



**Protocol on the supervision of branches under
MiFID**

October 2007



Foreword

CESR's work on supervision of branches under MiFID started in November 2006, after the approval of the MiFID Level 3 work programme Nov 06-Nov 07.

CESR consulted for the first time on this issue in Section B of its consultation paper 'The Passport under MiFID' (Ref. CESR/06-669), published on December 2006¹.

The main points raised by CESR stakeholders in the consultation, reflected in the feedback statement, are as follows:

- the importance of this topic, given that one of the intended benefits of MiFID is the smooth operation of the passport. There are at least 1 105 branches of firms conducting MiFID business in Europe;
- the need for clarity as regards how, and by whom, branches will be supervised on a day-to-day basis and whose applicable rules will need to be followed;
- a preference for a common, as opposed to a case-by-case, approach so as to reduce the possibility of inconsistencies, complexity and cost;
- the shared common interest of regulators and firms in supporting practical arrangements; and
- the desirability of any practical arrangements taking in to account firms' business models.

Stakeholders also supported the desired outcomes and possible success criteria (as suggested in the consultation paper) as being consistent with the principles put forward in the context of better regulation initiatives.

In May 2007 CESR issued final Level 3 recommendations in 'The Passport under MiFID'² (Ref. CESR/07-337). Recommendation number 5 states the following: "*CESR considers that members should be committed to the on-going work to agree (effective mechanisms of) practical cooperation for the supervision of branches. The results of this work must be transparent to stakeholders. Given the need for operational arrangements to be agreed as soon as possible (and in any event by 1 November 2007 at the latest) CESR members will take all reasonable steps to achieve this goal.*"

This protocol fulfils the commitment undertaken by CESR in taking up passporting issues as its main priority in the run-up to MiFID implementation.

In May 2007, CESR also published a Feedback Statement (Ref. CESR/07-318)³. The feedback statement made clear that CESR had asked the European Commission for an interpretation regarding the meaning of the Level 1 Directive text under Article 32(7).

On 19 June 2007, CESR received a response from the Commission ("Supervision of Branches"/MARKT/G/3/MV D/ 18.6.2007) attached to this Protocol. The Commission response is a helpful contribution that sets out various scenarios that CESR has used as relevant background in the making of this protocol, but it does not form part of any CESR arrangements. It is not for CESR to address the legal interpretation of Article 32(7) and so CESR neither endorses nor challenges the content of the response of the Commission.

¹ <http://www.cesr.eu/index.php?docid=4084>

² <http://www.cesr.eu/index.php?docid=4603>

³ <http://www.cesr.eu/index.php?docid=4605>



Introduction

The Members of the Committee of European Securities Regulators ('CESR'):

- A. Considering that they have entered into a multilateral memorandum of understanding on the exchange of information and surveillance of securities activities ('CESR MoU') dated 26 January 1999, amended in 2005, the purpose of which is to establish a general framework for cooperation and consultation between Competent Authorities in order to facilitate the fulfilling of their supervisory responsibilities.
- B. Considering that the Competent Authorities under Directive 2004/39/EC ('MiFID') should agree on a Protocol setting forth a framework regarding the supervision of branches of investment firms and credit institutions established within the territory of another Member State in order to support the transparent, efficient, complementary and effective supervision of such firms.
- C. Considering that the arrangements provided for in this Protocol cannot override or modify the legal responsibilities of the Competent Authorities under MiFID.
- D. Considering that the framework, in addition to the exchange of information, provides two optional models of cooperation to be agreed by two or more Competent Authorities:
 - a model based on the joint and coordinated supervision of branches by the Competent Authorities concerned (a Common Oversight Request); and
 - a model whereby a Competent Authority requests another Competent Authority to provide supervisory assistance regarding one or more branches (a Standing Request for Assistance).
- E. Considering that the Competent Authorities shall cooperate by way of using one or both of the above models or by using other effective models or tools for cooperation.
- F. Considering that unlike requests made under the CESR MoU, requests received under this Protocol need to be agreed by the requested Competent Authorities to take effect.
- G. Considering that this Protocol is without prejudice to the CESR Level 3 guidelines on MiFID transaction Reporting approved in May 2007⁴.
- H. Considering that MiFID contains in Chapter I of Title II, Chapter III of Title III and Chapter II of Title IV a number of provisions that are particularly relevant to cooperation between Competent Authorities in relation to supervisory matters. In particular:
 - Article 13 (9) provides that the Competent Authority of the Member State in which the branch is located shall enforce the obligation of recordkeeping with regard to transactions undertaken by the branch, without prejudice to the possibility of the Competent Authority of the home Member State of the investment firm having direct access to those records;
 - Article 32(1) provides that the Member State in which a firm establishes a branch shall not impose any additional requirements, save those allowed under Article 32(7), on the organisation and operation of the branch in respect of the matters covered by MiFID;

