ANASF
Associazione Nazionale Promotori Finanziari

Member of ***FECIF***
The European Federation of Financial Advisers and Financial Intermediaries

TO: CESR - Committee of European Securities Regulators
11-13 Avenue de Friedland
75008 Paris

Ref: CESR/06-669

Milan, 9th February 2007

ANASF COMMENTS ON

"The Passport under MiFID"

ANASF (Associazione nazionale promotori finanziari) is the main professional association which represents the Italian financial advisors (promotori finanziari) and has about 12.000 members. ANASF is pleased to have the opportunity to take part in the public consultation on 'The Passport in the MiFID Directive' and to offer its opinion.

The tied agent is qualified by the MIFID directive as a 'tied agent' and therefore as a sole agent. Therefore, as he can only act in the interests of a single investment firm, he is not seen as an independent intermediary but as a 'longa manus' of the investment firm. The tied agent, specifically because he is not an intermediary, does not benefit from an EU passport, unless it is through the investment company he works for.

The investment firm can operate in another Member State through tied agents in two ways:

- freedom to perform services;
- through stable organisation.

In the first case, which we will call '**A**' for simplicity, the investment firm uses tied agents resident in its area and enrolled in the public register of the home country. In the second case, which we will call '**B**' for simplicity, the investment firm uses tied agents residents in the host country. In turn, case B divides into two sub-situations:

B1: The tied agents are enrolled in the public register of the host country if this has allowed investment firms to make use of tied agents and has set up a public register

B2: The tied agents are enrolled in the public register of the home country if the host country has not allowed investment companies to make use of tied agents and has not set up a public register

As is known, the MIFID directive does not, in itself, regulate the offer outside, leaving the ability to emanate national regulations to the individual Member States. However, it should be observed that in cases B1 and B2, given that the tied agent is assimilated to a branch, the control of the outside offer is not, however, noted, given that all the activity performed is to be considered as being carried out in the office.

The assimilation of the tied agent to a branch leads to considerable differences for the investment firm and the tied agent at various levels - organisational, control, fiscal and substantial. From the combination of the recitals and articles 23 and 32 of the Directive, it emerges that the tied agent is not considered in a similar way to intermediaries because he works in a proprietary manner with a single company and is, as a result, 'tied' to the investment firm. However, he is recognised as a branch of the firm.

With reference to cases A and B1, in which both the home and host countries allow tied agents to handle clients' money and/or financial instruments on behalf and under the full responsibility of the investment firm (see Art. 23 of the directive), clarifying the real meaning and scope of this regulation appears unavoidable. Given that the tied agent is not an intermediary and tied in a proprietary manner to the investment company, it is important to define what "handle clients' money and/or financial instruments" means. Defining the operational abilities is necessary to understand what type of control to apply.

With reference to point 76, concerning the method of consulting the register, it should be noted that Art. 32, para. 2, of the directive sets out that "…in case an investment firm uses a tied agent, established in a Member State outside its home Member State, such tied agent is assimilated to the branch and subject to the provisions of this directive relating to branches".

Further, Art. 23, para. 2, sets out "…Member States require the investment firm to ensure that a tied agent discloses the capacity in which he is acting and the firm which he is representing". As a result, it can be assumed that there will always be a requirement for the tied agent to make a disclosure to the client in which he clarifies which investment firm he works for and in which public register he is enrolled.

In addition, in cases A and B1 in which there is a regulation of tied agents in both the home and host countries, there is then the opportunity for the client to check both the tied agents working in behalf of the investment firm with freedom to perform services and those enrolled in the register of the host country.

In cases A and B2, in which there is no regulation of tied agents in the host country, it is considered that the control authority of the host country should advertise the tied agents operating with freedom to perform services on its Internet site, in collaboration with the authority of the home country. In case B2, tied agents will benefit from the advertising rules applying to branches as they are treated as such.

With reference to point 77, there is agreement with the opinion of the CESR.

With reference to point 78, Article 23.4 II of MiFID sets out that Member States may allow competent authorities to collaborate with investment firms and credit institutions, their associations and other entities in registering tied agents and in monitoring compliance of tied agents with the requirements of paragraph 3. In particular, tied agents may be registered by an investment firm, credit institution or their associations and other entities under the supervision of the competent authority.

Regarding this, Italian[1] legislation has provided for the institution of an Organism consisting of the professional associations representing "promotori finanziari" and those qualified which will arrange for the professional register of "promotori finanziari" to be kept. The Organism will be a legal person and will be in the form of an association with organisational and statutory independence, respecting the principle of territorial division of its structure and activities. The Organism will arrange for enrolment in the public register, subject to a check on the necessary requirements and will carry out everything else necessary for the maintenance of the professional register. It will operate respecting the principles and criteria set out by the CONSOB, and under its control.

The initiative of the Italian parliament seems to respond to the requirements of Article 23.4 of MiFID, which took the Italian legislation as an example in the regulation of tied agents and could also be a support for other European states which will have to make provision for the professional sector of the tied agent for the first time.

With reference to point 79, a basic clarification, particularly concerning case B2, is considered necessary. In this point, the CESR starts by saying that the tied agent is an unauthorised entity. This view can be shared for the reasons given above.

However, it also needs to be considered that the tied agent resident in the host country is, to all intents and purposes, a branch of the principal firm and, for this aim, is an authorised entity. This should be taken into account for control purposes.

The tied agent resident in the host country will be subject to the control of the host country as a branch, to the extent indicated in Art. 32 and, in particular, paragraph 7, independently of whether the host country allows investment companies to make use of tied agents.

Therefore, in both cases B1 and B2, the host country will have powers of direct control on tied agents in any case as he operates as a branch and can be assimilated to this. In case B1, the powers deriving from the fact that the tied agent is enrolled in the public register kept by the host country can be added.

In case A, however, there will be a need for a system of co-operation because the control is in the hands of the home country which will need to have collaboration with the authorities of the host country for the control of activities carried out abroad.

With particular reference to the anti money-laundering legislation, it is thought that the consolidated interpretation is that the principle of territory reigns. The tied agent in case A will be subject to the legislation of the home country and, therefore, the authorities of that country will be competent. In case B, the tied agent will be subject to the legislation of the host country and, therefore, the authorities of that country will be competent.

With reference to point 80, 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?"* It is noted that, if the host Member State does not allow the use of tied agents in its country, it cannot exclude the activation of a control for cases A and B2. Even if it does not set up a public register, it must, however, monitor the tied agents operating in areas in co-operation with the control authority in the home country.

[1] "Law on savings" 262/2005 Art. 14 b)

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?"*

There is agreement with the orientation of the CESR.

Question 12: "*To help resolve the practical questions on the supervision of tied agents, good co-operation between regulators will be necessary. CESR intends 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?*

There is agreement with the orientation of the CESR.

We remain available for any further clarification you may require.

With kindest regards.

The Chairman
Elio Conti Nibali