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ASSOCIATION OF FOREIGN BANKS IN GERMANY

INTERESSENVERTRETUNG AUSLÄNDISCHER BANKEN, KAPITALANLAGEGESELLSCHAFTEN, FINANZDIENSTLEISTUNGSINSTITUTE UND REPRÄSENTANZEN
REPRESENTATION OF INTERESTS OF FOREIGN BANKS, INVESTMENT MANAGEMENT COMPANIES, FINANCIAL SERVICES INSTITUTIONS AND REPRESENTATIVE OFFICES

Committee of European Securities Regulators
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February 9, 2007\SN

Response to the CESR Consultation Paper "The Passport under MiFID"

Dear Sirs,

The Association of Foreign Banks in Germany very much appreciates the possibility to respond to the CESR Consultation Paper "The Passport under MiFID" (hereinafter referred to as "the Consultation Paper").

We represent more than 150 foreign banks, investment management companies, financial services institutions and representative offices in Germany, among them several entities belonging to the leading institutions world-wide. The activities of our members involve to a large extent the provision of banking and financial services in Germany, but due to their international structure they are also facing the typical cross-border problems that arise when being integrated in the actions of a globally positioned group.

Since several of our members are EU-branches established in Germany, the practical functioning of the MiFID passport regime is of particular interest and of crucial importance for our association. Before answering in detail the questions of the Consultation Paper, we would like to outline our views on the functioning of the MiFID passport regime. Our answers to the Consultation Paper should be read in the light of these remarks.

I. The Functioning of the MiFID Passport Regime

1. The foremost objective of any guidance for the functioning of the MiFID passport regime should be to avoid dual supervision. If branches were subject to dual supervision by both home and host supervisor, they would be discriminated in comparison to subsidiaries or other undertakings established in the European Union. This would constitute a clear infringement of Art. 48 EC Treaty. Furthermore, any dual supervision would have the effect of diminishing the attractiveness of the passport and thereby severely damage the promotion of a single market for financial services.

   The competencies of home and host regulator should therefore clearly be delimited from each other. Institutions should have legal certainty as regards the responsibilities of home and host supervisors as well as the application of home or host regulation.

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We are aware of the fact that such clear delimitation of supervisory powers and applicable underlying provisions is difficult. However, in view of the culture of mutual trust between supervisors and the enhancement of supervisory convergence through MiFID, it should be possible for supervisors and regulators to find a workable, clear and certain consensus for the split of competencies and responsibilities with regard to the supervision of branches.

2. Delimitation of supervisory powers in respect of branch business

We suggest that, as far as conduct of business rules are concerned, such delimitation should in the first place depend on the criterion "within its territory". According to Art. 32 (7) MiFID, the derogation from the principle of home state responsibility regarding the activities of branches only applies to services provided by the branch within the host state's territory. So far, CESR has unfortunately avoided a definition of what services provided within the host state's territory constitute and has instead restricted itself to developing a flexible set of solutions to cater for all possible applications on this point. We are convinced that the complexity of the issue could be significantly reduced and legal certainty for the investment firms and branches affected greatly enhanced if the question of what constitutes the provision of services within a state's territory were answered. In particular, the distinction made by CESR between domestic branch business and cross-border branch business would become obsolete.

In our view, several options for the definition of "within its territory" should be discussed.

The first one would be geared to the goal of sales activities, i.e. the location of the client. However, such an approach is not consistent with Art. 31 MiFID according to which cross-border services are exclusively subject to home state regulation and not subject to those states´ regulation in which territories the client is domiciled.

Instead, we suggest a definition that is in line with the Commission's Interpretative Communication on the Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive, OJ C 209/6 of July 10, 1997, p. 7: "In order to determine where an activity was carried on, the place of provision of what may be termed the `characteristic performance´ of the service, i.e. the essential supply for which payment is due must be determined."

