THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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The Passport under MiFID

Public consultation

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INTRODUCTION

Background

1. Directive 93/22/EEC of 10 May 1993 on investment services (ISD), adopted the approach of effecting only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems. This made it possible to grant a single authorisation valid throughout the Community and to apply the principle of home Member State supervision. By virtue of mutual recognition, investment firms authorised in their home Member States may provide any or all of the services covered by the ISD for which they have received authorisation throughout the Community by establishing branches or under the freedom to provide services[1].

2. The ISD ensured that investment firms have the same freedom to create branches and to provide services across frontiers as was provided for credit institutions by the Second Council Directive (89/646/EEC) of 15 December 1989.

3. The ISD accepted that the stability and sound operation of the financial system and the protection of investors presuppose that a host Member State has the right and responsibility both to prevent and to penalise any action within its territory by investment firms that is contrary to the rules of conduct and other legal or regulatory provisions it has adopted in the interest of the general good and to take action in emergencies.

4. Directive 2004/39/EC of 21 April 2004 (hereafter MiFID) has adopted the approach of enhancing the degree of harmonisation in order to offer investors a high level of protection and to allow investment firms to provide services throughout the Community on the basis of home country supervision.

5. By way of derogation from this principle, the Directive confers on the host Member State[2] the responsibility for enforcing certain rules in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.

6. In its consultation paper (06-413) on its Work Programme, CESR gave priority to those aspects of the Directive that relate to the functioning of the passport of investment firms, including home/host relationships in the authorisation phase, home/host relationships regarding supervision and monitoring of the provision of services/activities by branches, transitional provisions around the passport, and issues regarding the provision of cross-border business by tied agents.

Objectives

7. This consultation paper presents proposals and questions for a common approach on the notification procedures set out in Articles 31 and 32 of MiFID and on the future collaboration between the home and host authorities that will be necessary in order to guarantee efficient and consistent supervision of cross-border activities, taking into account the provisions of the directive included in chapter II of title IV.

8. The main aims of these proposals and questions can be summarized as follows:

[1] Cf. recital 3 of the ISD.
[2] Cf. Article 32.7 of MiFID.

- maximum harmonisation of the notification procedures;
- uniform interpretation of Articles 31 and 32;
- enhancing collaboration between host and home regulators during the authorisation and supervision phases;
- clarifying some aspects regarding the supervision of tied agents, Multilateral Trading Facilities (MTF) and representative offices.;
- elaboration of pragmatic solutions for the transition from the ISD passport to the MiFID passport;
- prioritisation of those aspects where investment firms need clarity in the short term.

9. The elaboration of these proposals will not only facilitate a consistent approach to these supervisory issues across the EU but will also ensure, by way of prior public consultation, that the views of the industry and consumers will be fully taken into consideration.

10. The outcome of CESR's work will be reflected in agreements which do not constitute European Union legislation. CESR Members will introduce these agreements in their day-to-day regulatory practices on a voluntary basis.

11. Cesr has drafted the section B of this consultation document considering that there may be different interpretations of what "in its own territory" means and has therefore developed a flexible set of solutions to cater for all possible applications on this point. CESR will seek orientations from the European Commission as regards the legal interpretation of the Directive in this particular regard. Should relevant impacts on the current proposals originate from the Commission's response, CESR will bring these to the attention of market participants.

12. CESR's outcomes will not, in any case, prejudice the role of the European Commission as guardian of the Treaties.

13. Preparation of these proposals is being undertaken by the MiFID level 3 Expert Group through the MiFID level 3 Intermediaries Subgroup. The Expert Group is chaired by Mr Arthur Philippe, Director of Luxembourg's Commission de Surveillance du Secteur Financier (CSSF). The Intermediaries Subgroup is chaired by Mr Antonio Carrascosa Morales, General Director of Spain's Comisión Nacional del Mercado de Valores (CNMV).

Public Consultation and Timetable

14. CESR invites responses to this consultation paper. Respondents can post their comments directly on CESR's website (www.cesr-eu.org) under the section "Consultations". The consultation closes on **31 January 2007.**

15. The purpose of this consultation is to receive feedback on the contents of this document and to the specific questions it contains. CESR has included these questions to highlight those areas in which it would be particularly helpful to have the views of respondents. Comments are, of course, welcome on all aspects of the proposals but, if changes are required, a rationale accompanied by practical examples of the impact of the proposals would be very useful. CESR also welcomes specific drafting suggestions if respondents are seeking changes to the proposals. Respondents are also welcome to make any relevant points which they do not think are covered directly by the questions.

A. THE TIMETABLE IN THE NOTIFICATION PROCEDURES (ARTICLES 31 (3) AND 32 (6) OF MIFID)

16. Extract from MiFID text:

Article 31 (3): The competent authority of the home Member State shall, within one month of receiving the information, forward it to the competent authority of the host Member State designated as contact point in accordance with Article 56(1). The investment firm may then start to provide the investment service or services concerned in the host Member State.

17. Although it is not the objective at Level 3 to impose obligations, CESR suggests that, once the notification has been dispatched by the home regulator to a recognised point of contact in the host, this is the date from which the firm may commence cross-border activities. It would be up to the home authority to notify the firm that the notification has been forwarded and ensure that it has been received by the host (a list of contact persons in each CESR Member should be maintained).

18. CESR is of the opinion that there is no requirement in the MiFID to wait for the firm to appear on the host's register before commencing cross border services. However, it is of course open to the firm to check the register of the host itself to see if its entry has been recorded. It is in the interest of the firms to do so. Additionally, this is also in benefit of the host Member State investors which, mainly, shall visit the host register.

19. CESR members agree to update their Registries in a timely manner so as to reduce the possibility of any confusion.

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?

20. Extract from MiFID text:

Article 32 (6): On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the branch may be established and commence business.

21. What is the potential for host Member States to postpone the date that a branch can commence business until domestic requirements not arising from financial services regulation have been met?

22. CESR is of the view that, in line with the approach to the provision of services, the decision to approve a branch lies with the home regulator. Following the dispatch of a notification by the home regulator, the host regulator would have a maximum period of two months to deal with the notification file.

23. CESR feels that registration by the host should not have to take place before the branch can commence operations. This is in line with the proposed approach for the commencement of cross border services under article 31(3). Two months should be sufficient time for the host to have updated any register of firms. Once the firm has either received communication from the competent authority of the host Member State or the two months has elapsed, whichever is the sooner, the branch may be established and commence business under the MiFID passport.