⁴ CESR Level 3 Guidelines on MiFID Transaction Reporting, (Ref. CESR/07-301) approved on 29 May 2007.

- Article 32(7) provides that the Competent Authority of the host Member State shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 of MiFID and in implementing measures under those Articles. The Competent Authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the Competent Authority to enforce the obligations under Articles 19, 21, 22, 25, 27 and 28 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory;
- Article 54 provides the obligation of professional secrecy that will apply to the information that will be shared between Competent Authorities on the basis of this Protocol;
- Article 56(1) requires Competent Authorities to cooperate with each other whenever necessary for the purpose of carrying out their duties under MiFID. It also requires Competent Authorities to render assistance to Competent Authorities of other Member States. In particular it states that they should exchange information and cooperate in any supervisory activities;
- Article 56(3) provides that Competent Authorities may use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in their Member State;
- Article 57(1) provides that the Competent Authority of one Member State may request the cooperation of the Competent Authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation;
- Article 58 (1) provides a regime of exchange of information according to which Competent Authorities of Member States having been designated as contact points for the purposes of this Directive in accordance with Article 56(1) of the Directive shall immediately supply one another with the information required for the purposes of carrying out the duties of the Competent Authorities, designated in accordance to Article 48(1), set out in the provisions adopted pursuant to this Directive;
- Article 59 provides that a Competent Authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity as provided for in Article 57 or to exchange information as provided for in Article 58 only where:
 - (a) such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of the State addressed;
 - (b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
 - (c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

In the case of such a refusal, the Competent Authority shall notify the requesting Competent Authority accordingly, providing as detailed information as possible.

- I. Considering that Art. 32(7) of MiFID determines the respective competences of home and host Competent Authorities and hence the national provisions applicable to branches, and that each Competent Authority may, when acting in pursuance of a request for assistance from another Competent Authority, apply its own national provisions, unless the parties agree otherwise, for example in order to ensure that the particular requirements set forth in national law are complied with.



AGREE as follows:

Article 1 - Definitions

In this Protocol, the following terms have the meanings given below:

- “CESR MoU”: CESR Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities (Ref.: CESR/05-335);
- “Competent Authority” means a member of CESR or an Authority that has joined this Protocol in accordance with Article 16;
- "Common Oversight Request" means a request made by a Competent Authority to another Competent Authority in order to obtain an agreement on the establishment of joint and coordinated supervision of branches on the basis of a common oversight programme regarding one or more branches;
- "Standing Request for Assistance" means a request for assistance made by a Competent Authority to another Competent Authority in order to obtain an agreement on the terms and conditions under which the latter Competent Authority will provide supervisory assistance regarding one or more branches to the former Competent Authority;
- "Firm" means an investment firm or a credit institution providing investment services.

Article 2 - Scope

This Protocol to the CESR MoU concerns the practical cooperation arrangements under MiFID for the supervision of business conducted through branches established in a Member State other than the Home Member State of the firm.

