

**INTESA SANPAOLO RESPONSE TO
CESR CONSULTATION ON
THE PASSPORT UNDER MiFID
CESR/06 – 669**

EXECUTIVE SUMMARY

The response of the Intesa Sanpaolo Group to the CESR's consultation on passport under MiFID addresses the following main issues:

- The clarification of those aspects where investment firms need clarity in the short term should be prioritized. In particular the relationships between home and host regulators regarding the supervision and monitoring of the provision of services and activities from branches should be the main concern;
- The view of the industry is key to facilitate a consistent approach to supervisory issues across the EU and to contribute to the elaboration of proposals appropriately addressing and solving the issues identified by CESR, as well as to deliver better regulation;
- The fundamental role of CESR in requiring a strong commitment from members to be consistent and pragmatic in the application and interpretation of the legislation should be emphasized;
- The business model as well as the policies and procedures implemented within firms should be the starting point for regulators to identify and develop the “best fit” solution to supervise branches.

GENERAL COMMENTS

The Intesa Sanpaolo Group, created as from 1 January 2007 as a result of the merger of the Intesa Group and the Sanpaolo Group, is the largest banking group in Italy and one of the major players in the European market.

The Intesa Sanpaolo Group appreciates the transparent process followed by CESR to finalise its Level 3 work to ensure a consistent and coherent interpretation of MiFID and would like to submit the following comments and responses.

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?

Intesa Sanpaolo welcomes the interpretation suggested by CESR since it provides firms with certainty and predictability as to the exact moment from which they can start to provide services on a cross – border basis, as well as to the steps which regulators will follow in the notification procedure.

However, it should be stressed that firms need the co-operation of their home regulators to find out when exactly the notification has been dispatched and received by the competent authority of the host Member State. In practice, firms may commence cross – border activities upon receipt of the communication of their home regulator confirming the dispatch and the receipt, rather than upon dispatch of the notification to the host regulator.

For these reasons we believe that CESR should recommend regulators to notify firms “without delay” as to the forwarding and to the receipt of the notification by the recognized point of contact in the host Member State.

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?

Intesa Sanpaolo believes that the referral of the firm by the home regulator to the host regulator’s or CESR’s website is extremely helpful for investment firms, which would otherwise have to carry out burdensome investigations to be aware of any additional commercial requirements to be fulfilled in order to be inserted into the trade register and start business under the MiFID passport.

Yet, it would be convenient to always - not only “where necessary” – refer the firm to the host regulator’s or to CESR’s website to find out whether (i) there are additional requirements to be met in order to establish a branch or that (ii) the host country does not require further commercial requirements to be satisfied. In this latter case, the absence of additional requirements should be clearly stated on the web site.

Furthermore, in order to avoid liability for firms and inefficiencies in the procedure, home and host regulators and CESR should not only be responsible for keeping up to date the commercial law provisions, but should also coordinate

closely among themselves in order to avoid inconsistencies and divergences in the information contained on the web sites or in relation to the links to which firms should refer to.

Finally it should be made clear that the existence of additional commercial requirements to be satisfied in order to establish a branch does not affect the two month maximum timeline for the host regulator to deal with the notification file. The scope of Article 31 (3) – which provides firms with a clear maximum timeframe before establishing and commence business - would otherwise be jeopardized.

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?

Preliminarily, we would like to put forward some comments regarding paragraphs 26 to 30.

Part B of the paper recalls that the outcome of the consultation on a proposed 2006/2007 CESR work program for MiFID level 3 was clearly indicating that the industry considered as a priority the definition of the relationship home/host regulators on the supervision and monitoring of branches.

One of the intended goals of the consultation paper is in fact the “prioritization of those aspects where investment firms need clarity in the short term” (see paragraph 8) which, together with a “uniform interpretation of Articles 31 and 32” should lead to a clear cut definition of the home/host regulators’ responsibilities in relation to branches, as well as to a consistent interpretation of the same throughout all Member States.

The accomplishment of these goals, leading to a smooth functioning of the MiFID passport, would benefit both investors - boosting the degree of intra - community competition - firms, which would have to comply with a clear set of rules and regulators, whose competencies would be clearly defined.

Intesa Sanpaolo welcomes the pragmatic approach adopted by CESR on how to identify and solve the issues arising from the supervision of branches under MiFID, analyzed from an operational perspective in order to develop solutions which will work in practice rather than only on paper. The process model developed by CESR also mirrors this approach.

However, the consultation paper does not define in clear terms which matters have to be considered as “organizational” and which, rather, as falling within the

definition of “conduct of business”, which is a key concern for both regulators and firms. In fact, it is important to underline that not only regulators (see paragraph 27) need a clear framework in order to be compliant and therefore enhance confidence in consumers, but also firms.

A clear and transparent regulatory environment will enable investment firms (a) to take informed decisions on whether to carry out activities in a different Member State and (b) to ascertain what regulatory duties they will be subject to and eventually at what costs. This knowledge is essential both for mitigating regulatory risks and for calculating the business case.

The solution of the challenges connected to the supervision of branches will benefit both regulators and firms which share a common interest in supporting proper supervision and investors’ protection (see paragraph 28). That is why, in order to ensure a clear understanding amongst regulators and firms, these should collaborate closely to define how best, in practice, supervising branches, developing “specific solutions or supervisory tools with flexibility on a case by case basis”. In particular, the investment firms’ business model as well as their policies and procedures should be taken into account as a starting point when developing efficient and effective means of branch supervision.