One possible approach to determine the place of the characteristic performance of a service could be to regard as decisive the location or place of incorporation of the entity acquiring the client. According to this approach, a service would be performed within that state's territory in which the client is being attended, irrespective of the location of the client. However, this definition of "characteristic performance" will face significant practical difficulties in cases of divisions of work between entities, e.g. branch and headquarter, since the entity having acquired the client and attending him would not necessarily be the same as the entity performing the service.

For practical reasons, the place of the "characteristic performance" should instead be defined as the location or place of incorporation of the entity which is actually carrying out the service in question. The specification of the entity actually carrying out the service can easily be determined, even in cases of work division between branch and headquarter or other branches. The determination of "within its territory" would follow the typical lines of business and work division in investment firms and should respect the allocation of responsibilities within investment firms and their branches. One could easily define for each specific activity the applicable MiFID regime and the competencies of the supervisors.

If, for example, the branch is simply acquiring the client, giving investment advice and/or receiving and transmitting the client's orders, however the headquarter is the entity responsible for carrying

out the orders in the market or providing portfolio management services, only the former activities will be subject to host state supervision, since only these activities would constitute branch business in the host state's territory. There would be no need for host supervisors to enforce e.g. Art. 25 MiFID or the rules on best execution, since in the case described above the activities for which these rules are relevant are performed in the home state's territory. On the other hand, if the branch is itself executing orders or providing portfolio management, it will of course be subject to host state supervision as regards compliance with these provisions. The same applies to ancillary services. The entity actually providing e.g. custody services or investment research will be supervised as regards compliance with the relevant conduct of business rules by the supervisors in the state in which it is located (for the organisational requirements cf. I.3. below).

Furthermore, there would be no need to differentiate between the supervisory treatment of "domestic" branch business and "cross-border" branch business. In both cases, the only relevant criterion would be whether the characteristic performance of the service occurs at the branch in the host state's territory or not, regardless of the location of the client.

A clear link between the place of the characteristic performance of the respective service and the applicable MiFID regime would enable investment firms and supervisors to determine easily which activities of branches constitute branch business within the host state's territory. Only for those activities of branches carried out within the host state's territory will the branch be subject to host state supervision as regards compliance with Articles 19, 21, 22, 25, 27 and 28 MiFID. In all other cases, the home jurisdiction shall exclusively be applicable and the home supervisor shall be the only competent authority.

The complexity described by CESR would be significantly diminished, legal certainty would be enhanced and the attractiveness of the passport would be upheld. Most importantly, however, dual supervision would be avoided, thus preventing an infringement of Art. 48 of the EC Treaty and a discrimination of branches as compared to subsidiaries.

Avoiding dual supervision becomes even more important if one takes into account that the collision law might force investment firms dealing with consumers located in another Member State to also observe the local client protection rules for the respective client relationship. Therefore, in addition to the conduct of business rules to be observed due to supervisory rules, investment firms might also have to fulfil the requirements of the national conduct of business rules of the client's domicile due to consumer protection rules. If branches of investment firms were subject to the conduct of business rules of both home and host state and at the same time also had to observe the conduct of business rules of the client's domicile, they would face severe problems. It is therefore crucial that at least from the supervisory side dual supervision and the application of more than one set of conduct of business rules is avoided.

3. Interface between conduct of business rules and organisational requirements

As regards those cases in which the host state supervisor is responsible for ensuring that the obligations laid down in Articles 19, 21, 22, 25, 27 and/or 28 MiFID are complied with, mechanisms should be found to avoid conflicts with the home supervisor's measures for ensuring compliance with organisational rules. Intensive co-operation and co-ordination of home and host supervisors should be fostered and enhanced, e.g. through joint working as suggested in paragraph 48 f) of the Consultation Paper. In addition, we would like to suggest that supervision of branch activities within the host state's territory follows the principles set out below:

As recital 32 MiFID points out, the reason for the derogation from the principle of home state authorisation, supervision and enforcement of obligations in respect of the operation of branches within the host state's territory is that the host state authority is closer to the branch and is better

placed to detect and intervene in respect of infringements of rules governing the operations of branches. Host state supervision is therefore directed towards the detection and intervention in case of infringements, not towards the prevention of such infringements.

