

European Financial Planning Association (€FPA)
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Rotterdam, 2 February 2007

To:
Mr. Arthur Philippe, Chair of MiFID Level 3 Group
Committee of European Securities Regulators (CESR)
11-13 avenue de Friedland
75008 PARIS - France

Re:
Public consultation: The Passport under MiFID, CESR/06-669

Dear Mr. Philippe,

€FPA Comments on CESR's Consultation on the Passport under MiFID

First of all, €FPA would like to express our gratitude in having the opportunity to contribute, through this written response, its attempt to clarify the legal regime of passports under MiFID.

The European Financial Planning Association (€FPA) is a non-profit financial services standard setting and certification organisation which operates in Europe and which was created in the interest of both professional financial advisors and the people they serve. €FPA's main objective is to increase the general public's awareness of the activities of their members and to oversee their members' compliance with the profession's ethical codes and standards of professional quality.

€FPA considers this CESR's public consultation very timely and crucial. It has the opportunity to establish unique guidelines of interpretation for the new regime of passports that will result in greater competition and efficiency in the European financial marketplace. The financial advisors and planners need to know, as professionals in the market, their respective obligations and exactly how to interpret the legal regime.

Preliminary remarks

This new regime of the European passport, with respect to financial product distribution, is of great importance for financial advisors, since the new regime applies to all investment products including collective investments, and to all

participants in the financial distribution chain, from the banking networks to the independent advisors.

MiFID contemplates an important change in the manner of regulating the European passport of investment firms, that is to say, in regulating the exercise of freedom in establishing and providing investment services. Contrary to the Investment Services Directive (ISD) of 1993, MiFID allows investment firms authorized in one Member State to provide services throughout the European Union, subject only to the legal regime of the home country of the investment firm providing the services. This rule has only one exception: where the investment firm establishes a branch in another Member State, the rules of conduct of the host country are also applied. In such cases, *two* legal regimes are involved and a special coordination between the home and host authorities becomes necessary in order to distribute the supervisory functions.

The reorganization of the European passport in the supply of investment services requires, therefore, the development of coordination procedures between financial supervisors. With this aim, CESR has opened a period of public consultation, in relation to the interpretation of Articles 31 and 32 of the MiFID, which are dedicated to the free supply of investment services and activities and to the establishment of a branch.

Next we are going to answer those questions within the consultation document which have greater impact on the orderly exercise of activities by investment advisors and financial planners, in particular questions 1 to 5 and 10 to 12 of the questionnaire, with some additional comments on the tied agent's framework.

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?

When exercising the right to provide investment services in another Member State, the precise date on which the provider may commence business cannot be left to the discretion of the regulators. Therefore, €FPA shares the opinion of the consultation document that the service can be provided from the precise moment at which the home authority notifies the host authority of its authorization to commence operations.

Nevertheless, it is necessary to emphasize that from the points of view of investor protection and transparency of the relationship between the investment services providers and their customers, we must ensure that once the authorization notification has been sent, the provider of the services is also immediately registered in the registry of the host authority. This can only be done through proper coordination between the registries of the regulators.

Investors have the right to know, at all times, that their investment firm is licensed to operate within their home jurisdiction. Therefore, investment advisors and other investment services providers must be able to provide their clients in the host country with evidence of their registration with the host regulator. Once the home regulator authorizes the investment firm to commence business, this authorization must be

simultaneously communicated to, and registered with, the host regulator. This host registration and its communication are highly relevant because they can affect the reputation of the intermediary market.

We therefore believe it is necessary that regulators coordinate themselves in such a way that investment services providers are registered in the host country from the exact moment at which the authorization to commence operations was notified to the host authority.

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?*

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

It seems to us very advisable that CESR be charged with the centralization of the information necessary to open branches. In this way, any company will be able to access, through CESR's website, the requirements of internal legislation and rules necessary to open to branches in any of the different Member States.

However, the information would have to include not only the requirements of relevant internal legislation and rules, but also legislation and rules concerning the commencement of activities through tied agents, since MiFID applies the same regime to both the opening branches and operating by means of tied agents.

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

EFPA shares the opinion expressed in the consultation document in relation to the requirement that investment service providers adapt to the new European Passport regime and collaborate with the regulators through strict compliance to the norms of conduct.

The complexity of the European Passport regime does not arise from the means by which investment firms choose to develop their business. Investment firms are free to exercise their free market rights, and particularly, decide on how their business will develop through the establishment of branches, subsidiaries and agents. The complexity of the European Passport regime and its supervision is the direct result of its regulation under MiFID. The supervision of the European Passport regime is thus the exclusive responsibility of financial regulators.

It is important to remember that the ultimate goal of this legal framework is to facilitate the provision of investment services while providing effective supervision, which ensures the compliance of investment firms in the market.

The primary function of the interpretation of the rules and legislation must be to facilitate the provision of investment services via clear criteria.

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?*

€FPA understands that the legal framework of the regulator of the home country is exclusive, and not merely pre-eminent. Investment service providers can operate in different Member States under the home country regime.

As we have mentioned above, there is only one exception, in relation to the opening of branches in other Member States in which the host country rules of conduct also apply.

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?

Question 11: Do you agree that there is a need for co-operation between competent authorities to help ensure that the requirements for good repute 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 repute and knowledge? Would any specific guidelines be helpful; if so, what are your suggestions?

