CESR/06-669: THE PASSPORT UNDER MiFID – ABI RESPONSE TO CESR CONSULTATION PAPER

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1. Members of the Association of British Insurers are large institutional investors managing own funds worth some £1.2 trillion as well as third party funds, with substantial holdings across main EU markets. Our members have a strong interest in the integrity and efficiency of the financial markets and in promoting the confidence of the investing public. In addition, the Financial Services Authority in the UK is planning to apply some of the conduct of business rules in MiFID to life insurers. Matters relating to MiFID implementation are therefore of fundamental importance to the ABI.

General comments

2. We agree with CESR's overall objectives: a common and consistent approach to notification procedures and supervision of cross-border activities is fundamental to the creation of a single market in financial services.

3. However, we have concerns about how those objectives can be achieved in practice. In particular, we are not convinced that a case-by-case approach to supervision of branches can provide sufficient clarity and certainty to firms wishing to operate in other member states.

4. We therefore believe that CESR's role is fundamental in ensuring a high degree of regulatory and supervisory convergence and a coordinated implementation of passporting provisions.

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?

5. We agree with the one-month deadline for the home member state to forward the information to the competent authority of the host member state. We also agree that firms can start cross-border activities from that date.

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?

6. We agree with the referral of the firm by the home regulator to a host regulator's or CESR's website. We think it would be more straightforward for CESR to maintain a central repository of links to commercial law provisions in different member states on its website. The onus should still be on member states to keep the links up-to-date.

7. We agree with the two months deadline for the host regulator to deal with the notification file regarding branches. We also agree that the registration by the host does not have to take place before the branch can start operating.

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

8. We agree but we are somewhat concerned about the domestic commercial provisions acting as a barrier to branch establishment. CESR should monitor that these do not lengthen the process of branch registration and it should also encourage host state regulators to shorten their response time and rely on the work already conducted by the home state regulator. Two months should be seen as a maximum response time, rather than a default.

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

9. We agree with the CESR's exposition of the current complexity of doing business across the EU. There are many possible combinations in which a firm can provide services depending on the structure of its business and the location of the client.

10. MiFID goes some way in trying to simplify this complexity. For example, our members are supportive of the application of home state rules to cross-border services where there is no branch established as described in 35(a).

11. However, we would caution against the overly narrow interpretation of Article 32.7, particularly the meaning of 'within its own territory'. We believe it would be impractical for a branch to comply with different sets of conduct of business rules when providing cross-border services. Please see Question 5 for a detailed response.

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?

12. We agree with CESR's description of practical challenges for supervisors trying to apply the relevant provisions across the EU. However, we are not convinced that CESR has fully considered the very similar problems facing firms that have branches in other member states.

13. In particular, we are concerned about the supervision of branches providing cross-border services into other EU states. The proposal to split the responsibility for supervision between the home and host regulator would mean that the same branch could be subject to two sets of conduct of business rules depending on where the service is provided.

14. We believe the cost of imposing such a requirement would be disproportionately high. The costs would primarily be related to complexity of implementing two sets of regulatory requirements for what is essentially the same service. There would be costs of staff training and systems changes as well as ongoing compliance costs.

15. We are also concerned about the time it would take to realise a fully flexible solution. Firms are only given nine months to be compliant with MiFID. An approach which is based on a case-by-case approach would be difficult to implement in such a short timescale, especially as it will, in some instances, require extensive systems changes. This would undoubtedly be aggravated by the staggered transposition of MiFID across the EU.

16. It seems unlikely that there would be corresponding benefits to clients. Ultimately, the service they receive under different sets of rules should be of the same standard. Otherwise the whole purpose of MiFID is undermined.

17. CESR should choose a solution that balances these costs and benefits in a proportionate way. We believe that in most cases a branch should be subject to a single set of conduct of business rules.

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

18. We agree with the desired outcomes.

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?

19. We agree with the success criteria outlined in Annex 2. The breadth of the concerns outlined, together with the overarching aims of MiFID, should serve to produce a balanced result.

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

20. We welcome the attempt by CESR to identify a range of practical solutions to the problem of branch supervision. However, some of the options identified could prove to be extremely complex to implement.

21. For example, the precise division of home and host regulators' respective responsibilities as described in 48(a) would be difficult to determine considering the variety of business models and regulatory approaches across the EU. The end result may be a multitude of

bilateral agreements between firms and regulators or between regulators themselves, and an unnecessarily complex landscape for firms wishing to operate cross-border. This could distort the level playing field as two firms undertaking identical activities or providing the same services could end up being subject to different rules. Similarly, joint working by home and host regulators under 48(f) would be extremely onerous for firms with many branches across the EU.

22. In fact, we believe that any solution that is not scaleable from the level of individual firm to a general principle would be costly and complicated for firms to comply with.

23. Out of the proposed options, we believe 48(e) and 49(b) are likely to be the most practicable, as they would result in one set of conduct of business rules being applied to a branch.

24. However, we would add that the success of outsourcing or delegating would to a significant extent depend on regulators exercising a sufficient degree of flexibility and trust. The right balance would have to be struck between outsourcing the supervisory tasks but not the overall responsibility. Firms should not end up in a position where their choice of particular rules negatively impacts on their relationship with supervisors despite high-level agreements.

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?

25. Although we agree with CESR’s assessment of challenges of branch supervision, we do not agree with all the conclusions outlined in 50 – 55. In particular, the ‘best fit’ solution should not depend on a wide variety of factors outlined in 52, nor should it be based on a case-by-case approach. Instead, it should be standardised as much as possible in order to provide clarity and certainty to firms.

26. Flexibility is important but we believe in this case it would inhibit, rather than encourage cross-border business. This is because firms would struggle to assess and apply all the permutations of supervisory agreements across the EU.

27. We would therefore urge CESR to opt for the most straightforward solution and this for many firms would be the application of a single set of conduct of business rules to all the business done by a branch.

Questions 10 - 14

28. We currently have no views on the above.

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

29. We agree. Any problems encountered when trying to classify activities of representative offices ought to be resolved by the competent authorities of home and host states.

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?

30. We agree with the proposals for common mapping of ISD to MiFID.

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

31. We support the establishment of a protocol among the EU authorities and we have no immediate suggestions for additional issues to be considered.