Host state supervision should clearly be restricted to matters regarding Articles 19, 21, 22, 25, 27 and 28 MiFID. If the host state authority becomes aware of an infringement of these provisions, it should carefully evaluate whether such infringement might be due to organisational deficiencies or not and whether such infringement can be avoided through other means than changes in organisational structures or common policies and procedures applicable to the whole investment firm including all its branches.

If infringements are due to organisational deficiencies, the host state supervisor should consult the home state supervisor and they should evaluate jointly whether and which organisational requirements would be suitable to find remedies. The responsibility for and enforcement of organisational matters, however, should exclusively lie with the home state supervisor.

Host state supervisors should generally accept the home state's organisational and conduct of business rules which are in line with the home state's MiFID regime. In principle, the host state authority should take a pragmatic approach and only intervene in the way described above if the organisational structure of the branch results in a violation of the obligations pursuant to Articles 19, 21, 22, 25, 27 and 28 MiFID.

If these principles are being observed, individual solutions and agreements between supervisors on how best to carry out branch supervision granting sufficient flexibility for the adoption of a common supervisory approach respecting the specific circumstances of the individual case should produce workable and attractive results. Of course, the suggestions above are without prejudice to the possibility that supervisors entrust the competent authorities of another state to carry out supervisory tasks on their behalf. However, the applicable law for assessing compliance and taking measures in case of infringements should be that of the competent authority's state.

II. Comments to the Consultation Paper

Our comments to the Consultation Paper are as follows:

A. The timetable in the notification procedures (Art. 31 (3) and 32 (6) of MiFID)

Q 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?

We welcome CESR´s proposal that an investment firm shall be permitted to commence cross-border activities once its home regulator has dispatched the notification to the host regulator. This would greatly facilitate the procedure and enhance legal certainty for the investment firms involved.

Q2. 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?

Cf. our answer to Question 3.

Q3. Do you agree with the proposal set out in paragraph 24?

We definitely agree with CESR´s view that registration by the host should not have to take place before a branch can commence operations. We have strong doubts whether additional national requirements for the establishment of branches and the commencement of their business are permitted under MiFID. Requirements for the establishment of branches going beyond those stipulated by MiFID, such as constitutive entries in commercial registers, should, in our opinion, be regarded as infringements of MiFID. However, from a German point of view, we are not affected by such obstacles to the establishment of branches and the commencement of operations.

B. The division of home / host responsibilities regarding branches

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

Operations of investment firms under a passport will indeed face severe practical problems which require transparent solutions giving the necessary legal certainty to the investment firms affected. Especially supervision of branches seems problematic due to the split of responsibilities between home and host supervisors as set out in Art. 32 (7) MiFID. CESR has outlined some of the problems that arise in this context. However, we fear that the possible scenarios can be even more complex, since CESR´s analysis does not consider the case of division of work between branch and investment firm which, in practise, occurs very often, probably even in the majority of branch set-ups.

The complexity could be significantly reduced if CESR defined what constitutes branch services provided "within the host state's territory" and clearly stated that supervisory competencies of the host regulator are restricted solely to these cases and only as regards compliance with Articles 19, 21, 22, 25, 27 and 28 MiFID. As outlined above (cf. our comments at I.2.), the criterion "within its territory" should only encompass those cases in which the characteristic performance of the service occurs in the territory of the host state. For the sake of practicability and legal certainty, the place of the characteristic performance of a service should be defined as the location or place of incorporation of the entity which is actually carrying out the service in question.

Such definition would clearly delimit the competencies of home and host state supervisor and give unequivocal guidance on the applicable MiFID regime. Even in cases of division of work between branch and headquarter or other branches or in the case of "cross-border activities" of branches, one could easily establish whether and to which extent the respective activity constitutes branch business within the host state's territory. In all other cases, home rules would exclusively be applicable.

