

Association of Independent Financial Advisers

Response to CESR consultation paper on the passport under MiFID

AIFA is the trade association that represents UK regulated independent financial advisers (IFAs). Membership of AIFA is voluntary and on a corporate basis. AIFA currently represents over 70% of IFA firms in the UK.

IFA firms are the leading distribution channel for retail financial products in the UK. They generate over 60% of business by monetary value and are the major sector advising and arranging private pensions in the UK. As such, IFAs represent a dominant force in the maintenance of a competitive and dynamic retail financial services market.

We would like to thank CESR for the opportunity to respond to the above consultation paper.

The vast majority of our members will remain outside the scope of the MiFID due to UK Treasury's decision to operate the Article 3 exemption. However, some of our members have indicated that they planning to make use of the passport under the MiFID.

We do welcome the Commission's intention of simplifying cross-border trade in the EEA but we do have some concerns about the potential detriment for UK retail consumers resulting from EEA firms passporting into the UK. We explain these concerns in our answer to question 5 of the consultation paper. We are specifically focusing on the issues surrounding firms that are making use of the passport without setting up a branch in the host Member State.

Question 1: We believe that firms do need certainty and the proposed timeframe seems reasonable. However, we do see a problem arising where the competent authority of the home Member State fails to process notifications in a timely manner. Firms would then be operating in the host Member State without the competent authority being aware of it. The home Member State should therefore notify the investment firm that it has dispatched the notification before the firm can start its passporting activities.

Question 2: Yes, we agree

Question 3: Yes, we agree

Question 4: We agree with CESR's conclusions. However, we have some concerns which we are setting out in our answer to question 5.

Question 5:

We acknowledge that the MiFID was implemented in a way that tried to prevent gold-plating but this still cannot negate the fact that financial markets in different member states have reached different levels of maturity and that regulatory standards differ. This does not so much apply to the type of firms that the MiFID is aimed at ie larger investment advisory firms that in most cases are already carrying out cross-border activities. However, the MiFID also gives small advisory firms that cater for retail clients the opportunity to make use of a passport. We see serious potential for consumer detriment in the following areas.

Training and suitability

The UK has a very developed retail financial services market due to the fact that consumer's financial needs that are often covered by state provision in other member states are left to the private sector in the UK. This means that there is a wider range of products on offer to UK consumers some of which are more sophisticated and difficult to understand than those on offer in other member states but which are in direct competition with MiFID instruments. UK based advisers will advise customers on a range of products taking their suitability into account, as required by MiFID. The UK regulator has therefore introduced stringent training and competence requirements for investment intermediaries who advise on such products. The same is not always the case in all other member states and the MiFID does not contain any detailed T&C requirements. We therefore have serious concerns about potential consumer detriment arising from a lack of clarity as to what professional standards advisers who passport into the UK adhere to and the fact that EEA advisers passporting into the UK will be restricted to giving advice on MiFID instruments even when there are other, more suitable substitutable products available in the market.

Consumer protection

The second issue arising out of the homestate responsibilities for passporting firms is consumer access to guarantee schemes and complaints services. The UK has a very robust consumer protection regime with generous access to consumer redress mechanisms which includes free access to the Financial Ombudsman Service for complaints. Furthermore, consumers are protected by the Financial Services Compensation Scheme acting as a statutory compensation fund of last resort in cases of complaints against financial services firms that are unable to meet their liabilities. Other Member States have not the same standard of consumer protection and UK residents who seek advice from passporting investment advisers might not be aware that they are foregoing this protection. We therefore believe that home state regulators have to pay extra attention to the way in which firms disclose this type of information. The MiFID is only prescriptive about the content but not the format in which this information has to be disclosed.

We acknowledge that it is likely that only a small number of small advisory firms will take advantage of the passport. However, the potential detriment for affected consumers could be significant.

Question 6: We agree with the desired outcome.

Question 7: We believe that consumer protection/detriment has to be a factor when evaluating possible solutions. We believe that it is important to ensure that consumers do not encounter detriment by the change from home to host state regulatory supervision.

Question 8: We believe that firms will need to have regulatory certainty and that a clear division of responsibility is preferable. We believe that suggestion “b” is therefore the most practicable as firms will have regulatory certainty and will also know that they are being treated in the same way as their competitors.

Question 9: We have no comments

Questions 10-14: are not applicable to our members.

Question 15: We have no comments

Question 16: This is not generally applicable to our members as very few are covered by the ISD. However, we are concerned about the potential problems arising out of late implementation by some Member States. At this stage only two member states have managed to meet the Commission’s implementation deadline of 31 January. Although, some Member States are likely to implement before the MiFID comes into force in November, it is very likely that some will fail to do so. We believe that firms from Member States that have implemented the Directive and who are therefore compliant with the Directive should not be penalised by the tardiness of other Member States. Those firms should therefore be allowed to passport into Member States that have not implemented the Directive as they will be supervised by the relevant authority in their home member state.

Question 17: We welcome CESR’s proposals.