultation CESR
(Ref.: CESR/06-669)
The Passport under MiFID

Comments by the French Association of Investment Firms (AFEI)

1. The French Association of Investment Firms (AFEI) represents investment service providers active in France. Its members include more than 120 investment firms and credit institutions authorised to provide investment services. Approximately one-third of AFEI members are subsidiaries or branches of foreign institutions.
2. AFEI has contributed actively to numerous discussions, working groups, consultations relating to the Markets in Financial Instruments Directive (MiFID). AFEI welcomes CESR's initiative to consult market participants on the very important and difficult question of the Passeport under MiFID.
3. Before answering the specific questions included in CESR's consultation paper ("CP"), AFEI wishes to make a few general comments on the approach taken by CESR.

I. – General comments

4. AFEI notes that a large part of the questions raised by CESR in its CP, in fact, concerns exclusively the regulators, the way in which they will have to cooperate and allocate among themselves the various responsibilities to ensure proper supervision of the firms and a smooth operation of the markets under MiFID. While of course, it is in the firms' interest to have a system in which the regulators cooperate efficiently so that the firms can fully benefit from the provisions of MiFID allowing them to provide freely cross-border services throughout Europe, the mechanics of the European passport themselves (notably how to ensure proper supervision of the activities of a firm outside its home Member State ("home MS") are entirely for the regulators to decide.

5. What is important for the investment firms is twofold :
 - The determination of the conduct of business rules to be applied (because this question concerns the relationship of the firms with their clients) and the related question of the identification of the supervising authority; in both cases, the challenge is to find arrangements that are practical but at the same time offer the maximum level of legal certainty.
 - The determination of the authority to which the reporting of transactions should be effected.

As more fully explained below (paragraphs 18 *et seq.*), the main issue relates to the situation of the branches and particularly the application of Article 32(7) of MiFID in which the notion of services rendered "within" the territory of the branch, as opposed to what could be rendered outside such territory, has created great confusion in the financial community.

6. In this respect, AFEI would like to stress the need for clear criteria – which will no longer be subject to various interpretations and will be accepted and applied by all regulators. Such criteria will have to be practical, from an operational standpoint, but they will also have to be sufficiently certain from a legal standpoint.

7. In that respect, CESR rightly recalls (in paragraph 12 of the CP) that its determination will not “prejudice the role of the European Commission as guardian of the Treaties”. It is unfortunate that CESR did not also mention the role of the European Court of Justice (“ECJ”) and the fact that eventually, the legal interpretation of MiFID lies with the ECJ. In practice, it may well be that the ECJ will only be consulted on this issue in a few years’ time in the context of a specific case. In the circumstances, it is not unreasonable to assume that a few cases involving interpretative issues will arise in the future, particularly as the matter relates to the protection of clients. While looking for pragmatic solutions, the regulators should keep in mind that the solutions to be adopted should be sufficiently certain from a legal perspective so as to increase the chances that they be upheld by the ECJ, should this jurisdiction be asked to interpret a particular point.

II. – Answers to the questions raised by CESR

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

Question 1: As regards article 31 (3) do you agree with the above regarding what should be the date from which a firm can start to provide cross-border investment services in to the host Member State under a passport? If not, for which reasons?

8. AFEI shares CESR’s view 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*”. The starting date must be the date of transmission by the home MS to the host Member State (“host MS”) of the relevant information received from the firm, provided the home MS has complied with its obligation under article 31(3) to forward the information received from the firm to the host MS within one month of receiving it. If the home MS has not complied with such obligation (i.e. it has failed to forward the information within a month of receiving it), the starting date must be one month after the date of transmission by the firm of the information to the home MS.