Article 3 - General principles

Cooperation among Competent Authorities should be based on the following principles of equal standing:

- Reciprocal cooperation: Competent Authorities will cooperate on a best efforts basis to make use of the possibilities given by this Protocol. They will cooperate in the spirit of mutual trust and understanding with a view to supporting each other in the discharge of their duties. Therefore they will consider in good faith all requests from other Competent Authorities who want to enter in a cooperation agreement according to this Protocol.
- Efficiency: the cooperation procedures defined in this Protocol will be applied in a proportionate and reasonable manner to avoid duplication of tasks by different Competent Authorities and, as a result, reducing supervisory costs and pressure on scarce supervisory resources. Furthermore, Competent Authorities should seek to avoid imposing unnecessary burdens on firms.
- Effectiveness: the increasing provision of investment services through branches in the European Union heightens the challenge of supervising firms beyond home borders. The practical arrangements foreseen in this Protocol would allow Competent Authorities to discharge their duties in a more effective manner, contributing to the sound provision of cross-border services and to increased confidence that firms conducting MiFID investment business through branches deliver the appropriate level of investor protection.



- Transparency: the Competent Authorities will provide firms with clarity as to the arrangements for branch supervision.

Article 4 – Unsolicited exchange of information

1. Without prejudice to Article 3(4) of the CESR MoU and to the CESR Protocol on MiFID passport notifications, each Party will communicate to another Party, without prior request and undue delay, any relevant factual information in which the other Party, as determined in good faith by the communicating Party, is likely to have a material interest with regard to the discharge of its duties under the MiFID. In particular, the Parties will, on an unsolicited basis, provide each other with the information specified in paragraphs 2 to 5 below. The provision of unsolicited information is made pursuant to articles 56, 58 and 62 of MiFID.
2. When the host Competent Authority becomes aware of any actual or potential breach of duty under MiFID and its implementing measures by a branch that indicates that there are significant concerns about the firm's continuing compliance, it will inform the home Competent Authority of all relevant facts including any action it has taken with regard to such breach, and any remedial action the firm has taken. Where appropriate, the host Competent Authority will inform the home Competent Authority of any action it intends to take or any remedial action the firm intends to take.
3. When the home Competent Authority becomes aware of any actual or potential breach of duty under MiFID and its implementing measures that indicates that there are significant concerns about the firm's continuing compliance, it shall communicate to the host Competent Authority all relevant facts which may support the host Competent Authority in the discharge of its duties, including any relevant action that the home Competent Authority has taken with regard to such breach, and any remedial action that the firm has taken. Where appropriate, the home Competent Authority will inform the host Competent Authority of any action it intends to take or any remedial action the firm intends to take.
4. The host Competent Authority shall inform the home Competent Authority 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 to be notified under Article 16(2) of MiFID. The host Competent Authority shall communicate to the home Competent Authority any material findings that are likely to impact on the discharge of the home Competent Authority's duties.
5. The home Competent Authority shall inform the host Competent Authority 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 to be notified under Article 16(2) of MiFID, that are located within the host Competent Authority's territory. The home Competent Authority shall communicate to the host Competent Authority any material findings that are likely to impact on the discharge of the host Competent Authority's duties.

Article 5 - The Common Oversight Request

1. A Competent Authority may solicit another Competent Authority to agree on a common oversight programme by submitting a Common Oversight Request.
2. If a requested Competent Authority receives a Common Oversight Request from a requesting Competent Authority, it will agree to negotiate on a common oversight programme in accordance with that request and this Protocol unless it has good reason for refusing to do so and will promptly confirm to the requesting Competent Authority whether it:



- a. agrees to the principle of a common oversight programme, or
 - b. does not agree to the principle of a common oversight programme, in which case it will explain its reasons to the requesting Competent Authority and the parties will endeavour to agree a mutually acceptable basis for providing assistance.
3. The good reasons referred to in paragraph 2 are understood as not limited to those reasons mentioned under Article 59 of MiFID.
4. Within the scope of mutual assistance, Competent Authorities may agree to meet on a regular basis to exchange information pertaining to, and plan the means of co-ordinating and/or sharing the tasks for the supervision and review of branches and the monitoring of compliance with MiFID and its implementing measures.
5. The Competent Authorities may cooperate by periodically adopting a jointly agreed programme covering these areas including thematic work. They may decide a common determination of the risks that the investment services and the operations of firms present or may agree on a thematic review of specific MiFID requirements with cross-border implications.
6. The Competent Authorities agree that as a result of such meetings, Competent Authorities may issue requests for assistance taking into account the programme of oversight and the resources available to the other Competent Authorities. The Competent Authorities agree that they will, on a best efforts basis, include the activities of branches of concern to the other Competent Authorities in their programme of supervision of compliance with MiFID and its implementing measures.
7. The Competent Authorities may agree to adopt a standardised methodology, simultaneous reviews, jointly prepared meetings or visits and shared assessment letters. The Competent Authorities may formulate their assessment of the activities of branches and any remedial measures required of the firm in a shared assessment letter.

Article 6 - Standing request for assistance

1. A Competent Authority 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 and will promptly confirm to the requesting Competent Authority whether it:
 - a. agrees to provide assistance in accordance with that request, in which case it will do so by signing and returning a copy of the Standing Request for Assistance, which shall form the agreement to provide assistance; or
 - b. does not agree to provide assistance in accordance with that request, in which case it will explain its reasons to the requesting Competent Authority and the parties will endeavour to agree a mutually acceptable basis for providing assistance.
2. The good reasons referred to in paragraph 1 are understood as not limited to those reasons mentioned under Article 59 of MiFID.
3. A Competent Authority will as far as practical use the form of Standing Request for Assistance set out in the Annex to this Protocol as a basis for an agreement. However, Competent Authorities may amend the content of the Annex to suit their particular circumstances.



Article 7 - Amendments of the cooperation arrangements between Competent Authorities made under this Protocol.

1. If a Competent Authority wishes to amend cooperation arrangements referred to in Article 5 and 6, it will provide a proposal to the other Competent Authority that is party to that agreement, clearly explaining the proposed amendments. The other Competent Authority will confirm to the first Competent Authority whether it:
 - a. agrees to those amendments, in which case that agreement will be amended from the date agreed by the parties; or
 - b. does not agree to those amendments, in which case it will explain its reasons to the first Competent Authority and the parties will endeavour to agree a mutually acceptable basis for providing assistance, which will take effect when agreed by the parties in accordance with its terms.
2. A Competent Authority that receives a proposal to amend an agreement to provide supervisory assistance made under this Protocol will endeavour to respond promptly to the Competent Authority that made the request, taking account of the complexity of the proposals set out in that request.

Article 8 - Termination of the cooperation arrangements between Competent Authorities made under this Protocol.

If a Competent Authority wishes to terminate a cooperation arrangement referred to in Article 5 and 6, it will explain its reasons and endeavour to provide reasonable notice of its intention to do so to the other party.

Article 9 - Basis of supervision

1. A Competent Authority will use the requirements transposing MiFID in its own Member State as the basis for its supervisory activities under this Protocol unless otherwise agreed. This will not affect the legal application of the requirements transposing MiFID in the Member States concerned. As far as the jurisdiction of the concerned parties can accept, parties may agree on a bilateral basis that the supervision of the branch by one Competent Authority will be done on the basis of specific provisions of the other Competent Authority.
2. Each Competent Authority will use the supervisory tools and practices it is accustomed to using in a national context and may undertake supervision at a level of intensity that it determines is most appropriate for the nature and scale of activities undertaken by the firm unless otherwise agreed. In doing so a Competent Authority will make its best efforts to take account of the relative importance that the other Competent Authority places upon such cooperation and assistance.

Article 10 - Effect

1. Any arrangement or exchange of information done under this Protocol and the related activities of the Competent Authorities will be subject to the CESR MoU, unless provided otherwise in this Protocol.
2. Nevertheless, this Protocol does not alter or supersede any provisions under national or Community law or other regulatory arrangements to which the Competent Authorities or other bodies are subject, or which the Competent Authorities may have agreed for the purposes of on-going cooperation in respect of individual firms.