24. In some countries, the establishment of a branch entails that certain specific domestic commercial provisions also have to be satisfied. In some Member States, as long as these requirements remain unfulfilled, it is impossible for the host regulator to update the appropriate register in order to include a branch that does not exist according to domestic common legislation, nor may it be established and commence business. Consequently, when a notification for a branch is received, CESR Members voluntarily agree, where necessary, to advise the firm to consult the host's website in order to be informed about the additional commercial requirements that must be met before the branch can be recorded in the host register . The responsibility to keep any such list of commercial law provisions up to date would rest with each relevant host regulator. Thus, in such cases the term of the two months may be more easily met. Another way to solve this issue could be a link on CESR's webpage to the regulators' web pages where regulators could, on a voluntary basis, display the domestic requirements to register branches.

25. As a consequence of the above mentioned facts, Members agree that the home regulator should publish an advisory note (e.g. on its website or register) to reflect the fact that when first conducting business with a branch in the relevent Member State(s), it is recommended to also check that the branch is entered on the host register.

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?*

B. THE DIVISION OF HOME/HOST RESPONSIBILITIES REGARDING BRANCHES

Background

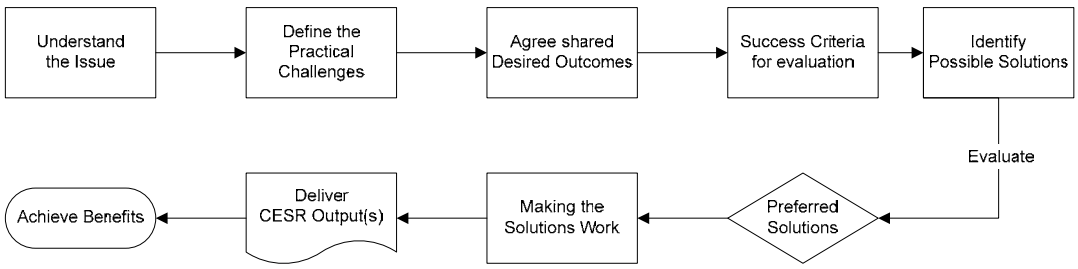
26. The consultation on a proposed 2006/2007 CESR work programme for MiFID Level 3 identified the issue of practical and operational aspects related to the functioning of the passport as being of importance to intermediaries. In particular, home/host relationships regarding the supervision and monitoring of the provision of services and activities from branches was an area which industry responses agreed should be made a priority.

27. Smooth functioning of the use of the passport is important to the operation of a competitive, single market. Consumers will benefit from this increased competition, provided they have confidence that regulators are able to monitor the provision of the MiFID protections through proper supervision.

28. The purpose of this chapter of the consultation is to consider, from an operational perspective, the specific challenges which both firms and regulators will face that arise from the way in which the responsibilities for regulation and supervision of branches are divided (between home and host regulator) under MiFID. It is also intended to help regulators identify, agree and implement real practical solutions to meet those challenges, through the examination of a flexible range of possible supervisory tools that help address the issues identified. Ideally, regulators and firms should share a common interest in supporting any such practical arrangements that help ensure that branch operations are controlled and supervised properly, in order that the required MiFID standards of protection are delivered. It is envisaged that through this process the key principle of better financial services regulation across the EU will be facilitated.

29. In taking this work forward, CESR has adopted the following process model to arrive at recommendations for consultation. Each stage is explored in turn in the following sections of this chapter, accompanied by questions on the specific areas where respondents' views are sought.

Figure 1



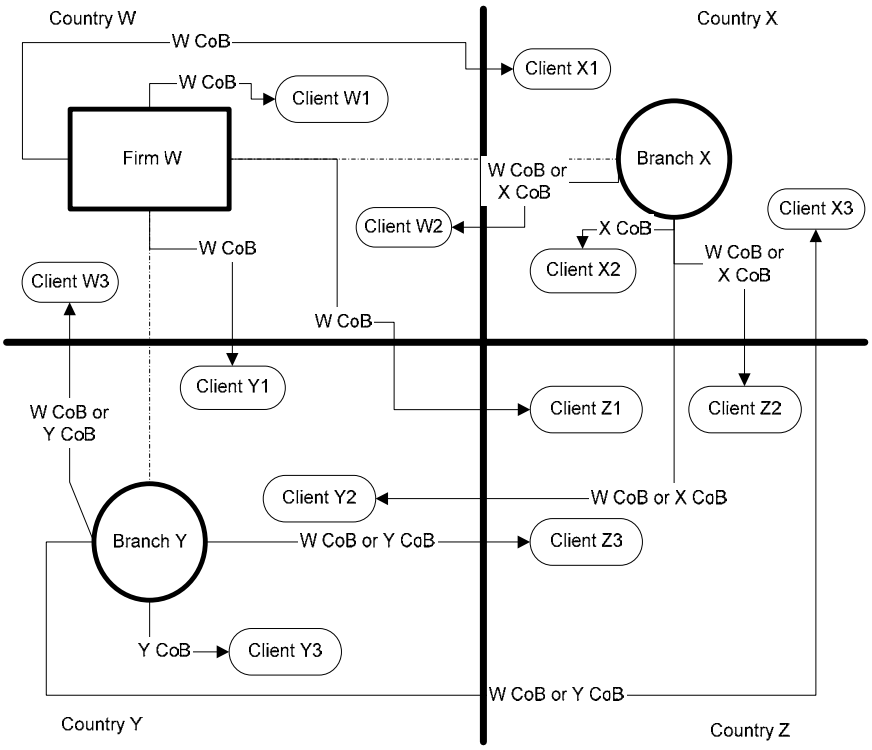
30. The key proposal that emerges is that the respective home and host regulators agree among themselves – and communicate their views to relevant firms – on how best in practice to carry out branch supervision. And that they agree on the specific solutions or supervisory tools with flexibility on a case-by-case basis. To support this, a common framework, for example through a protocol, will be developed as required.

Understanding the Issue(s)

31. The rights of investment firms to operate under a 'passport' on the basis of their home state authorisation, whether providing investment services and activities on a cross-border basis or the establishment of a branch, are set out in Articles 31 and 32 of MiFID. These provisions cover, inter alia, the respective responsibilities of home and host regulators.