9. Indeed, AFEI is concerned that the home MS may fail to forward the relevant information to the host MS or simply it may fail to inform the firm that it has done so. Under MiFID, the home MS is obliged to forward the information to the host MS within one month of receiving it from the firm (art. 31(3)); strictly speaking, it is not obliged to notify the firm that it has done so. In fact, CESR indicates that “*it would be up to the home authority to notify the firm that the notification has been forwarded and ensure that it has been received by the host*”. In the interest of the firms, such wishful thinking is not sufficient. This is why the solution must be that if the home MS has failed to forward to the host MS the information received from the firm, within one month of receiving it, it must be deemed to have forwarded it to the host MS, one month after receiving it from the firm. Therefore, one month after such receipt, the firm can start providing cross-border services. Furthermore, it is clear that under MiFID, there is no requirement to wait for the firm to appear in the host’s register.

10. It could happen, occasionally that, if the home MS has failed to inform the firm of the fact that it has forwarded the information to the host MS, a firm could commence to provide cross-border services in the host MS a few days too soon. In that case, if the firm is reprimanded for having rendered the cross-border services before the proper date, the sanctions should not be excessive, given the circumstances. Furthermore, one would hope that the validity of the operations carried out in relation to such services would be upheld by the Courts, should the matter be litigated. Any nullity in the circumstances would be extremely severe and disproportionate. Furthermore, it would not be consistent with the objective of MiFID which is to allow firms to provide cross-border services freely, with no prior authorisation required, the purpose of article 31(3) being only to organise the information procedure between the home and the host MS.

11. It is worth noting that the position set out above is perfectly in line with the position taken by the European Commission in its "1997 Interpretative Communication on the Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive". The issue was very similar and the Commission's position was that *"the procedure to be followed prior to exercising the freedom to provide services differs from that applicable to the establishment of a branch"*. *"A credit institution should therefore be able to commence its activities under the freedom to provide services as soon as it has notified its intention to its own supervisory authorities, which under Article 20(2) [of the Second Banking Directive] have one month in which to send that notification to the supervisory authorities of the host country"*. The interpretation of article 31(3) of MiFID should be exactly similar.

Question 2: Concerning article 32 (6) do you agree with the referral of the firm by the home regulator to the host regulator's or CESR's website when applying for a branch passport, when necessary?

12. The combination of article 32(3) and 32(6) means that in effect, a firm wishing to establish a branch in another MS may have to wait 5 months after it has provided its home MS with all the required information before it may commence business. AFEI believes that there is no other possible interpretation of article 32(6) of MiFID than that expressed in paragraphs 22 and 23 of CESR's CP, i.e. since the decision to approve a branch lies with the home regulator, the host regulator should have no more than two months to deal with the notification file – such two month period being sufficient for the host MS to update its register of firms – and in any case, registration by the host should not have to take place before the branch can commence operations.

13. Having said that, it must be acknowledged that in certain countries, the establishment of a branch entails that certain specific commercial provisions have to be satisfied before the branch can effectively operate and therefore be registered on the appropriate register of the host MS. In this respect, it must be stated clearly, first of all, that no local commercial requirements should be such that they would prevent, in practice, the establishment of a branch and the functioning of the European passport. Secondly, it must also be stated clearly that under MiFID, prior registration or the branch by the host MS is not required for the branch to commence its operations.

14. The question raised above (Question n°2) is essentially a question that concerns the regulators which should agree on the best system to ensure that up-to-date information will be easily accessible by the firms. Whatever system is put in place, either by way of referral of the firms by their home regulator to the host regulator's or to CESR's website, it should be practical and ensure that the information is always up to date. In addition, firms should be advised to seek the relevant information independently and ensure that this information is up-to-date.

Question 3: Do you agree with the proposal set out in paragraph 24?

15. As the proposal set in paragraph 24 of the CP relates to a possible referral of the firms to the host regulator's or CESR's website, one can only assume that question 3 refers to paragraph 25 of the CP. Assuming that this is accurate, the proposal is that the home regulator publish an advisory note to reflect the fact that when first conducting business with a branch in a MS, it is recommended that the firm also check that the branch is entered in the home register.