Moreover, it should be stressed that in order to determine regulators’ responsibilities and applicable rules for firms, reference should always be made to the location of the entity which ultimately provides the service or performs the relevant activity. To that extent, in our view the location of the client is of no relevance. In our view, emphasis should be put rather on the procedures and practices followed internally and to any existing agreement between the parent company and the subsidiaries or branches for the provision of services and/or for the provision of activities.

Finally, Intesa Sanpaolo strongly supports CESR’s view on requiring close co-operation amongst supervisors which would be best achieved through the development of a common framework (e.g. protocol) on branch supervision (see Question 17 below).

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?

Intesa Sanpaolo agrees with the supervisory challenges identified by CESR. In particular, we share the view that in order to allow the passport to operate smoothly a change of approach amongst home and host regulators and firms is needed. In particular, we note that the challenges identified in relation to the regulation and supervision of the cross – border provision of services without a branch (paragraph 37) also arise in connection to the cross – border provision of services through a branch.

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

We agree with the suggested desired outcomes. These can be shared for the benefit of all stakeholders, since if the legal framework is clear, then regulators, firms and consumers will benefit therefrom. In particular, based on the principle of proportionality, a right balance should be found between the desired goal of proper supervision by firms' management and regulators and the creation of burdensome formalities for the provision of cross – border services or activities by branches, which should be kept to the minimum necessary.

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?

Intesa Sanpaolo agrees with the success criteria identified in Annex 2. In particular, as regards “clarity”, we believe that the implementation of a clear business model by firms and the development of clear supervisory practices by regulators should be considered as equally important factors insofar as they complement each other.

Moreover, in relation to “efficiency”, it should be borne in mind that legal costs may also arise in cases where different sets of rules regulate, respectively, the transaction and the exercise of supervisory powers by the supervisor.

As to “inseparability”, we believe that structured transactions should be considered as an “*unicum*”. Accordingly, to delineate regulators' responsibilities and applicable rules for firms, reference should be made to the location of the entity which ultimately provides the relevant structured transaction.

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

Amongst the various options identified to address the challenges arising in connection with the supervision of branches (paragraph 48), we believe that the solutions under c), d) and e) are the most practicable ones.

Moreover, in relation to the cross – border provision of services by a branch (paragraph 49), we consider the solution under b) as the more feasible one, since it is also in line with the spirit of the consultation paper which aims at enhancing good and close co-operation as well as ongoing communication/exchange of information amongst regulators, also through the delegation or outsourcing of tasks (see paragraphs 56 to 61).

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.

We agree with the evaluation and conclusions outlined by CESR.

In particular, we agree that in some cases branch supervision could be better carried out through the supervision of a sole regulator (be it home or host) by means of delegation of tasks. Whatever the best solution may be, it is important for supervisors to be clear with firms on the way in which they intend to supervise branches in practice.

Above all, a clear cut distinction between “organizational” and “conduct of business” requirements should be drawn, since - notwithstanding the possible delegation of responsibilities - it should be clear which authority ultimately bears the responsibility for the supervision of the branch.

These considerations apply in relation to all the possible solutions against success criteria for branches, outlined under Annexes 3(i) and 3(ii).

C. 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?

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?

We agree that co-operation between competent authorities would be of help in ensuring that the requirements for good repute and possession of knowledge for tied agents are met in practice. In that regard, the fundamental role of CESR in enhancing good and close co-operation as well as ongoing communication and exchange of information amongst regulators should be emphasized.

Moreover, supervisors will have to carry out their tasks in such a way so as to maintain the confidence and trust of the host regulator in their procedures and course of action. Again, a change of approach amongst the different players is needed to make the MiFID framework on passport work properly.

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?

CESR should provide firms with a clear cut definition of the home/host regulators' responsibilities in relation to tied agents as well as enhance a consistent interpretation of the same rules across all Member States, in accordance with the provisions on branches and provision on cross – border services.

In particular, it should be clearly stated that whenever firms are pursuing activities in another Member state through tied agents without setting-up agencies, branches or subsidiaries, they should not be subject to the provisions provided for by Article 32 (2) 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?

Yes, also in relation to MTF passporting, the importance of achieving a strong commitment from CESR's members to be consistent and practical in the application and interpretation of MiFID should be once more underlined.

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?

Yes, the "connectivity test" appears reasonable, insofar as it encompasses all possible means developed by firms to provide users or participants with direct access to the MTF.

E. THE ACTIVITIES OF REPRESENTATIVE OFFICES

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

Yes.

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?

Yes, we believe that the proposal of mapping ISD to MiFID would be extremely useful for firms so that they can understand if additional authorizations may have to be requested to regulators, in order to carry out their activities without interruption. Moreover, it will ensure certainty for both firms and investors which can rely on the updated information contained in the relevant registers.

However, it should be also pointed out that, in conformity with the principle of efficiency, costs to firm in connection with the mapping exercise should be kept to the minimum necessary. In that regard, Member States' supervisory authorities could also be involved as depositaries of the list of activities carried out by firms subject to their supervision.

G. FURTHER HARMONIZATION 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?

Intesa Sanpaolo strongly supports the proposal for a protocol between supervisors aimed at further enhancing a consistent and coherent interpretation and application of the MiFID provisions on passporting.

In our view, the protocol should also address the key issues connected to the provisions of MiFID on branches, making clear how supervisory responsibility will be allocated amongst supervisors and which rules firms will have to comply with.

In addition, we believe that the use of the Internet should be dealt with and promoted by the protocol, in particular, as a means to improve the information to and the contact with the public.

For any further comments or questions, please contact:

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