32. The situation can appear complex given the different combination of ways which a firm can choose to do business across the EU. For example, a firm that maintains a branch in a host country may also choose to provide services on a cross border basis into the host country without using the services of its local branch. Clients may also find themselves provided with services from several offices of the same firm located in different countries based on freedom to provide services. Whereas under the ISD a firm providing cross border services must understand and apply the rules of conduct of each host state into which it passports services, under MIFID, the firm will only need to focus on home rules and the rules of the host states in which it has branches.

33. The complexity outlined above is illustrated in the example figure 2 as follows:



Note: This figure is illustrative only and the allocation of responsibility for Conduct of Business (CoB) reflects the explanations set out in paragraph 34

34. Figure 2 above represents a plausible example scenario whereby a firm W is authorised in a member country W and also operates branch establishments in member countries X and Y. The firm conducts business, both directly and from both its two branches, with clients[3] in each of member countries W, X, Y and Z. The result is that in addition to 'local' business conducted within each country (e.g. head office W with client W1, branch X with client X2 and branch Y with client Y3), each establishment also conducts business on a cross-border basis.

[3] The term "client" is simply used here as a convenient label and hence could include "counterparties".

35. Although the MiFID provisions improve on the existing position under the Investment Services Directive (ISD) through reducing the scope for regulatory 'overlaps', they also pose significant operational challenges for the effective day-to-day supervision. These arise because:

a) responsibility for the regulation and supervision of cross-border services (without a branch) into another Member State direct from a place of business in the firm's home state is reserved solely for the home regulator. (E.g. head office W doing business with clients X1, Y1 and Z1 in figure 2);

b) responsibility for branch regulation and supervision is divided between home and host state regulators: organisational matters are reserved to the home regulator, while certain branch responsibilities[4] are for the host regulator; and

c) the scope of the host regulator's branch responsibilities under Article 32(7) is limited to business conducted within the territory of the host state. When a branch is conducting business outside its territory, then responsibility for conduct of business rests with the home state regulator. The precise division of responsibility between home and host regulators will, in practice, depend upon the extent to which the relevant services are provided within the territory where the branch is located.

36. To make these provisions work it will be essential for firms to have coherent policies and procedures to ensure that their various cross-border activities, in whatever form, are controlled properly and that the required MiFID protections are delivered to all clients as appropriate. A clear understanding among firms and regulators as to how a firm operates its business across the EU as well as close co-operation between regulators will also be required.

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

Defining the Practical Challenges

37. As regards the issue identified under paragraph 35.a) above, unlike the ISD, MiFID does not provide for the 'host' regulator to apply any "common good" requirements (for example MiFID marketing provisions) to any business conducted on a cross-border services business in to its territory direct from the home state. As a result, the host regulator will need to accept that it has no remit and should trust the home regulator to approach the supervision of such business in the same manner as it would for purely domestic business; the home regulator will need to respond to the challenge by operating in such a way as to maintain the confidence of the host in its supervision. Firms will need to take their responsibilities in respect of such business seriously, manage the change to an environment under MiFID where home regulator rules become pre-eminent, and account to their home regulator accordingly.

38. In terms of the issue identified under paragraph 35.b) above, certain firms may design operational processes and procedures, IT systems, business continuity and compliance arrangements around the business of a branch. In such instances, the management of the firm and its branch establishment will wish to know to what extent, in practice, they may be answerable to the host as well as the home regulator. Whilst on paper 'organisational requirements' are reserved to the home regulator, the distinction between the systems and controls environment for a branch and the way in which business is conducted may not be a clear one.

39. For the issue identified under paragraph 35.c) above, the host regulator is responsible for supervising the conduct of all services provided by the branch "within its territory". For services provided outside the territory of the branch the responsibility for conduct of business rests with the home regulator. Regulators and firms need to understand the practical

[4] Mainly these are conduct of business matters, though certain market transparency and integrity responsibilities (including transaction reporting) are also included under Article 32(7).

consequences of the branch having to observe the rules of both the home and host regulator. CESR is seeking to find practical arrangements that mitigate the complexity of branches being subject to two conduct of business rule-books and dual supervision..

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?**

Sharing Desired Outcome(s)

40. Regulators have an obligation to monitor and supervise the activities of firms in accordance with the requirements of MiFID; the senior management of firms have a responsibility to ensure compliance with those requirements. Accordingly, both regulators and firms should have a common interest in understanding the practical arrangements governing compliance by, and supervision of, branches. A good desired outcome will be one that all relevant stakeholders can share.

41. A shared outcome that firms have clear governance and controls over branches and their business would appear to be desirable, regardless of whether, in practice, a line can be drawn between MiFID 'organisational' and 'conduct of business' requirements.

42. A suggested desired outcome for the practical challenge of, in some cases, business conducted by a branch needing to comply with two sets of conduct of business rules instead of one, would be that both the firm's management and regulators can supervise properly whilst not creating any unnecessary burdens to the provision of cross border services or activities through a branch.

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

Evaluating Success

43. A number of possible success criteria for evaluating the options for addressing the challenges of how to supervise branches in practice have been identified. Individual detailed considerations are grouped together under broad, higher level factors and these can be found set out in Annex 2.

44. The higher level factors selected are intended to help ensure that any practical solutions take account of the need for clarity, are efficient and effective for both regulators and firms to implement, and adopt a pragmatic approach in the light of the different ways that firms might actually operate their businesses through branches.

45. No particular weight or validity has (yet) been attached to the 'success criteria'. It is possible that the relative arguments might depend upon the extent of harmonisation of rules and supervisory convergence achieved under MiFID implementation in practice. However, even allowing for this, some of the criteria reflect the practical aspects of geographical remoteness from the branch operation. The criteria should allow individual solutions to cope flexibly with particular situations.

46. CESR believes that the use of such criteria will help in the evaluation of practical solutions that make a real difference to supervisory oversight and compliance by firms, whilst helping to promote better regulation.

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?**

Identifying Possible Solutions

47. As noted above, responsibility for the provision of cross-border services (without a branch) into another Member State direct from a place of business in the firm's home state is reserved for the home regulator. CESR believes that the common standards created by MiFID provisions, together with enhanced understanding between regulators and convergence in supervisory practices should help ensure that this aspect of cross-border business operates smoothly. CESR believes there is no need at this time for further guidance in this area.