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?

Although MiFID does not anticipate the creation of a centralized registry of tied agents providing their services in the European Union, we suggest that CESR could establish a central database, containing information received from diverse regulators, allowing public access via CESR's Website. Making this information available would be helpful to investors by allowing them access to current information with respect to the tied agents qualified to operate in the different Member States.

This central database of tied agents would also be useful for the agents, as it would strengthen their relationships with their clients, who could at any moment confirm their agents' compliance with license requirements.

€FPA considers it essential that CESR provide clear interpretations of the good repute and appropriate knowledge requirements of tied agents with respect to be admitted to the public register, further to Art. 23. 3.III of MiFID. We propose that such interpretations be developed along the line of the ethical codes currently approved by, and applied to, investment advisor and financial agent associations.

For example, the €FPA Code of Ethics emphasizes the need for professionalism, continuous education and knowledge of the tasks assumed on behalf of clients by Members of the association.

EFPA is in favour of coordinating the work of supervisors on good repute and educational requirements of tied agents. This collaboration could be extended to the advisors' associations, who require that 1) their members be certified by professional bodies, and 2) adhere to an approved code of ethics. This proposal is in line with Article 23.4.II of MiFID, which allows Member States to establish competent authorities' collaboration with investment firm associations in registering tied agents and in monitoring compliance of tied agents with the requirements of good repute and appropriate knowledge, and also permit the associations' management of the tied agents' register under the supervision of the competent authority.

In this sense, EFPA considers that in the development of the tied agents regime, it could be helpful take into account the opinions and, accept the collaboration, of the professionals' representative associations, based on a certification system with a Code of Ethics. Therefore, EFPA proposes to arrange meetings with CESR to assist in the development of the interpretative criteria concerning the requirements of good repute and appropriate knowledge that the tied agents must maintain.

EFPA also believes that CESR should strengthen the cooperation between the supervisory bodies and the agents' representative associations. It is important to point out, that in light of how the branches operate, the agents, whether working as autonomous professionals or tied agents, are independent professionals whose supervision requires special treatment that can be better developed jointly, between regulators and professional associations/NGOs.

Additional Comments on Tied Agents Framework

EFPA feels, in general, that CESR's interpretation of the European Passport should be flexible in relation to the private initiative preserving the various financial distribution models existing in the different Member States. Therefore the legal framework should be neutral with respect to the industry's chosen distribution channel. For example, CESR should expressly recognize the concept of the "advisor-seller". In several member states, financial distribution takes place through tied agents who, on one hand sell the products, and on the other, advise the clients on investments. The market, through the decisions of the investors, may develop several efficient models of distribution; for example, tied agents who advise their clients, independent financial advisors, or a mix of both.

EFPA is in favour of the tied agent regime of MiFID as a possible distribution channel, because it recognizes the compatibility between the promotion and sale of financial products, at the same time advising the client about such products. However, we believe that CESR must distinguish between two kinds of advising: 1) autonomous advising, and 2) instrumental advising. By autonomous advising, we mean the core investment service of recommending investor specific investments, and by instrumental advising we mean the complimentary activity of financial marketing by informing the client about the technical characteristics of the product.

CESR should recognize that tied agent can, on behalf of the principal intermediary, provide autonomous advising. CESR should also recognize, as a good market practice, that the agents carry the obligation of advising the client of the risk and other characteristics associated with the products.

Recital 37 of Directive 2004/39/EC establishes the rights of tied agents to undertake, among other things, “related activities in respect of financial services” not covered by the Directive. This Recital recognizes the industry’s freedom to organize the financial product distribution network. We suggest that CESR include the instrumental advice among the related activities that tied agents may undertake. Investors will be better protected if the advice they receive includes information with respect to the technicalities of the product.

Furthermore, we also consider it necessary to clarify the following points: 1) CESR should recognize that financial planning asset allocation is an activity related to financial advising as a core investment service that could be exercised by the tied agents, and 2) CESR should determine when the tied agent could provide the financial advising on his own behalf and be paid directly by the client.

€FPA believes that the provision which allows tied agents “to handle clients’ money and/or financial instruments” as specified within Article 23.2.II needs interpretation by CESR. This measure presents a new risk for investors as well as the principal intermediary, since the advisor could potentially abuse any existing fiduciary power in his possession. For this reason, we propose that CESR establish clear criteria with respect to the implementation of measures that will separate the client’s property from that of the agent’s, always under the control of the principle.

We further propose that the same ethical requirements established for tied agents also be applied to the employees of financial firms who provide investment advice in the course of their employment. From the point of view of investor protection, the ethical and educational requirements of the financial advisor must be the same, regardless of whether the advisor acts as agent or employee of a financial organization. Also, this measure would stimulate competition in the market, by establishing standards with respect to the provision of similar services.

Lastly, it could also be useful to harmonize the provision of services by tied agents, when incorporated and operating as a distinct legal entity. CESR could establish criteria on how to apply the relevant internal law to better develop the internal financial market.

If we can provide further assistance, please do not hesitate to contact us.

Yours faithfully,

A handwritten signature in dark ink, appearing to be 'J. Soler-Albertí', written in a cursive style.

Josep Soler-Albertí
Chairman,
European Financial Planning Association (€FPA)