16. AFEI disagrees with this proposal because of the risk that such a recommendation be construed as meaning in reality that the branch must be registered in the home register before it may start conducting business in the home MS. This would be inconsistent with CESR's view (as expressed in paragraph 23 of the CP) that registration by the host should not have to take place before the branch can commence operations. As mentioned in paragraphs 12 and 13 above, AFEI strongly supports this view.

B. THE DIVISION OF HOME/HOST RESPONSIBILITIES REGARDING BRANCHES

**Question 4: What are your views on the exposition given in paragraphs 31-36 above?
What grounds do you have to support your views?**

17. AFEI agrees with the terms of paragraph 35 of the CP, which states correctly the legal position regarding which authority (home or host) is responsible for the regulation and supervision of cross-border services in the two situations described therein i.e.

- when cross-border services are provided **direct** from a place of business in the firm's home state: in that case, it is the exclusive responsibility of the home MS;
- when cross-border services are provided through a **branch**, in which case, the responsibility for branch regulation and supervision is divided between home and host state regulators:
 - organisational matters are reserved for the home regulator ;
 - the matters referred to in article 32(7) of MiFID (referred to hereafter as the "Conduct of Business Rules" or "CoBR") are for the host regulator as regards "the services provided by the branch within its territory". When the services are provided by the branch "outside its territory", then AFEI agrees that, as stated in paragraph 35 c), the "responsibility for conduct of business rests with the home state regulator".

18. The key question, in relation to this matter, is therefore to determine what is to be considered as services rendered within the territory of the branch as opposed to those rendered outside such territory. It is highly unfortunate in that respect that at this point in time, no orientation from the European Commission is even available on this key issue. CESR's remark in paragraph 11 of the CP that "*it will seek orientations from the European Commission as regards the legal interpretation of the Directive in this particular regard*" is most surprising as is surprising CESR's further comment that "*should relevant impacts on the current proposals originate from the Commission's response, CESR will bring these to the attention of market participants*". Indeed, even if the legal interpretation of a European Directive eventually lies with the ECJ, as already

mentioned in paragraph 7 above, rather than with the European Commission, nevertheless, since the interpretation of article 32(7) is at the heart of this question, an orientation from the European Commission prior to this consultation being launched, rather than after it has been completed, would have been more than welcome.

19. In this absence of such orientation, it is clear nevertheless that there is a need for a criterion that will enable the market participants and all parties involved to make this determination with the utmost certainty. In this connection, AFEI believes that the criterion to be chosen must satisfy two essential requirements: on the one hand, it must be simple, clear and pragmatic; on the other hand, it must offer the maximum level of certainty from a legal standpoint.

- The determining criterion must be simple, clear and pragmatic: in other words, its application must be such that there will be no further doubt as to what services are rendered within the territory of the branch and what services are rendered outside such territory. At the same time, it will need to be pragmatic, i.e. to lead to the simplest possible solution for investment firms.
 - Strictly speaking, article 32(7) of MiFID leads to the potential application of two sets of CoBR, those of the host MS (for the services rendered within the territory of the branch) and those of the home MS (for the services rendered outside the territory of the branch). It must be noted that this dual solution constitutes an improvement when compared to the situation that existed under the ISD (where potentially there was a different set of CoBR applicable in each EU country in which the investment firm conducted its activity whether such activity was conducted direct from the home MS or through a branch established locally). Nevertheless, one must admit that, from an operational standpoint, it remains quite complicated, for an investment firm, to be under the obligation potentially to apply two different sets of CoBR (even if the expected harmonisation under MiFID should hopefully minimise the differences existing in the future application by the various EU countries of their respective CoBRs). For that reason, the simplest solution would undoubtedly be a solution that would lead to the application of only one set of CoBR. However such a solution would imply that all services provided by a branch, wherever they are actually provided, would be deemed to be provided “within the territory” of the branch.
 - In AFEI’s view, it is not possible to consider that all services are provided by the branch within its territory. The wording of article 32(7) of MiFID as well as the discussions that took place at the time such article was first introduced in MiFID lead to the conclusion that it was clearly envisaged at the time that a branch could render services either within its territory or outside such territory.
 - Therefore, it remains necessary to adopt a simple criterion that will also offer the maximum security from a legal standpoint.
- The determining criterion must offer the maximum level of certainty from a legal standpoint
 - AFEI would like to stress again that the legal interpretation of European directives eventually lies with the ECJ which will be free to interpret the terms of article 32(7) as it thinks fit, irrespective of any interpretation that will have been made previously by either CESR or the European Commission. Of course, such interpretation will necessarily take place in the context of a lawsuit involving that issue but, in this