48. To help address the challenge in supervising branches, under the general division of responsibilities between home and host regulators, of where the boundary between 'organisational' and 'conduct of business' requirements lies, a number of possible options or solutions have been identified as follows:

    a) Regulators agree as precisely as possible where in practice the line is drawn between their respective responsibilities;

    b) Home regulator focuses more on the organisational or control aspects of branches (than may have done so under ISD);

    c) Home regulator asks the firm questions on organisational matters sent by the host regulator (and passes on any material findings);

    d) Firm provides a defined set of common information on organisational matters (that includes the branch) to both home and host regulator;

    e) Home regulator requests co-operation in supervisory activity, through delegating or outsourcing tasks of supervision (but not responsibility) on various organisational matters to the host regulator; and/or

    f) Joint working (e.g. meetings with senior management, on-site visits etc) by home and host regulators that include coverage of organisational matters.

49. For resolving the challenge of how to supervise practically a firm which has to follow more than one set of 'conduct of business' rules, possible options have been identified to address the cross-border activities done by a branch:

    a) Both host and home regulators supervise separately their relevant business of the branch (according to whether the particular activity or transaction is 'domestic' or 'cross border' respectively);

    b) Regulators co-operate by delegating or outsourcing between themselves the task of supervision (but not responsibility) for looking at the conduct of all the business of the branch. Whilst this might normally be expected to result in the home regulator delegating or outsourcing tasks to the host, there may also be circumstances in which delegation or outsourcing from the host regulator to the home could be appropriate; and

    c) Joint supervision (e.g. meetings with compliance staff, file reviews; on-site visits etc) by home and host regulators.

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

Evaluation

50. The possible solutions to the specific challenges of how to supervise branches can be evaluated using the success criteria identified. The intention is to help provide some useful pointers as to how the challenges may be approached in practice to help achieve desired outcomes.

51. 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.

52. As regards the line between 'organisational' and 'conduct of business' requirements (Annex 3(i)) CESR considers that the precise combination or 'best fit' solution will depend upon a number of different factors, including how a branch is governed, the nature and scale of its activities and its importance to the local 'markets'. Success will also depend, to a larger extent than under ISD, upon branches complying with the firm's operational model as regards policies and procedures relating to its organisation.

53. Accordingly, CESR proposes that the respective home and host regulators be able to agree among themselves – and communicate their views to the relevant firms – on how best to carry out this aspect of branch supervision and to agree the specific solutions from the identified list with flexibility on a case-by-case basis. CESR will support Members in implementing such an approach (for example through a common protocol or framework) if/as required.

54. How to respond to the supervisory challenge in circumstances where responsibility for conduct of business at a branch falls to both home and host regulators is addressed in Annex 3(ii).

55. CESR recognises that a home regulator may face practical difficulties in supervising the provision of certain investment services and activities undertaken by a branch (established outside its home country) into other EU countries. Therefore, CESR suggests that consideration be given as to whether/how the monitoring of compliance with conduct of business requirements by a branch over all its business might be better achieved through just the host regulator. For example, through the home regulator delegating or outsourcing supervisory tasks (but not responsibility) to the host where agreed. CESR also recognises that there may be instances where the particular circumstances suggest that the home regulator would be better placed to monitor the activities of the branch as a whole, in which case there is the option that delegation or outsourcing between regulators could work in the opposite direction (from host to home).

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.

Making the Solutions Work

56. It is possible that some of the solutions identified in order to help achieve real practical outcomes may, on first impression, appear difficult for regulators to deliver. However, CESR believes that in practice members should be able to overcome any initial reservations in order to make the beneficial solutions work and so achieve better regulation.

57. In the case of the provision of cross-border services (without a branch) in to another Member State direct from a place of business in the firm's home state, firms and regulators must adjust to the new requirement for such business to be the responsibility of the home regulator. Whilst there will no longer be any direct role for the 'host' regulator, good cooperation should ensure that any relevant intelligence that might come its way can still be shared with the home regulator (to the extent provided for by the usual gateways).

58. It is important that firms establish proper governance and controls over all their operations, including branches, in order to comply with the 'organisational requirements' in MiFID. In some cases the host regulator where a branch is established will have a particular interest in such controls and may be able to play a valuable part in helping the home regulator to ensure that they are adequate. The solutions identified in this paper provide a range of ways in which this may be achieved in a proportionate manner according to the circumstances. To implement those solutions close cooperation between home and host regulators is required, although should the result be that the host regulator identifies any material weaknesses in controls (other than to the extent that they relate to conduct of business for the branch) ultimate regulatory responsibility to ensure action is taken by the firm still rests with the home regulator.

59. For the conduct of cross-border activities undertaken through a branch, issues involving say delegation or outsourcing of tasks designed to help improve monitoring and prevention also need to consider other practical aspects. For example, which particular set of detailed 'conduct of business' rules would the host use in practice to monitor the branch against in respect of business covered under the area of delegation or outsourcing agreed? And how would any corrective action directed at firms be enforced by the competent authority with jurisdiction in the event of material compliance weaknesses being encountered by the regulator to whom supervisory tasks had been delegated or outsourced?

60. It is possible that a more detailed analysis of how to deal with any consequential issues (such as those identified above) may be required following the result of consultation. However, it is the initial view of CESR that, given the more harmonised approach under MiFID and with limited scope to add to such requirements, where a task of supervision is delegated or outsourced from one regulator to another then a practical approach could be taken as to how that task is fulfilled. For example, if supervision is delegated or outsourced from home to host then it should be possible for the host regulator to be guided to a large extent by the set of (conduct of business) rules where the branch is established. Equally, in cases where delegation or outsourcing operated the other way (from host to home), the home regulator could refer to the home rules. In this way the firm should still be able to ensure that its branch delivers all the relevant MiFID standards of protection.

61. With the relevant responsibility still resting with the regulator that agrees to delegate or outsource supervision, the regulator that accepts to undertake the delegated or outsourced tasks would need to refer across any material weaknesses it finds. A material weakness in compliance with the common MiFID standards and principles should generally be capable of being seen as such notwithstanding exactly how such requirements have been implemented in the specific rules in any given EU country. Competent authorities will have to cooperate closely and communicate clearly, an area where CESR has a tradition in doing so and has built up trust among members. This should provide a basis for unbureaucratic approaches where appropriate and it is possible to draw upon CESR-Pol's experience in close cooperation and the exchange of information on enforcement cases to help. MiFID contains cooperation provisions for regulators which should prove sufficient.