By way of example, we would like to illustrate the consequences of such approach for some of the scenarios described by CESR in figure 2 (paragraph 33) of the Consultation Paper:

1. Firm W conducting business with clients W1, X 1, Y1 and Z 1:

As CESR points out, these are all cases of cross-border business exclusively subject to home-state conduct of business rules pursuant to Art. 31 MiFID.

2. **Branch X conducting business with client W2, Y 2, Z 2 or X2 or Branch Y conducting business with client W 3, Y 3, Z 3 or X 3:**

   In all these cases, it would have to be determined which services are actually provided by the branch within the territory of the respective host state X or Y according to the division of work and allocation of responsibilities within the investment firm, including its branches. The location of the client either in the home state, the host state or another state would not be of relevance.

   If, for example, one of the clients of Branch X received investment advice and Branch X simply transmitted his orders to Firm W, however, the execution of client orders is performed by Firm W in Country W, only the investment advice will be subject to the supervision by the competent authority of State X as regards compliance with conduct of business rules. Issues such as best execution or compliance with transaction reporting requirements would not be relevant for that particular service by Branch X to the client and therefore not be in the scope of state X´ competencies.

   If, however, Branch Y not only gave investment advice to its clients but also executed itself orders of its clients, it would perform both the service of investment advice and execution of client orders within state Y´s territory – irrespective of the clients´ location in State Y, X, W or Z. Consequently, the competent authority of State Y would have to ensure that the conduct of business rules, amongst others also those relating to transaction reporting, best execution and client order handling, are being complied with by Branch Y. State W would have not competencies and responsibilities in this respect.

3. **Firm W is a systematic internaliser:**

   Assuming that Firm W is a systematic internaliser and Branch X or Branch Y transmitted orders of any of their clients to Firm W for execution, only Firm W would have to disclose the quotes. It would be the home state's responsibility to supervise compliance with Art. 27 MiFID, since the branches would not perform that service within their respective host state's territory.

If one adhered to the concept proposed by CESR which differentiates between domestic and cross-border branch business, branches would have to apply diverging conduct of business rules for the same performance or service depending on whether the client is located in its host state or in another state. This would result in confusion both for supervisors and for the branches as well as for the external auditors having to assess compliance of branches with conduct of business rules.

Another problem that might arise under the proposed concept of CESR is the duplication of transaction reporting. If the possibility to give regard to the typical division of work between branch and headquarter does not exist, there may be cases in which both branch and headquarter have to fulfil reporting requirements. E.g. if the branch simply transmits the client's orders to the headquarter which then executes them in the market, both branch and headquarter could have to fulfil the reporting requirements pursuant to home and host regulation. This duplication of reports could result in a deterioration of the quality of transaction reporting, especially if one keeps in mind that the host authority would, in addition, transmit the reports of the branch to the home state authority.

In view of Art. 62 MiFID pursuant to which host state authorities have the possibility to take precautionary measures despite the fact that the home state authority is responsible for supervision of branch activity, such strict delimitation of supervisory powers constraining the scope of supervision by the host state authority would not hinder the host state authority to intervene, should it believe that the branch located in its territory acts in breach of the obligations arising from its

domestic provisions implementing MiFID. Due to Art. 62 MiFID there actually is no need for a dual supervision.

Q 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?

We strongly object to CESR´s assumption that branches will be subject to two conduct of business rule-books and dual supervision. It should be avoided by all means that branches have to observe the rules of both home and host regulator. Otherwise, this would constitute a clear infringement of Art. 48 EC Treaty since branches would be discriminated in comparison to subsidiaries.