3. In providing assistance (including the performance of supervisory activities) or information to any other Competent Authority under this Protocol, each of the Competent Authorities is performing its function of providing regulatory assistance to another Competent Authority and is not assuming any further responsibilities than those set forth by its own national law transposing MiFID and is not performing any functions of the Competent Authority to which it provides the assistance or information. The responsibilities, accountability and legal oversight of the Competent Authorities in providing assistance or information shall therefore be solely governed by the law and subject to review by the Courts of the Member State in which they are established and not by the law or Courts of the Competent Authorities to which they provide assistance or information.

Article 11 - Costs

To the extent that individual cooperation arrangements concluded under this Protocol raise issues related to the allocation of costs, the relevant Competent Authorities will deal with them bilaterally.

Article 12 - Amendments to the Protocol

Any general amendments to this Protocol should be made in accordance with Article 10 of the CESR MoU.

Article 13 – Publication and notification

1. The terms of this Protocol will be published by CESR.
2. Notwithstanding article 6 (3) of the CESR MoU, the parties to an agreement made according to this Protocol will, in a timely manner, notify to the firms concerned the practical supervisory arrangements envisaged by that agreement, and any substantial changes to, or termination of, those arrangements.

Article 14 - Contact points

The Competent Authorities shall notify CESR of the appropriate contact points for the purposes of this Protocol. In absence of such a notification the contact points indicated in the annex B of the CESR MoU will be deemed valid. CESR will maintain a list of those contact points and make it available to Competent Authorities. The Competent Authorities will use those contact points for the provision of notices under this Protocol unless requested otherwise in relation to a particular arrangement or arrangements.

Article 15 - Language

Unless otherwise agreed, when co-operating under this Protocol, the Competent Authorities will use English as their main working language.

Article 16 - Additional parties

Further authorities of the Member States of the European Union or of the Contracting States of the European Economic Area who have been designated under article 48 of the MiFID and who wish to join this Protocol will first be required to join the CESR MoU.



Article 17 - Methods of communication

1. In order to facilitate the co-operation between Competent Authorities pursuant to Articles 4, 5 and 6, and to streamline the exchange of information between Competent Authorities and firms, the Parties may agree to use advanced internet-based communication technologies including bulletin boards and virtual data rooms.
2. Requests, replies thereto, unsolicited information, and any other communications under this Protocol may be transmitted by e-mail, fax, phone or any other communication device agreed by the relevant Parties. However, should the information relate to an actual or potential breach of duty, if any of the above communication methods have been used, the Parties will confirm the information through the formal requirements as set out in Article 4 of the CESR MoU.
3. In using any methods of communication, Competent Authorities shall pay due regard to data protection, security and commercial confidentiality.



Annex ~ Standing Request for assistance

This request for assistance is made under the Protocol ("Protocol") to the CESR multilateral memorandum of understanding ("CESR MoU") on the exchange of information and surveillance of securities activities concerning **supervision of branches under MiFID**. This request can be made by a Home or a Host Competent Authority.

Note: Where a is ticked this will indicate that the request by the requesting Competent Authority is for the relevant option to be applied by the requested Competent Authority.

From: <i>(Requesting Authority)</i>	<i>[Insert name of requesting Competent Authority and address]</i>	
To: <i>(Requested Authority)</i>	<i>[Insert name of requested Competent Authority and address]</i>	
Date on which the request is made:	<i>[Insert]</i>	
Date on which the request is intended to take effect if agreed:	<i>[Insert]</i>	
Contact point for the purpose of the request:	<i>[Insert name, telephone number and other appropriate contact details.]</i>	
Request for assistance	The requesting Competent Authority requests that the requested Competent Authority performs supervisory activities regarding each of the investment firms and credit institutions covered by the scope of this request in relation to the requirements and the business covered by the scope of this request. That supervision shall be conducted in accordance with the terms of the Protocol.	