connection, it must also be stressed again that the likelihood of legal proceedings being initiated on this particular issue is quite high, given the subject matter to which it relates, i.e. conduct of business rules which aim at protecting the clients and are therefore extremely important to them. It is not unreasonable therefore to foresee that legal proceedings will be or at least could be initiated in the future by clients who could try to challenge the application of one particular set of CoBR if they consider that it is in their interest to do so (for instance, because they will consider that another set of CoBR would have been more favourable to them). Given the duration of legal proceedings, it is not unreasonable either to predict that the ECJ's decision in that respect would not be rendered before quite a number of years. Hence, the need for legal certainty, i.e. the need to choose today a determining criterion for the application of article 32(7) of the MiFID, which offers the maximum level of security in the sense that it is very likely to be upheld in due course by the ECJ, should it be asked to interpret the terms of such article.

20. The combination of simplicity and legal certainty is difficult to achieve. As regards CoBR, for the reasons mentioned above, our view is that legal certainty should prevail over a solution that could possibly lead in practice to the application of only one set of CoBR but would not be legally supported by the terms of article 32(7). AFEI would therefore support a solution that would not give a too extensive interpretation of the terms of such article, and particularly of the notion of "within its territory" which, in the spirit of MiFID, was clearly intended to be a derogation to the general principle of extensive responsibility of the home regulator set out by MiFID.

21. As regards the reporting of transactions, the analysis can be a bit different. If, naturally, legal certainty is important, it must be measured against the risk of a solution being challenged in a few years' time before the ECJ. Such risk, in our view, is almost null because this matter concerns the regulators, the sharing of their responsibilities and the way in which they cooperate to organise the supervision of the cross-border services provided by the firms throughout Europe. Clients have no direct interest in one solution or another and therefore, the likelihood of court litigation on this particular issue is minimal. This is why AFEI would support a solution that would be pragmatic for the firms and would be accepted by all the regulators. Pragmatism in this connection means clearly for the firms to have to report their transactions to one clearly identified authority only, leaving it to the regulators to organise among themselves the passing of information. AFEI is pleased to see that CESR is treating this issue very seriously and has launched a separate consultation on Transaction Reporting. Given the interest of this matter for its members, AFEI will express its views on this issue in its response to such consultation.

22. AFEI would like to take advantage of this consultation to raise another issue which is not specifically addressed in CESR's CP but which is directly linked to the subject matter of this consultation and should, in our view, be addressed by the regulators at the same time at the issues covered by this consultation. This issue concerns whether or not MiFID is applicable in certain situations where one element (location of the branch, location of the client, execution of an order.....) is situated outside the European Union while the other elements are situated in one of the MS. For example, if a service is provided to a client located in one of the MS by an investment firm located outside the EU, will MiFID apply? In fact, there is a variety of situations where the answer to this question is not obvious. During the open hearing of 2nd February 2006, we asked whether and when this question would be addressed and the immediate response was that this would be looked at in a second phase, after all the issues relating to the application of MiFID within the European Union have been dealt with. In our view, it is not possible to separate those two issues. From day one, i.e. from the 1st of November 2007, the professionals will be faced with situations where they will need to decide (i) whether or not MiFID is applicable and (ii) if it is, what set of rules is applicable under the supervision of which regulator.