As regards other practical challenges, we would like to address the issue of requirements and obligations resulting from applicable domestic civil law, in particular from consumer protection rules, governing the contractual relationship between firm or branch on the one hand and the client on the other. If these stipulate other requirements than the applicable conduct of business rules of the home or host state, investment firms or branches performing services for clients located in another state than their location or place of incorporation might have to observe not only the rules of their home or host state applicable for supervisory purposes but also the domestic rules of the client's jurisdiction for civil law purposes. Although CESR cannot solve the resulting problems, the need of investment firms to also consider local investor protection rules when performing services for clients located in another state and to address these domestic rules in their policies and procedures should be respected by supervisors when assessing and accepting conduct of business policies. Furthermore, in order to lessen the resulting burdens for investment firms and branches at least to some degree, it should be a priority to avoid dual supervision as regards compliance with both home and host state conduct of business rules.

For clarifying purpose, we would also like to comment on paragraph 37 of the Consultation Paper, although this does not directly relate to Question 5 and our answer set out above. In said paragraph, CESR seems to assume that there remain common good requirements under MiFID, such as MiFID marketing provisions. Of course, we fully agree with the conclusions CESR makes, namely that host regulators will need to accept that they have no remit and should trust the home regulator. However, we would nevertheless like to point out that there are no MiFID provisions being common good requirements. In line with the jurisprudence of the ECJ on the scope of application of Art. 46 EC Treaty, common good requirements can only be resorted to insofar as no harmonisation through European law has taken place.

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

Unnecessary burdens for firms and divisions of competencies which hinder a clear governance and control over branches by the firms should definitely be avoided. Due to the harmonisation of investment services regulation through MiFID and the intention of CESR members to enhance co-ordination, co-operation and supervisory convergence, such an outcome should be achievable without endangering effective supervision and compliance with MiFID provisions.

Above all, however, it must be avoided that branches have to observe the rules of both the home and host regulator. Otherwise, branches would be discriminated against. As outlined above (I.2. and II. 4), this can be achieved through a clear definition of the criterion "within its territory" and by restricting host supervisors´ competencies to the cases of branch business carried out within their territory.

Q 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?

The criteria set out by CESR in Annex 2 reflect how well-balanced and in depth CESR is considering the matter. Indeed, they mirror the difficulty of balancing supervisory concerns and needs on the one hand with the practical, legal and economic needs of investment firms on the other. However, we would like to emphasise once more that a definition of the criterion "within its territory" would greatly reduce the need for such complicated assessments and case-by-case solutions. Indeed, solutions would then only have to be found for those cases in which host state conduct of business rules might conflict with home state organisational rules.

In these remaining cases which could give rise to conflicts between supervisors, criteria proposed by CESR could indeed be of great help for finding adequate and workable solutions. However, we feel that CESR should also stress the importance of more general aspects, such as the fact that the information channels between supervisors will be improved by MiFID and that communication, mutual assistance and exchange of information will be much easier under the MiFID regime. Furthermore, prominent objectives of MiFID, amongst others to enhance supervisory convergence, create a culture of trust between supervisors and to establish a single market, should also be criteria which supervisors should keep in mind when attempting to find satisfactory solutions. Another aspect that should be of particular importance is the attractiveness of the passport.

Q8. Do you have any comments on the possible solutions identified above? Do you have any others that you feel could help?

We agree with CESR that there presently is no need for further guidance as regards the provision of cross-border services without a branch. However, it might prove helpful in the future if CESR gave some guidance on the scope of the host state's right to take appropriate measures pursuant to Art. 62 (1) second subparagraph MiFID.

As for the supervision of branches which perform services within the host state's territory, we feel that there should be some guidance setting out the parameters within which home and host supervisors can find adequate solutions. Due to the fact that there are overlaps between conduct of business rules pursuant to Articles 19, 21, 22, 25, 27 and 28 MiFID falling in the supervisory competence of the host state and organisational matters which are in the competence of the home state, there is again a strong necessity to avoid dual supervision. Investment firms should not have to comply with the greatest common denominator.

