

EUROPEAN PASSPORT: COOPERATION BETWEEN HOME AND HOST SUPERVISORS

Treatment of third country investment firms

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Agenda

- Introduction
- Third country firms
- Regime under MiFID
 - Cross border provision of services
 - Cooperation among competent authorities (CAs)
- Closing remarks

Background

- In early 90s – fragmented national financial legislation
- Options
 - Detailed EU level harmonisation
 - Decentralised approach based on single authorisation allowing provision of financial services through-out of the EU (“European passport”), home country control and mutual recognition

Principal features I

- European passport
 - Authorisation to carry out business activities in only required in the home country. Cross-border branches and free provision of services are authorised under the same passport.

Principal features II

- Home control

- Branches are subject to the home state supervision regime (where the institution is authorised)

- Mutual recognition

- Institution or services fulfilling the requirements set out in the EU law and conforming to one Member State (MS) standard re accepted also in other MSs

Forms of cross-border business within the EU

- “simple” cross-border provision of services
- Branch
 - Integral part of an institution, thus any cross-border operation through a branch outside the territory of the MS in which this branch is located is a provision of services by the investment firm and not by the branch as a separate legal entity
- Subsidiary
 - Legally independent entity. (Parent entity and subsidiaries form a group.)

Requirement for and coverage of authorisation

- Performance of investment services and activities as a regular or business on a professional basis is subject to prior authorisation with appropriate scope by the competent authority of its home MS.
- Authorisation = a single passport: provision of services on a cross-border basis or through a branch

Notification of cross border operations I

- Notification to its home Member State competent authority (Articles 31(2) and 32(2) of MiFID).
- The home competent authority must then communicate this information to the competent authority of the host Member State (Articles 31(3) and 32(3) of MiFID).
 - The MiFID does not provide any role for the host competent authority in the authorisation process (but Art. 60 of MiFID)

Third country treatment regime

- Non EEA firm – requirement to establish in a EEA state
- Supervision in the state in question
- Adhere to the EU standards
- Head office vs. Branch – consequences for a right to passport

Notification of cross border operations II

- The notification process is a practical tool for enabling both the efficient supervision by the home competent authority and the effective cooperation among the CAs of home and host MSs.

The level of supervision under the MiFID

- Basic principle: HOME STATE CONTROL
- MiFID expanded home states responsibility + measures reinforcing mechanisms co-operation

Exemptions for branches I

- Article 32(7) and applies to the supervision of branches with respect to the obligations set out in Articles 19, 21, 22, 25, 27 and 28 of MiFID = core for supervision of the host CAs
- Eligible counterparties' regime Art. 19, 21 and 22(1) of MiFID (Art. 24 of MiFID)

Exemptions for branches II

- Article 32(8) confers the power to the home competent authority of the firm to carry out on site inspections in the territory of the host Member State.

Exemptions for branches III

- the precautionary measures in form of transaction reporting obligations, (Article 62)
the powers for
 - Member States to require all investment firms with branches within their territories to report to them periodically on the activities of those branches for statistical purposes (Article 61(1))
 - host MSs to require branches to provide the information necessary to monitor compliance with Article 32(7) (Article 61(2))

Exemptions for branches IV

- Agreement for branch transaction reporting within the CESR Members
- All implies that there needs to be cooperation among CAs.

Allocation of responsibilities (home/host CAs) I

- Clear cut area („black/white zone“)
- „Grey zone“

B/W zone I

- both the branch through which the service is provided and the client are in the host Member State
 - responsibility for supervising the obligations referred to in Article 32(7) should be allocated to the host competent authority
- branch through which the service is provided is in the host MS, but b) the client the home Member State,
 - CA responsible for supervising these same obligations should be that of the home Member State.

B/W zone II

- branch through which the service is provided is in the host MS, but the client is in the home MS,
 - CA responsible for supervising these same obligations should be that of the home Member State.

„Grey zone“

- A case by case basis - where the client is not either in the MS of the branch or in the MS of the head office
- Recourse to the independent intermediaries (tied agents)
- A clear line is even more difficult to draw in those cases where a service, or parts of the service, is carried out in one place, another part in another, through electronic means, outsourcing etc.
- In those cases where neither the home nor the host Member State competent authority claims responsibility, responsibility should rest with the home Member State supervisor.

„Grey zone“

Dual supervision of branches is a reality

Common principles for the supervisory regime over branches

- Shared and cooperative supervision (Art. 32(7)&(8), 61(2) on the conditions of 62(2) of MiFID)
- Legal obligation to co-operate (Art. 56(1), 57, 58(1) of MiFID)
- MoUs ~ how supervision would be shared between the home and the host competent authority
 - National (bilateral) MoUS
 - CESR Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities (Ref.: CESR/05-335)
- CESR Protocol on the Supervision of Branches under MiFID

CESR Protocol on the Supervision of Branches under MiFID I

- General principles
 - Reciprocal cooperation
 - Efficiency
 - Effectiveness
 - Transparency

CESR Protocol on the Supervision of Branches under MiFID II

- Unsolicited exchange of information
 - CAs communicate each other any material information that is likely to have effects on discharge of their duties under the MiFID. In particular
 - any breach of duty under MIFID by a branch (firm) if there are significant concerns about the firm's continuing compliance
 - of any action it intends to take or any remedial action the firm intends to take
 - of any supervisory activity of a material nature undertaken or to be undertaken with regard to a branch or a third party with which the relevant firm has entered or intends to enter into an outsourcing agreement that is required

CESR Protocol on the Supervision of Branches under MiFID III

- The Common Oversight Request – a unified form
 - a common oversight programme can be solicited requested CA has to agree to negotiate unless it has good reason for refusing to do so
 - agree to meet on a regular basis to exchange information
 - may cooperate by periodically adopting a jointly agreed programme covering these areas including thematic work
 - may agree to adopt a standardised methodology, simultaneous reviews, jointly prepared meetings or visits and shared assessment letters

CESR Protocol on the Supervision of Branches under MiFID IV

- Standing request for assistance – a unified form
 - A CA may solicit the assistance of another Competent Authority by a Standing Request for Assistance. If a requested Competent Authority receives a Standing Request for Assistance from a requesting Competent Authority, it will agree to provide assistance in accordance with that request and this Protocol unless it has good reason for refusing to do so.

Coming future

- ESMA – current cooperation regime in a new outfit?
- Challenges

Questions?

Thank you for your attention