Therefore, dealing with the question of the territorial application of MiFID is as important as the questions raised in this CP and both questions should be resolved before MiFID comes into effect.

Furthermore, the way in which the issues mentioned above in relation to branches will be resolved, the criteria that will be used for that purpose, should logically be used for the determination of what services are subject to MiFID and what services are not in the situations where one element is located outside the EU. It is obvious in any case that the market participants also need clear answers now on this question of the territorial application of MiFID. Therefore, not only it cannot be postponed but it should give rise to open discussions between the regulators and the market participants as soon as possible.

Question 5: Do you agree with the practical supervisory challenges as identified by CESR? Are there any others that you envisage may occur and could benefit from consideration by CESR?

23. AFEI agrees that when cross-border services will be rendered in another MS direct from the home MS, the home and the host regulators will be faced with the practical challenge identified by CESR in paragraph 37 of the CP. Undoubtedly, the regulators will need to trust each other and also to cooperate. But this is an issue for the regulators to solve among themselves.

24. In the situations described in paragraphs 38 and 39 of the CP, the question is not so much a question of "practical supervisory challenge". It is primarily a question of legal determination: in the case of the issue identified under paragraph 35.b) of the CP, legal determination of what constitutes "organisational" matters as opposed to CoBR; in the case of the issue identified in paragraph 35.c) above, what are the services rendered by the branch "within its territory" as opposed to those rendered outside such territory. Once the legal determination is made, it will be CESR's practical supervisory challenge to ensure that the regulators implement properly the principles/interpretation that will have been agreed upon and organise the necessary cooperation between themselves for that purpose.

Question 6: Do you agree with the suggested desired outcomes? Are they capable of being shared for the benefit all stakeholders?

25. AFEI can only agree with CESR's wish not to create any unnecessary burden for the firms which provide cross-border services through a branch and for the regulators who need to ensure supervision. However the most important objective is to provide for rules which, on the one hand, are clear and can therefore be easily applied and on the other hand, are legally secured (i.e. not likely to be held invalid by the ECJ).

Question 7: Do you agree with the broad 'criteria' outlined above and as set out in more detail in Annex 2, against which CESR will evaluate possible solutions? Do you have any comments? Are there any others you would suggest that could be material when considering the relative merits of different practical solutions?

26. As mentioned above, the supervisory challenges under MiFID presented by branches are issues for the regulators to solve under their own responsibility, taking into account the legal aspects involved to ensure legal certainty. The criteria listed in Annex 2 are broadly in line with the principles put forward in the context of the various and recent better regulation initiatives. In principle, no one can disagree with them. But again, the practical aspects of the supervision to be exercised by the regulators is a question to be solved by them.

Question 8: Do you have any comments on the possible solutions identified above? Do you have any others that you feel could help?

27. Same comments as above in paragraphs 23 to 26.

Question 9: Do you agree with the broad evaluation and conclusions as outlined in paragraphs 50-55 above? What does your own evaluation suggest? What evidence base can you provide to support your conclusions?

Two blank tables are provided at Annexes 3(i) and 3(ii) for respondents to use to create their own 'tick lists' to help formulate their own evaluation. CESR would welcome completed copies together with supporting analysis as part of any feedback to this consultation.

28. Same comment as above in paragraphs 23 to 26.

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

Question 10: In the absence of a single public registry of tied agents, how might Member states enhance co-operation for the benefit of clients?

29. There are several difficulties arising in connection with tied agents. Some of them come from the fact that tied agents are assimilated to branches. Therefore they raise the same issues as those mentioned above (see paragraphs 17 *et seq.*) in relation to branches and the division between home and host regulation and supervision.