It should be important to find solutions which uphold the attractiveness of the passport and the principle of home state supervision. As legal certainty is of crucial importance, we welcome very much CESR´s suggested solution in paragraph 48 a). Furthermore, intensive co-operation and co-ordination of home and host supervisors should be fostered and enhanced, e.g. through joint working as suggested in paragraph 48 f). However, the larger the influence and relevance of host state regulation is, the less attractive will it be for investment firms to establish branches and provide services under the passport, especially if they maintain branches in more than one host state. Therefore, the focus should be on narrowing down the scope of the host state's competencies. In view of this, CESR´s suggestion in paragraph 48 e) does not seem adequate. We would rather like to refer to our comments above (I.3.) with regard to the supervision of compliance with host conduct of business rules by the host supervisor.

As regards CESR´s proposals in paragraph 49, we again strongly object to the idea that branches should have to follow more than one set of conduct of business rules. Host supervisors should only

supervise the business conducted by branches within their territory, irrespective of the location of the client. In all other cases, only home rules should be applicable and they should be enforced by the home supervisor.

Q 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.

As set out in our answer to Question 7 and in our comments in Part I., there should be no need for such a complicated evaluation. If the criterion "within its territory" were clearly defined, the complexity of the matter would be significantly reduced and dual supervision could be avoided.

C. The cross-border activities of investment firms through tied agents

Q 10. In the absence of a single public registry of tied agents, how might member states enhance co-operation for the benefit of clients?

CESR fears that clients might not be able to verify the tied agent's status and to access information on the public register of the home state of the investment firm. This can only occur in the case of a tied agent registered in the home state of the investment firm but established in another Member State not having a regime allowing for tied agents and consequently not having a domestic register of tied agents.

We feel that the state in which the tied agent is established can take measures for client protection without the need for further co-operation between the competent authorities. As these tied agents are assimilated to branches, the Member State in which they are established will get a notification of their establishment. This information can be made public together with a referral to the register of the investment firm's home state.

Q 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?

Co-operation between competent authorities as regards the verification of whether the tied agent established in another Member State fulfils the criteria for registration certainly is helpful. However, if the home state's MiFID implementation has made use of the option in Art. 23 (3) fourth subparagraph, there is no need for involving another Member State's competent authority.

We do not think that specific guidelines would be helpful. Such information exchange should be informal, thus allowing for a pragmatic, timely and uncomplicated procedure.

Q 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?

n.a.

D. The cross-border activities of an MTF

Q 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?

We definitely agree that a common approach will benefit investors and industry – and also supervisors.

Q 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 by adjusted or replaced or elaborated on more and for which reasons?

The connectivity test as defined by CESR in paragraph 89 of the Consultation Paper does not differentiate between non-physical (e.g. software, direct access via Internet) and physical ways (e.g. infrastructure in the host state's territory) of establishing connectivity. We feel that such differentiation is nevertheless necessary.

MTFs should only be regarded as passporting their services if they actually provide appropriate arrangements on the host state's territory, whereas non-physical ways such as in particular direct access via internet should not constitute a passporting. The wording of Art. 31 (5) and (6) MiFID suggests that only physical ways should be regarded as passporting, since it simply refers to "appropriate arrangement on their territory".

If passporting encompassed also non-physical ways of establishing connectivity, MTFs would face severe practical problems. Due to the fact that services offered via Internet can, in principle, be accessed by clients located anywhere in the world, MTFs would have to establish mechanisms which restrict access via Internet only to users in certain Member States or otherwise have to notify to every Member State the provision of direct access via Internet. This is not only impractical, it would also reduce to absurdity the purpose of the notification system. Most importantly, however, there is no need for considering such provision of direct access as passporting since in any case the characteristic performance of the service would take place at the location of the MTF, i.e. in the home state.

Therefore, the connectivity test should be restricted to physical ways of establishing connectivity. Non-physical ways, especially the provision of direct access via Internet, should not constitute passporting. According guidance by CESR would be helpful.

E. The activities of representative offices

Q 15. Do you agree with the arguments set out in this chapter?

