



Legal

Corporate Center/Corporate Investments

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Subject: MiFID Level 3: "The Passport under MiFID"

Dear Mr. Demarigny,

Please find hereafter the response of Deutsche Bank to the CESR Consultation Paper: "The Passport under MiFID" of December 2006 and specifically to Part B, which discusses the division of home/host responsibilities regarding branches. We welcome the opportunity to participate in a discussion on what are crucial issues under MiFID, not just for the large investment banking groups but for any institution with a significant commitment to cross-border business in the EU. We appreciate the continued hard work of CESR and its staff and acknowledge the priority CESR has given to these issues in its Level 3 programme.

We would be happy to discuss with CESR, any aspect of this response, in detail.

Yours sincerely,

Deutsche Bank Aktiengesellschaft



(Dr. Otto)



(Ihle)

1 Enclosure

Enclosure: The response of Deutsche Bank to the CESR-Consultation Paper “The Passport under MiFID”

How we are affected

Deutsche Bank AG (DB) operates outside Germany via an extensive network of branch offices throughout the EU. Of these, DB London branch provides a significant number of services on a cross-border basis. Branch offices in other EU locations focus more on local business, i. e. with clients and counterparties situated in the branch country, although some of these branches also have a significant degree of cross-border business because they act as ‘hubs’ for a geographical region.

We understand that the interpretation of the term “within its territory” is presently still under discussion. However, even if the approach suggested by the EU Commission, i.e. the characteristic performance test, is to ultimately prevail, a significant portion of these branches’ activities would be considered to be provided on a cross-border basis and, under the concept of “dual” supervision under the MiFID, be assigned to the supervision of the home country regulator. As a result, these branches will, in any case, be facing exactly the scenario which has been described in the consultation paper. In addition to having to comply with two rule books governing largely identical issues, DB would be burdened with the need to determine the applicable rule book first. In light of the typically time-critical nature of the types of business affected, the likely result could be an unacceptable degree of uncertainty.

A similar assessment holds true for most other firms with trans-European operations and branches in different member states. Notwithstanding the criteria mentioned in Annex 2 to the Consultation Paper – not all of which seem to be convincing to us (for example the different treatment of branches and subsidiaries – as mentioned under b v. - is inherent to the home country principle, on which the MiFID is generally based) -, we therefore think that a pragmatic approach is needed which involves close cooperation between the different regulators involved.

DB recognizes that responsibilities under Article 32 (7) have been assigned to the host regulator for business conducted “within its territory” whereas any other matters are reserved for the home regulator. The practical approach suggested hereafter is built on the assumption that the home regulator’s responsibility with regard to any activities regulated under MiFID cannot (and will not) be delegated.

Solutions

I. Conduct of business matters

A solution could be based upon the following considerations:

1. The firm, at its discretion, may request from its home regulator to be permitted to apply rules and regulations of the host regulator (“host regulator rule book”) of a particular EU branch or particular branches regarding the conduct business as set forth in Art 32 (7) of the MiFID.

2. Upon such request, the home regulator, in recognition of his own (ultimate) responsibility for cross-border activities will, in cooperation and with the support of the host regulator, review the respective host regulator rule book in order to positively identify issues, if any, which he in his absolute discretion would not consider as sufficiently covered or regulated by the host regulator rule book ("exceptional issues"). It would be expected that such issues are in fact "exceptional" ones only, on the basis of the level of harmonization to be achieved by MiFID and the Lamfalussy procedure.

3. The home regulator would then document and communicate any such exceptional issues to the firm. The home regulator would further confirm to the firm that it would deem compliance with the host regulator rule book as compliance of its own (home regulator) rule book. Such *deemed compliance* would only extend to issues in scope which have not been identified as exceptional issues.

4. The home regulator's responsibility for the conduct of business for cross-border activities would, in principle, not be affected. In order to meet its own duties in this regard, the home regulator, as a prerequisite to the suggested procedure, needs to agree on an arrangement with the host regulator to ensure that an adequate level of information regarding the actual supervision is being shared. Such arrangement could extend to any supervisory action undertaken including inquiries, audits and disciplinary action, as well as possible amendments or waivers of any requirement under the host regulator rule book. The overall purpose of such arrangement would be to adequately enable the home regulator to assess the supervision in scope and get actively involved, in the possible though unlikely event that the supervisory activity of the host regulator supervision were considered insufficient.

The suggested approach has the advantage of allowing the home regulator to largely refrain from direct or day to day involvement while remaining in a position to honour its supervisory responsibilities as set forth under MiFID. At the same time, from the firm's perspective, it were ensured that at least for day-to-day supervisory issues related to the conduct of business there were effectively one regulator facing the firm. As a result, the ability to obtain guidance on time-critical issues can be expected to improve under such arrangement.

II. Organisational matters:

1. For organisational matters, the responsibility under MiFID is distinct from that for conduct of business matters. The organisation of an entity, in principle, cannot be divided in a way that branches are organized differently depending on the location of the specific branch. Moreover, firms which are so-called universal banks, as applies to a large number of affected entities such as DB, are credit institutions under the CRD and as such to a large extent already subject to organisational duties under the supervision of their home regulators.

2. Therefore, the MiFID's approach to concentrate supervisory responsibility for organisational matters on the home regulator is consequent and consistent with approach of the CRD. From the firm's perspective, such approach means it needs to follow the home regulator rule book only; the home regulator would be the one regulator facing it. As organisational matters are typically less time-critical or transaction driven nor are they by their very nature branch-specific, we do not see the home regulator's responsibility as a practical challenge.

3. Any distinction between organisational and conduct of business matters should keep these fundamental considerations in mind. "Systems and controls" are at their very core issues related to the organisation of the firm and not the conduct of business. E.g., the outsourcing of services and functions should only be governed by one rule-book firm-wide. In our view, the organisational requirements regarding systems and controls can, as the rest of the organisational rules, also clearly be distinguished from conduct of business obligations, as these concern the overall structure and set-up of the firm, whereas the conduct of business can only be assessed on a case by case basis (usually for individual transactions).

On the other hand, it is true that deficiencies in a branch's conduct in individual cases can also point to weaknesses in the firm's organisation; we therefore feel that this should be one prominent case in which the host authority is to share information with the home regulator, as set out above under I.4.

4. The above notwithstanding, there appears to be valid cause for the host regulator to be adequately informed about organisation-related issues, including systems and controls-related ones. These issues as well as the conduct of business matters require a detailed bilateral arrangement between the two affected regulators to share information on a regular basis, under specific circumstances as well as on request. This exchange of information should however take place directly between the regulators themselves, so that the firms would only face the home regulator in organisational matters.

III. Need for single EU- wide approach:

From our perspective, it would be highly preferable if CESR, **as a whole and for all its members**, could agree to the approach outlined above, or indeed any other unified way of organising supervision as regards the matters falling under Art. 32 (7) coming out of the current consultation. Only this will enable firms to establish a coherent organisation across all its EU branches in that regard. Otherwise, the result of discussions between regulators could very well be a patchwork of different regulatory rules applying to different branches, raising implementation cost for firms and increasing the likelihood of – involuntary- breaches of such rules.

Conclusion

We recognize that the suggested approach may be received as quite ambitious. However, we are confident that we have both adequately taken into account the statutory responsibilities of the two respective regulators affected as well as the firms' practical needs. As a result, close cooperation among regulators, as is often called for, could be lifted to a new level. In short, a win-win-win situation!