62. Following consideration of all responses to the consultation, if appropriate, it would still be open to CESR to consult further with the European Commission as to whether there is a case for interpretative guidance which would even more closely align any underlying legal analysis with the identified solutions by which the shared desired outcome and better regulation might be more easily delivered in practice.

63. As noted earlier, in practice a firm may choose to exercise its right to passport through a variety of different ways in order to realise the opportunity to access the EU market(s). This can introduce added complexity, although the main supervisory issues arising from the structures used should be capable of being broken down and resolved in the ways proposed. However, it should be stressed that firms themselves can make an important contribution to dealing with such apparent complexity through a clear understanding and explanation of how their chosen business model operates and is controlled in practice.

Delivering Outputs

64. The initial output of the work undertaken by CESR is reflected in this consultation paper and on which the views of all interested stakeholders are now sought.

65. Assuming that there is general agreement of what needs to be done, CESR may wish to build the findings in to a framework or protocol for regulators, which would also provide firms and other stakeholders with a visible sign of commitment and help explain further how agreed solutions will be delivered in practice.

66. It is also possible that there may be some aspects that require further work as part of the on-going process of fostering greater supervisory convergence and regulatory co-operation.

Achieving Benefits

67. CESR is committed to determining how best to supervise branch activities under MiFID and its proposals put forward for consultation in this paper are intended to help deliver potential benefits. It is suggested that this work should promote greater awareness of the issues, supervisory convergence, and enhance mutual understanding of the supervisory tools used by different regulators when acting as home or host. In particular, it should support the key principle of better financial services regulation across the EU.

C THE CROSS-BORDER ACTIVITIES OF INVESTMENT FIRMS THROUGH TIED AGENTS

Background

68. MiFID introduces a regime for tied agents. According to Article 4 (25) of MiFID, a 'tied agent' means a natural or legal person who, under the full and unconditional responsibility of only one investment firm, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments and/or provides advice to clients or prospective clients in respect of those financial instruments or services.

69. When an investment firm uses a tied agent, under Article 13(2) of MiFID its obligations to establish adequate policies and procedures sufficient to ensure compliance with the provisions of MiFID extend to its supervision of the tied agent.

70. An investment firm or a credit institution, which wishes to perform investment services in a host country, may use tied agents if its home country authorises their use. The investment firm can have recourse to a tied agent to exercise either its right to provide services or its right to free establishment. The notification procedure provides for the home regulator to inform the host regulator of the identity of the tied agents.

71. When investment services are provided through a tied agent established outside of the investment firm's home country, the tied agent is assimilated to a branch and subject, according to Article 32 (2) MiFID, to the MiFID provisions relating to branches. CESR is of the opinion that this means that tied agents are treated on the same basis as a branch. Therefore, the notification procedure for branches descibed in Article 32 (2) is applicable and the tied agent is subject to conduct of business obligations of the host country within its territory.

72. Article 23 MiFID sets forth the obligations of investment firms when appointing tied agents. The principal firm remains fully and unconditionally responsible for any action or omission on the part of a tied agent and so its home regulator will require the firm appointing a tied agent to monitor its compliance with MiFID.

73. According to Article 23 (2) MiFID a tied agent may only handle clients' money if the regime in both the home and the host countries for tied agents allows for this.

74. Article 23 (3) states that tied agents are registered in the public register in the country where they are established. Where the country in which the tied agent is established does not allow for the appointment of tied agents, this tied agent is to be registered with the competent authority of the home country of the investment firm on whose behalf it acts.

75. Tied agents can only be admitted to the public register if it has been established that they are of sufficiently good repute and possess appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant investment service information to the client or potential client.

Problems arising

76. The obligation to admit tied agents to a public register can, depending upon the precise circumstances, fall to different Member States. When the Member State where the tied agent is established does not have a regime allowing for tied agents, there is a problem of how clients know and are able to access information on the public register of the home Member State of the investment firm in order to verify the tied agent's status.

77. According to Article 23 (3) Member States must ensure that tied agents are only admitted to their public register if it has been established that they are of sufficiently good repute and possesses appropriate general, commercial and professional knowledge. To this effect Member States may allow investment firms to verify the good repute and possession of knowledge of their tied agents. In this case practical problems may arise in cases where the tied agent is established in another Member State from that of the principal investment firm. CESR is of the opinion that co-operation between competent authorities will be necessary in this area.

78. Article 23 (4) allows registration to be carried out in various manners in the Member States, for example, by the government, the competent authorities, the investment firms and credit institutions, etc. In order to assess appropriately the good repute and knowledge of tied agents prior to registration, CESR recommends that competent authorities cooperate in this endeavour, in particular in cases where tied agents are appointed in a host Member State that does not maintain a tied agent regime.

79. A tied agent is an unauthorised entity operating under the responsibility of the investment firm. This raises a number of practical questions for investment firms and for regulators.
   a) Regarding the organisational structure of the investment firm's cross-border activities, how does the investment firm, and the home regulator, evaluate the risks created? Are there any specific issues in addition to the way in which an investment firm might control an outgoing branch?
   b) Where a tied agent is established in another Member State, how will the host regulator exercise ongoing conduct of business supervision over an unauthorised entity? Are there any special issues to consider?
   c) How should complaints relating to a tied agent established in a Member State other than that of its principal investment firm be handled? Is it sufficiently understood that treating a tied agent as a branch means that the compensation mechanism of the home Member State covers losses attributable to a tied agent?
   d) How should the host Member State verify that a tied agent complies with money laundering obligations? How can a home Member State be sure that the investment firm's procedures are adequately implemented?
   e) How will Member States apply Article 23(6) in practice, and in a proportionate manner?

80. CESR will study the practical modalities of applying the suggested approach for branches to 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?**

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?**

D. THE CROSS-BORDER ACTIVITIES OF AN MTF [5]

Background

81. The MiFID establishes a process for investment firms and market operators operating an MTF to conduct cross border activities based on mutual recognition. It allows an investment firm or a market operator operating an MTF authorised in its home Member State to provide cross border services in other Member States without seeking authorisation in those host States, provided that the notification requirements of Article 31 MiFID are fulfilled. . However, whereas investment firms may use Articles 32 and 31 to set up branches and provide services in other Member States by way of free provision of services, including the service or activity of operating an MTF, the directive does not include provisions regarding the establishment of a branch for market operators.