30. Another difficulty, which is specific to tied agents, comes from the fact that the use of tied agents is not necessarily authorised in all MS. As a result, a MS may authorise a firm to use a tied agent in another MS which, however, will not accept the use of tied agents. In that case, the difficulty arises in connection with the publicity to be given of the use of tied agents in the country which does not authorise them. Article 23(3) states that tied agents are registered in the public register of the country in which they are established. However, when such country does not allow for the appointment of tied agents, this tied agent must be registered with the competent authority of the home country of the firm on whose behalf it acts.

31. In this latter situation, the question is how clients will know and be able to access information on the public register of the home MS of the investment firm in order to verify the tied agent's status. It must be recalled that the fact that a given MS does not recognise tied agents does not mean that such agents cannot validly operate in the MS in question. Under MiFID, a tied agent may validly operate in a MS -even a MS which does not authorise the use of tied agents- provided the home country of the investment firm which wishes to use a tied agent in another MS does authorise their use. Therefore the question arising in the host country which does not recognise tied agents is only a question of information to be given to the clients on the status of the tied agents operating in this country. This question is clearly of great interest to the firms. But it is a question that can only -and must be- solved between the regulators and therefore, indeed, cooperation between MS is not only important but it is in fact essential for that matter.

32. Therefore, the regulators must cooperate to put in place a system ensuring proper and easily accessible information for the clients regarding the status of tied agents established in a MS, including one that does not authorise the use of tied agents in its territory. One suggestion would be that the regulator of the

host MS in which the tied agent is established could post on its website an indication that while in its own country, tied agents are not recognised, they may nevertheless validly operate provided that they appear in the public register of the country in which the investment firm on whose behalf they act is established. This message appearing on the web site of the "host" regulator could include a recommendation that in the presence of a tied agents, the client enquires about the name and country of residence of the investment firm on whose behalf the tied agent is proposing to act and a referral to the websites of the each of the authorities, in the other MS authorising tied agents (a maximum of 26 of them), which respectively hold the public register of tied agents.

Question 11: Do you agree that there is a need for co-operation between competent authorities to help ensure that the requirements for good reputation and possession of knowledge for tied agents can be met in practice? Do you agree that prior to registration the home Member State should be able to exchange information with the competent authority of the Member State where a tied agent is located to help establish that he has the required good reputation and knowledge? Would any specific guidelines be helpful; if so, what are your suggestions?

33. Cooperation between competent authorities is also essential to ensure that the requirements for good reputation and possession of knowledge for tied agents can be met in practice. In this respect, it is essential that common criteria be defined precisely by the regulators and publicised on their respective websites and possibly also on CESR's website. The regulators should determine for instance that the tied agent will need to produce a certain type of official document establishing that he/it has never been convicted, certain diploma or other types of document or certificate establishing its professional expertise and good reputation. Once the regulators have agreed on the different types of documents/information to be produced, each regulator could indicate on its web site, for each category of document or information what is required locally. Guidelines would certainly be useful but probably not sufficient. Clearly, a common definition by the regulators of the criteria/documents/information to be used to ensure that the requirements set by the directive are met is necessary. Once these criteria have been assessed, an on-going exchange of information between the competent authorities is also necessary. The regulators should arrange for the way in which such exchange can take place.

Question 12: To help resolve the practical questions on the supervision of tied agents, good co-operation between regulators will be necessary. CESR is minded to conduct further work in this area. Do you have any practical suggestions or comments that could help CESR fine-tune its approach for tied agents?

34. AFEI supports the idea that CESR should work further on this issue. Since the tied agent established in another MS (other than the MS in which the investment firm is established) is to be considered as a branch, then it should be subject to the rules and supervision of the host MS regarding conduct of business and the other matters of article 32(7). Clearly it raises a number of practical but also legal issues which CESR has identified in paragraph 79 of the CP and should be addressed by the regulators. Again, good co-operation between regulators will be necessary but certainly not sufficient.