Investment firms and credit institutions falling within the scope of this request (Please indicate which one applies)	a. Each investment firm or credit institution subject to MiFID with branches in the territory of the requested Competent Authority for which the requesting Competent Authority is the home Competent Authority, or;	<input type="checkbox"/>
	b. The firm or firms listed in the Annex of this request for which the requesting Competent Authority is the home Member State that has established a branch in the territory of the requested Competent Authority, or.;	<input type="checkbox"/>
	c. The firm or firms listed in the Annex of this request for which the requesting Competent Authority is the host Member State being responsible for the supervision of the branch under Article 32(7) of MiFID.	<input type="checkbox"/>
Requirements covered by the scope of this request	Articles of MiFID and any implementing directive or regulation made under those Articles:	
	• Article 13 (9) - transactions records	
	• Article 19 – conduct of business obligations;	<input type="checkbox"/>
	• Article 21 – best execution;	<input type="checkbox"/>
	• Article 22 – client order handling.	<input type="checkbox"/>
	• Article 27 and 28 -pre and post trade transparency	<input type="checkbox"/>
• Other requirements (to be specified)	<input type="checkbox"/>	

<p>Business of the firm covered by the scope of the request originated by a Competent Authority located in the home Member State, such as</p>	a) all business conducted by the investment firm or the credit institution from its branch established in the territory of the requested Competent Authority	<input type="checkbox"/>
	b) all business conducted by the investment firm or the credit institution from its branch established in the territory of the requested Competent Authority except for services provided to clients located in the territory of the requesting Competent Authority	<input type="checkbox"/>
	c) all business conducted by the investment firm or the credit institution from its branch established in the territory of the requested Competent Authority into the following countries: X Y Z	<input type="checkbox"/>
	d) other situations (to be described)	<input type="checkbox"/>
<p>Business of the firm covered by the scope of the request originated by a Competent Authority located in the host Member State, such as</p>	a) all business conducted by the investment firm or credit institution from its branch established in the territory of the requesting Competent Authority.	<input type="checkbox"/>
	b) all business conducted by the investment firm or the credit institution from its branch established in the territory of the requesting Competent Authority except for services provided to clients located in the territory of the requesting Competent Authority.	<input type="checkbox"/>
	c) all business conducted by the investment firm or the credit institution from its branch established in the territory of the requesting Competent Authority into the following countries: X Y Z	<input type="checkbox"/>
	b) other situations (to be described)	<input type="checkbox"/>
Other information requested	(please specify if any or state "none")	



Signed by:	<i>[Sign here]</i>	
	<i>[Print name here]</i> A duly authorised representative for and on behalf of <i>[insert name of requested Authority]</i>	



Brussels, 18/06/07

MARKT/G/3/MV D(2007) 2386

Subject: Supervision of branches under MiFID

I. The issue under discussion

1. During the last few months DG MARKT services have consulted thoroughly with Member States and regulators on the issue of the allocation of responsibilities among competent authorities with respect to the supervision of branches in the context of Art. 32(7) of Directive 2004/39/EC on Markets in Financial Instruments (hereinafter "MiFID").

II. General legal analysis

2. According to Article 5 of MiFID, an investment firm which wishes to perform one or more investment services and activities listed in Annex I to MiFID must obtain authorisation with appropriate scope by the competent authority of its home Member State. If a firm wishes to provide those same services in another Member State on a cross-border basis or through a branch it can do so under this authorisation. It must simply notify its intention 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, i.e. the State where the firm intends to provide services or establish the branch (Articles 31(3) and 32(3) of MiFID).

3. Read together, these provisions lead to four basic conclusions:

1) Operation on a cross-border basis does not alter the nature of the authorisation granted to the investment firm by its home competent authority, nor does it require that authorisation to be amended: i.e. the MiFID confers a single passport based on home State control. Nevertheless, the MiFID does require the notification of cross-border operations. This notification process is a practical tool for enabling both the efficient supervision by the home competent authority and the effective cooperation among the authorities of home and host Member States.