82. The freedom to provide cross border investment services/activities by investment firms and market operators operating an MTF follows from Article 31 (5) and (6) of MiFID.

83. Article 31 (5) MiFID establishes that Member States shall, without further legal or administrative requirement, allow investment firms and markets operators operating MTF's from other Members States to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory.

84. Article 31 (6) MiFID establishes that the investment firm or the market operator that operates an MTF shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State of the MTF shall communicate, within one month, this information to the Member State in which the MTF intends to provide such arrangements.

    The competent authority of the home Member State of the MTF shall, on the request of the competent authority of the host Member State of the MTF and within a reasonable delay, communicate the identity of the members or participants of the MTF established in that Member State.

85. Article 31 (5) and (6) MiFID raise the question of what exactly constitutes providing such arrangements by an MTF so as to facilitate access to and use of their systems by remote users or participants (in other words what constitutes 'passporting' for an MTF). CESR believes that this is open to different interpretation partly due to the increasingly important role of Internet. CESR is of the opinion that different interpretations of Article 31 (5) and (6) by competent authorities will not contribute to a level playing field within the European Union. Both investors and industry would benefit from a common approach by competent authorities on this matter.

86. CESR therefore proposes a common approach for its members consisting a criterion on the basis of which can be decided whether an MTF is providing such arrangements on the territory of another Member State than its home Member State, as referred to in Article 31 (5) and (6) MiFID.

87. The aim of CESR is to develop an operational criterion that is easy to understand and to use by both competent authorities as well as the industry. The criterion should promote convergence, certainty and transparency to the supervisory practices.

Proposal

[5] The conclusions on this section specifically apply to MTFs.

88. CESR proposes to consider an investment firm or market operator operating an MTF who is authorised in a Member State, to be rendering cross border services/activities in another Member State, as referred to in Article 31 (5) and (6) MiFID, where direct access is provided to users or participants by the investment firm or market operator operating an MTF in the territory of a Member State other than its home Member State ("connectivity test").

Explanatory text

89. The connectivity test mentioned above covers for example the placing of screens by the MTF concerned in another Member State than its home Member State, or the delivery of software as to facilitate access to the platform, or the physical presence of infrastructure, or the establishment of a platform for trading securities registered in that Member State but also facilitating direct access via Internet.

90. In order for an MTF to be rendering cross border services/activities, as referred to in Article 31 (5) and (6) MiFID, it is suggested that the requirement of connectivity has to be fulfilled.

91. In case the investment firm or a market operator operating an MTF regards the arrangements provided or to be provided by the MTF in question as rendering cross border services/activities, as referred to in Article 31 (5) and (6), it shall inform the competent authority of its home Member State who shall then in accordance with Article 31 (6) notify the competent authority of the host Member State in which the MTF intends to provide such arrangements as referred to in Article 31 (5) MiFID.

92. CESR will consider to which extent the suggested approach for notification procedures (see chapter A) may be applicable for operators of MTF's, for example in practice, should a" reasonable delay" referred to in article 31(6) be aligned with the timetable for other investment services?

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?

Question 14: Do you agree with the suggested criterion ("connectivity test") for deciding whether an MITF is passporting its services/activities? If not, should the criterion be adjusted or replaced or elaborated on more and for which reasons?

E. THE ACTIVITIES OF REPRESENTATIVE OFFICES

93. A representative office is an office that represents the head office of an investment firm in another member state in order to make promotion regarding the branding of the firm, its services and activities. A representative office does not provide investment services or activities itself.

94. Some Member States have local requirements for representative offices of investment firms authorised and supervised in another Member State. Neither the ISD nor MiFID have provided a regime for the activities of representative offices. CESR believes that it has no specific mandate to provide recommendations regarding a regime for representative offices. CESR subscribes nevertheless to the view that no MiFID investment services or activities can be provided through a representative office.

95. It is important to qualify the nature of the activities performed by an office of an investment firm authorised by another Member State in order to determine the competent authority for the supervision of certain conduct of business rules. If in fact the office establishment provides investment services or activities, it has to be considered as a branch, and therefore the authority of the host Member State is competent for the supervision of the conduct of business rules referred to in Article 32 (7) of MiFID. If (i) the office is used only as a marketing instrument for the cross-border activities of the firm, and (ii) there is no MiFID investment service or activity taking place through the office itself, then any cross-border MiFID investment service or activity by the firm is the sole responsibility of the home Member State.

96. According to Articles 4(1)(25) (definitions) and 23 of MiFID the purposes of a tied agent may include, amongst other things, that of promoting the services of an investment firm. One of the differences between tied agents and representative offices is that the former are a separate entity, distinct from the investment firm (be they natural or legal persons), while representative offices are usually not legally distinct from the investment firm.

97. If the representative office (or other entity falling under the definition of representative office in paragraph 90 above) is a distinct entity from the investment firm, it could be qualified as a tied agent where it is promoting the services of the investment firm (service or activity included in article 23 (1) of MiFID) and the investment firm remains responsible for its actions. This is a possibility and not an obligation because to the extent that the representative office is providing only promotional services and activities it remains out of the scope of the Directive.

98. CESR agrees that if there are problems qualifying the activities of representative offices or other entities that do not perform investment services but undertake some promotional services or activities under article 23, the authorities of the host and the home Member States have to consult each other to avoid any misunderstanding regarding what is taking place.

99. CESR is of the opinion that where an investment firm establishes an office of the same legal entity in another Member State solely for promotional purposes, that office should not be qualified as a branch under MiFID.

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

F. TRANSITIONAL ARRANGEMENTS

100. To ensure firms can continue to carry out their business activities without interruption, MiFID Article 71(4) provides that passport notifications communicated before implementation for the purposes of the ISD should be deemed to have been communicated for the purposes of MiFID. This means that existing ISD passports will be recognised as MiFID passports following implementation from 1 November 2007. CESR has to consider whether any transitional arrangements are necessary to ensure that the records of the host regulator in respect of existing ISD passports reflect the revised MiFID investment service and activity, and financial instrument definitions.