Clear principles should be agreed between the regulators on a number of issues including (i) the supervision of tied agents by the authorities (which authority, how, according to which rules, what consequences?) (ii) the way in which an investment firm - under the control of its home MS - may control the activities of the tied agent to ensure that they are MiFID compliant, (iii) the way in which complaints relating to tied agents are to be handled (and the way in which the compensation scheme of the home MS operates to cover the losses attributable to tied agents), (iv) the way in which tied agents are to comply with money laundering obligations, (v) the variety of requirements to which tied agents may be subjects in a different MS in compliance with article 23(6) of MiFID.

D. THE CROSS-BORDER ACTIVITIES OF AN MTF

Question 13: Do you agree that a common approach on deciding what constitutes passporting for an MTF, as referred to in Article 31 (5) and (6) MiFID, by all CESR members will benefit investors and industry?

35. AFEI would like, first of all, to point out that the use of the word “passporting” for an MTF is only accurate, from a legal standpoint, as regards the investment firms which benefit from the European passport; It is not accurate for the “market operators” who do not benefit from such passport. Having said that, there is no doubt that a common approach on the implementation of Article 31(5) and (6) will benefit investors and the industry even though the principle set out in Article 31(5) is clear: investment firms or market operators operating MTFs from other countries must be allowed to provide on their territory all appropriate arrangements allowing local users or participants to have remotely all the benefits of a market participant.

Question 14: Do you agree with the suggested criterion (“connectivity test”) for deciding whether an MTF is passporting its services/activities? If not, should the criterion be adjusted or replaced or elaborated on more and for which reasons?

36. CESR’s proposed use of a “connectivity test” to determine when an operator of an MTF will be deemed to be providing cross-border services in another MS appears reasonable. However, AFEI’s view is that it would be necessary to elaborate further on this “connectivity test” which, as set out presently in CESR’s CP, is not yet sufficiently clear.

E. THE ACTIVITIES OF REPRESENTATIVE OFFICES

Question 15: Do you agree with the arguments set out in this chapter?

37. AFEI agrees that representative offices are not covered by MiFID and that no MiFID investment services or activities can be provided through a representative office. The difficulty arises from the fact that it is not always easy to distinguish a representative office from a branch, on the one hand and from a tied agent, on the other hand because both a branch and a tied agent can provide promotional services as well as investment services. AFEI agrees that it is important to qualify properly the nature of the activities performed

by an office of an investment firm in order to determine the competent authority for the supervision of certain business of conduct rules.

38. CESR notes that one criterion that could be used to distinguish a tied agent from a representative office is that the former is always a separate entity whereas the latter is usually not legally distinct from the investment firm. AFEI's view is that while this may be generally true (although not always), this criterion would not in any case be sufficient to distinguish a representative office from a branch.

39. AFEI agrees with CESR's assertion that if an investment firm establishes an office of the same legal entity in another MS solely for promotional purposes, that office should not be qualified as a branch under MiFID. AFEI wishes to add that the important element in such qualification, besides the fact that the office is established solely for promotional purposes, is that effectively, it only provides promotional services.

40. CESR proposes that if the representative office is a distinct entity from the investment firm, it could be qualified as a tied agent where it is promoting the services of the investment firm. CESR considers that is *"a possibility and not an obligation because to the extent that the representative office is providing only promotional services and activities, it remains out of the scope of the Directive"*.

41. AFEI believes that CESR's proposal, as set out above, is unclear. When it refers to a possibility, does it envisage an option on the part of the investment firm to request one qualification or the other? AFEI's view is that the key element in that respect is the real nature of the activities conducted by the office established by the investment firm, whether or not this office is legally separate. If these activities are solely of a promotional nature, then, they fall outside the scope of MiFID. If, in addition to promotional services, they also include actual investment services or activities, then, the MiFID rules should apply regarding particularly the determination of the applicable conduct of business rules and of the competent authority to supervise their application.

42. AFEI's agrees fully with CESR's view, as set out in paragraph 98 of the CP, that if there are problems qualifying the activities of representative offices or other entities, the authorities of the host and home MS have to consult each other to avoid any misunderstanding regarding what is taking place.