We agree with CESR´s arguments.

F. Transitional arrangements

Q 16. Do you agree with the proposal of mapping ISD to MiFID proposed in Annex 1? What changes or possible alternatives would you suggest?

We agree with the proposal of mapping ISD to MiFID as proposed in Annex 1 and we welcome CESR´s intention to put transitional arrangements in place.

This mapping will permit a smooth functioning of the transitional provisions set out in Art. 71 (1) MiFID. In addition, CESR should encourage home regulators to adopt a procedure according to which investment firms can update their notification in a timely manner without facing excessive administrative burdens.

CESR guidance would, however, also be necessary for those cases in which investment firms continue to provide services and / or activities which did not require authorisation under the ISD (e.g. investment advice) or which were not included as non-core services under the ISD (e.g. investment research and financial analysis). In these cases, Art. 71 (1) MiFID does not apply or its application is at least unclear, because investment firms do not have a license explicitly covering these services so far. Investment firms would – in principle – have to wait for the notification procedure to be completed before being able to continue providing these services under the passport. Since notification will only be possible after entry into force of the rules transposing MiFID into national law, i.e. after November 1, 2007, there is a danger that they might have to cease these activities and services for the time period between this date and the expiry of the two-month deadline or the receipt of the communication by the host state authority.

It seems to be central for the smooth change from the ISD-regime to the MiFID-regime that CESR develops a mechanism permitting an application of the transitional provision in Art. 71 (1) MiFID for these cases. Investment firms should be permitted to continue providing the services they already provided prior to the implementation of MiFID, although the necessary new notification has not yet been completed.

Another point that might require transitional provisions or at least clarification by CESR is the following:

Problems might arise due to differing implementation dates, in particular in the case of home states failing to implement MiFID in time. In view of the tight transposition schedule as well as due to the fact that some Member States have not even published drafts of their implementation acts and have rather indicated that they will most likely not be able to meet the transposition deadline, we are very much concerned of the potential implications of differing implementation dates in the different Member States for branches. It is crucial that CESR also addresses this issue and designs transitional arrangements applicable in that case.

As pointed out, the wider scope of MiFID with regard to investment and ancillary services as well as financial instruments will make new notifications necessary according to Art. 31 (2), (4) and Art. 32 (2), (9) MiFID. Investment firms will only be permitted to perform or offer the services and activities which require a new notification after expiry of the respective time period following the information of the host state authority by the home state authority. However, if the home state has not yet implemented MiFID, such notification of the host state authorities will not be possible. Consequently, the provision of such services and activities would have to cease until such services and activities can be supervised by the home state authority pursuant to the provisions of MiFID and the notification of the host state authority is possible.

In case of the home state failing to implement MiFID in time, an undertaking being active in a host state having met the transposition deadline would no longer be supervised in its home state according to the Directive and consequently would – in theory – no longer be able to benefit from the home state authorisation and the principle of mutual recognition. This would affect both the cross-border provision of services and the provision of services through a branch.

It would be very helpful for the affected investment firms if CESR could find a common position of its members on how to handle these cases and if CESR could find a practical solution allowing for a well and uninterrupted functioning of the European financial market despite eventual diverging implementation dates in the Member States.

G. Further harmonisation by way of a protocol between competent authorities

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

The issues raised by CESR certainly are suited to improve supervisory convergence and to improve the speed of supervisory decisions. We therefore very much welcome the issues to be handled in the protocol.

In addition, we suggest that CESR establishes a platform where supervisors with contrary views e.g. regarding the split of competencies or the interpretation of certain MiFID provisions can place their issues, thus enabling CESR to decide on these cases and allow other supervisors to become aware of potential problems and find an adequate uniform solution. This would greatly promote supervisory convergence and help fostering a level playing field in the EU.

Should you have any queries or wish a personal discussion, please do not hesitate to contact us.

Best regards,

Wolfgang Vahldiek Sabine Nachtsheim