101. CESR considers that it is necessary to put transitional arrangements in place to update supervisory records and to ensure certainty for passporting firms and users of the relevant public Register(s). Otherwise there is a significant risk that inconsistencies and additional complexities will develop going forward, especially when a firm wishes to expand the scope of its passporting activities, requiring a notification under the revised MiFID definitions. Therefore, CESR has developed an approach to update records to include the new MiFID definitions.

102. CESR proposes a common mapping of ISD to MiFID. This option would involve Members reaching agreement on a common mapping of ISD investment services and instruments to MiFID investment services, activities and financial instruments. Home and host regulators would then be responsible for updating their records using the agreed mapping, prior to 1 November 2007, relying on existing ISD records. To facilitate discussions, a suggested mapping of ISD to MiFID is included in Annex 1.

103. Although the initial mapping exercise would be completed by relying on existing records, any change to an existing passport, such as the addition of new activities, services or financial instruments (given the wider scope of MiFID compared to the ISD, for example commodity derivatives), would result in a new notification being required under articles 31(4) and 32(9) of MiFID. CESR recommends that home regulators adopt a procedure by which investment firms are invited to review their current passported services, activities and financial instruments and request any additional authorisations that come to light as a result of this review.

104. CESR proposes that home regulators, when notifying a modification of existing passported activities, provide the host regulator with an update of the existing passports.

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?

G. FURTHER HARMONISATION BY WAY OF A PROTOCOL BETWEEN COMPETENT AUTHORITIES

105. CESR seeks to enhance the collaboration among competent authorities in cross-border activities and to harmonise and facilitate the notification procedure under Articles 31 and 32 of the Directive. CESR seeks likewise to improve the information about investment firms provided to the public. Therefore, dependent upon the outcome of this consultation, CESR has the intention to negotiate, in the first quarter of 2007, a protocol among the various authorities. In this protocol at least the following topics should be treated:

a) harmonisation of the notification procedure

i. use and elaboration of standardised forms for the notifications;
ii. arrangements regarding the time schedule of notifications;
iii. exchange of information regarding problems concerning passport notification;
iv. the home authority to promptly advise the host authorities of the Member States in whose territories an investment firm carries on activities in terms of Articles 31 and/or 32 of MiFID of any decision by the home authority to withdraw the authorisation of that firm;
v. methods of communication (e.g. use of email).

b) collaboration among authorities

i. appointment within each authority of the person(s) responsible for all notification issues;
ii. exchange of contact lists among authorities;
iii. exchange of information among authorities regarding investment firms using the passport;
iv. periodic meetings on passport issues by the persons responsible, with the intention of improving the notification procedures and resolving interpretation questions or other problems regarding Articles 31 and 32 of the Directive (e.g. questions about the division of competences regarding tied agents).

c) improvement of information to and the contact with the public

i. arrangements regarding the contents of national public registers;
ii. an integrated list with all the references to the different national public registers should be available for the public;
iii. facilitating client contact with the authorities or extra-judicial bodies regarding their complaints, by making available a list of all the extra-judicial bodies in the different Member States;
iv. facilitating client contact with the investor compensation schemes in the different Member States, by making available a list of all the relevant addresses.

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

ANNEX 1 – SUGGESTED MAPPING OF ISD SERVICE AND INVESTMENT ACTIVITIES TO MIFID INVESTMENT SERVICES AND ACTIVITIES

ISD	MIFID
Section A: Core Services	**Section A: Investment services and activities**
1. a) Reception and transmission, on behalf of investors, of orders in relation to one or more of the instruments listed in Section B.	(1) Reception and transmission of orders in relation to one or more financial instruments
1. b) Execution of such orders other than for own account.	(2) Execution of orders on behalf of clients
2. Dealing in any of the instruments listed in Section B for own account.	(3) Dealing on own account
3. Managing portfolios of investments in accordance with mandates given by investors on a discriminatory, client-by-client basis where such portfolios include one or more of the instruments listed in Section B.	(4) Portfolio management
(moved from ISD Non-Core services to MiFID Investment services and activities)	(5) Investment advice *(moved from ISD Non-Core Services to MiFID Investment services and activities. For transition see ISD Section C: 6. investment advice….)*
4. Underwriting in respect of issues of any of the instruments listed in Section B and/or the placing of such issues.	(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and; (7) Placing of financial instruments without a firm commitment basis
(new activity)	(8) Operation of Multilateral Trading Facilities
Section C: Non-core Services	**Section B: Ancillary services**
1. Safekeeping and administration in relation to one or more of the instruments listed in Section B.	(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management
2. Safe custody services.	
3. Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the instruments listed in Section B, where the firm granting the credit or loan is involved in the transaction.	(2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction
4. Advice to undertakings on capital structure, industrial strategy and related matters and advice and service relating to mergers and the purchase of undertakings.	(3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings
5. Services related to underwriting.	(6) Services related to underwriting
6. Investment advice concerning one or more of the instruments listed in Section B.	*Section A: Investment services and activities* - (5) Investment advice
(new activity)	(5) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments
7. Foreign-exchange service where these are connected with the provision of investment services.	(4) Foreign exchange services where these are connected to the provision of investment services
(new activity)	(7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under Section C – 5, 6, 7 and 10 -

	where these are connected to the provision of investment or ancillary services

Section B: Instruments	Section C: Financial Instruments
1. a) Transferable securities.	(1) Transferable securities
1. b) Units in collective investment undertakings.	(3) Units in collective investment undertakings
2. Money-market instruments.	(2) Money-market instruments
3. Financial-futures contracts, including equivalent cash-settled instruments.	(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash
4. Forward interest-rate agreements.	
5. Interest-rate, currency and equity swaps.	
6. Options to acquire or dispose of any instruments falling within this section of the Annex, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates.	
new financial instrument	(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event)
new financial instrument	(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF
new financial instrument	(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls
new financial instrument	(8) Derivative instruments for the transfer of credit risk
new financial instrument	(9) Financial contracts for differences
new financial instrument	(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls

Annex 2

Suggested Success Criteria

CESR has identified the following success criteria with which to evaluate possible solutions to dealing with the supervisory challenges under MiFID presented by branches:

a. Clarity

   i. *Clarity* for regulators, firms and clients requires that firms define and implement a clear model for carrying out cross border activities. The way in which supervision is carried out in practice should also be understood clearly, ensuring no 'gaps' in coverage.