F. TRANSITIONAL ARRANGEMENTS

Question 16: Do you agree with the proposal of mapping ISD to MiFID proposed in Annex 1? What changes or possible alternatives would you suggest?

43. First of all, AFEI fully supports CESR's position that existing ISD passports will be recognised as MiFID passports following implementation from 1st November 2007.

44. AFEI also fully supports CESR's initiative to propose a common mapping of ISD investment services and instruments to MiFID investment services, activities and financial instruments. On the basis of that mapping, home and host regulators will be responsible for updating their records using the agreed mapping, prior to 1st November 2007, relying on existing ISD records.

45. AFEI agrees with the suggested mapping of ISD to MiFID as it appears in Annex 1 of the CP, subject however to the following comments regarding (i) the new service of "investment advice" and (ii) certain derivative contracts which already existed under ISD.

46. Regarding the new service of “**Investment advice**” (MiFID, Annex 1, section A, paragraph 5), AFEI fully supports CESR’s proposal that this service be deemed to have been simply moved from ISD Non-Core Service appearing in paragraph 6 of Section C (*“Investment advice concerning one or more of the instruments listed in Section B”*) to MiFID new list of Investment services and activities. The consequence of this is that all investment firms whose European passport, obtained prior to 1st November 2007, includes among the non-core services, the activity mentioned in Section C, paragraph 6 of ISD, will not need to request any change to their existing passport.

47. The remaining difficulty comes from the fact that providing investment advice is intrinsically linked to the nature of most services rendered by investment firms. In effect, investment firms providing for instance the service of “reception-transmission of orders”, in most cases do effectively also provide personal recommendations to the client, whether it is at the client’s request or at the initiative of the investment firm. Such reality should be recognised by the authorities and a procedure should be agreed urgently among the regulators to acknowledge that for instance, upon a declaration by an investment firm that it has effectively rendered this service, prior to 1st November 2007, this service will be deemed to be “passported” for the purpose of MiFID.

48. Regarding the mapping proposed by CESR concerning **the financial instruments**, it should be reviewed as it is not fully accurate to consider all financial instruments mentioned in Section paragraphs (5) to (10) as new instruments for which an additional authorisation is to be requested

49. AFEI certainly agrees that the home regulators should adopt a procedure by which investment firms will be invited to review their current passported services, activities and financial instruments and request additional authorisations that come to light as a result of such review. CESR should ensure that regulators agree on common principles in that respect. In establishing such procedure, the regulators should have as a priority objective to propose a procedure that will not create unnecessary burdens and costs for the investment firms and for the authorities as well and that will be realistic from a practical standpoint (i.e. will the authorities be able to deliver thousands of new authorisations without delay?). This is one additional argument in favour of having only a very light procedure, if any (for instance by way of simple declaration), as regards the provision of “investment advice” by firms which in effect have already been providing this service prior to 1st November 2007.

50. Finally, the regulators should address the transitional issues that will undoubtedly arise from the fact that all MS will not be in a position to implement MiFID on 1st November 2007. The firms’ current ISD passport will be revoked while in a number of MS, the new rules implementing MiFID will not yet be in place. Transitional rules should be defined by CESR to address the uncertainty that will arise in those cases.

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

Question 17: Do you consider the suggested approach appropriate and/or do you see other issues that should be handled in this protocol?

51. AFEI is certainly in favour of enhancing the collaboration among competent authorities in cross-border activities and increasing harmonisation through the establishment of a protocol between competent authorities or otherwise. This protocol should certainly address at the very least the issues mentioned in paragraph 105 of the CP. It should also deal with what appears to be the most sensitive issue in relation to the European passport, i.e. the situation of branches and the interpretation of article 32 (7) of MiFID. This matter appears to be particularly urgent and should be dealt with by the authorities with the greatest urgency.

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