b. Efficiency

   i. *Cost to firms*: Better regulation suggests that unnecessary costs should not be imposed upon firms (and hence ultimately their clients) where there are insufficient justifiable benefits and/or such costs can be avoided. Direct compliance costs (including reporting) and indirect costs such as training, opportunity cost of speed/delay in compliance response before completing business are relevant here. Legal costs may arise in cases where the law applicable to contracts between an investment firm and its client differs from that governing the supervisory side of a given violation; are there any liability risks associated with the interplay of supervisory and private international law? What will be the cost impact of the supervisory model for branches in practice?

   ii. *Cost to regulators:* What will be the cost impact for regulators of the new supervisory responsibilities? E.g. where both the home and host regulators attempt to supervise compliance in circumstances where two sets of rules are applied to the branch, compared to operating under just one? Will dealing with a greater range of business at 'arms length' require greater monitoring effort, more on-site visits to other Member States (and in a different language) etc?

   iii. *Speed of regulatory response*: Should a problem be encountered, how quickly can a regulatory response be managed? Perhaps there is a need to call in branch or firm management, visit, inspect files/records or gather evidence maintained at a branch (or in another country). Do logistics and practical considerations suggest a need for 'on the spot' action? If there is a need for the host and the home regulators to coordinate their efforts will this have an impact?

   iv. *Contact*: What best achieves the need felt by both the home and the host regulator for good, established and open access contact with the firm's representatives in the branch, thereby minimising the opportunity for misunderstanding?

   v. *Competition*: Are there any unintended regulatory 'incentives' to firms to restructure created? Such decisions should be left to normal business factors not regulation. E.g. would a branch be at a competitive advantage or disadvantage to a separately incorporated legal entity doing the same business? Is it important for the home and/or the host regulator to understand the factors that cause a firm to choose a given location for the sourcing of its activities?

c. Effectiveness

i. *Environment:* What, in practice, would be more effective for a firm that wishes to be compliant across all its business, regardless of activity or client type or location? In practice, which environment (host or home) does the compliance infrastructure and culture at a branch best tend to reflect? E.g. does the competence and knowledge of the branch staff, which conduct and/or oversee all the business performed by the branch, more closely reflect market practice in the local host or the home state? How easily can a firm acquire and develop the necessary understanding of the compliance requirements and culture of local host markets to enable it to control its business as a whole? Will this depend upon the different firms and individuals concerned?

ii. *Staff knowledge and professionalism:* What is the impact upon staff training and any competence and/or continuing professional development schemes for the firm's staff whether located in the home state or in a host branch; what will be most effective? E.g. for branch staff would this generally tend to take place locally within the host state and in accordance with its requirements, or at head office"? Does it involve any regulatory input?

iii. *Compliance culture:* What might help make it easier for firms to build, maintain and control a culture of compliance at branch level? How can a firm operating out of several locations foster a fully integrated environment with a shared compliance culture?

iv. *Local market practice:* What best helps supervision to be attuned to market practice and the attitudes and culture of staff working within firms and their branches when undertaking cross border activities?

d) Pragmatism

i. *Influence over branch and/or individuals:* How best for regulators to be able to "have words with" the local branch representatives and/or the firm's head office and hence arrive at corrective action in respect of a potential issue before it becomes serious, leads to widespread client detriment or requires formal enforcement provisions/powers to be invoked?

ii. *Errors:* How best to reduce the simple likelihood of errors or unintended 'gaps' occurring, either by firms or by regulators?

e) Business Practice

i. *Inseparability:* Is distinguishing amongst transactions according to which regulator has responsibility possible or unrealistic in practice? It can be common practice for certain investment business, involving say structured transactions, to be performed in and/or operated from one place (particularly where all the component parts of a 'complex' deal are carried out in the same office and may be inseparable), possibly generating long term risk on the firm's balance sheet.

ii. *Records and files:* Ease of access to records. Are the records and files for all business performed by a branch combined and not necessarily easily 'segregated' or identifiable by whether it is 'cross border' or 'domestic' activity? How are record keeping requirements met and files accessed when a firm both establishes a branch and provides services into the host state on a cross border basis? How quickly can a regulator expect to obtain access to the relevant files for supervisory purposes?

iii. *Operational focus:* Can supervisory practice align with how firms are run? E.g. around the nature of the activities and services performed by business operations established or on country lines?

f) Access to Complaints Mechanisms

i. *Independent complaint schemes:* Does supervision align with how/where a client would complain about business conducted with a branch? E.g. regarding a service provided on a cross–border basis, which relevant independent complaints body or ombudsman (if any) would be involved?

ANNEX 3 – EVALUATING POSSIBLE SOLUTIONS

Annex 3(i)

Evaluating possible solutions against success criteria for branches: the challenge of drawing a line between supervision of MiFID 'organisational' and 'conduct of business' requirements in practice

Criteria	Possible Solutions	a) Agree where line is drawn	b) Home focus on branches	c) Home asks questions for host	d) Information to home & host	e) Delegate or outsource supervision tasks	f) Joint working by home & host
a) *Clarity*:							
i) clarity							
b) *Efficiency*:							
ii) cost to firms							
iii) cost to regulators							
iii) speed of response							
iv) contact							
v) competition							
c) *Effectiveness*:							
i) environment							
ii) staff knowledge							
iii) compliance culture							
iv) local market practice							
d) *Pragmatism*:							
i) influence over branch							
ii) errors							
e) *Business practice*:							
i) inseparability							
ii) records and files							
iii) operational focus							
f) *Access to complaints*:							
i) independent schemes							

Annex 3(ii)

Evaluating possible solutions against success criteria for branches: the challenge of supervising in practice in circumstances where responsibility for 'conduct of business' rules rests with both the home and host regulators

Criteria	Possible Solutions: a) Relevant home & host supervision	b) Delegate or outsource supervisory tasks	c) Joint working by home & host
a) *Clarity*:			
i) clarity			
b) *Efficiency*:			
ii) cost to firms			
iii) cost to regulators			
iii) speed of response			
iv) contact			
v) competition			
c) *Effectiveness*:			
i) environment			
ii) staff knowledge			
iii) compliance culture			
iv) local market practice			
d) *Pragmatism*:			
ii) influence over branch			
iii) errors			
e) *Business practice*:			
i) inseparability			
ii) records and files			
iii) operational focus			
f) *Access to complaints*:			
i) independent schemes			