2) Authorisation under the MiFID is granted to the investment firm as a whole and not to a branch. The establishment of a branch is one of the ways in which a firm can operate cross-border. The branch is an integral part of the investment firm: it is not legally separate and does not require a separate authorisation (Article 32(1) of MiFID).

3) The competent authority that must be notified whenever a company is seeking to provide a service on a cross-border basis or establish a branch in another Member State

is always that of the home Member State. **The MiFID does not provide any role for the host competent authority in the authorisation process¹.**

4) Any cross-border operation through a branch outside the territory of the Member State 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.**

4. By contrast, at the **level of supervision**, the MiFID contains limited exceptions to the principle of home State control. The important exception for the purposes of this paper is set out in 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. In addition, 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 State². Some further exceptions to home country supervision under MiFID include the precautionary measures that may be taken by the host Member States (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)); and the power for host Members States to require branches to provide the information necessary to monitor compliance with Article 32(7) (Article 61(2)).

5. These exceptions from the general principle of home State control only concern branches, and do not apply to subsidiaries set up by EU companies in another EU Member State. This is because, unlike a branch which is part of the investment firm, subsidiaries are independent legal entities requiring separate authorisation by the competent authority of their own home Member State in accordance with Article 5 of MiFID.

6. In those cases where Article 32(7) allocates responsibility for supervision to the host Member State (e.g. conduct of business rules), it is logical that supervision should take place on the basis of the host Member State's regulatory provisions transposing the Directive. Conversely, in all other cases supervision should take place on the basis of the home Member State's regulatory provisions.

7. The issue of allocation of responsibilities between the competent authorities of the home and the host Member State is, to a large extent, not relevant with respect to supervision of a large portion of wholesale business. The obligations under Articles 19, 21 and 22(1) of MiFID (art. 24 of MiFID) do not apply in relation to eligible counterparties³. So de facto and de jure for those branches which are dealing with eligible counterparties only the obligations set out in Articles 22 (2), 25, 27 and 28 are of relevance. In addition, Articles 22 (2), 27 and 28 of the MiFID have been supplemented

¹ The only case where MiFID provides for the involvement of competent authorities other than that of the home Member State with respect to the authorization process is in cases where the entity seeking authorization is a subsidiary or under the control of an investment firm or credit authorization authorized in another Member State. In such cases, Article 60 requires the competent authority of the home State to consult other authorities before granting authorities.

² Practically speaking all these articles seem to imply that there needs to be cooperation among competent authorities.

³ In addition, Article 50 of the Implementing Directive 2006/73/EC allows most professional clients to opt for an eligible counterparty status. However, art. 24 (2) second subparagraph also allows eligible counterparties to ask for a "full MiFID treatment". In those cases, the issue of allocation of responsibility is exactly the same as for professional and retail clients.

by detailed implementing measures in the level 2 Regulation⁴ which aim at ensuring uniform application throughout the EU. As to transaction reporting (art. 25), CESR has reached an agreement for branch transaction reporting that solves the problem of supervision for all categories of clients (i.e. eligible counterparties as well as professional and retail clients) – see below under III. 8. c)).

III. Home/host supervision: Different possibilities

8. Following several rounds of consultations with Member States and taking into consideration the background surrounding negotiations on Article 32 (7) of MiFID, the following situations can be envisaged concerning allocation of responsibilities between home and host competent authorities:

a) When 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 authority⁵.

b) When the client is in the Member State of the head office (i.e. the home Member State), the competent authority responsible for supervising these same obligations should be that of the home Member State.

c) In between the situations described under a) and b) – where there seems to be consensus on the allocation of responsibility between home and host competent authorities – there is a "grey area" where the allocation of responsibility has to be decided on a case by case basis. This "grey area" concerns cases where the client is not either in the Member State of the branch or in the Member State of the head office. 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. This grey area has been resolved in the field of transaction reporting (art. 25), where a practical solution has been agreed by regulators within CESR that allows branches to report all their transactions to the host authority and under host provisions if they so wish, with an option to firms to make dual reports to home and host if they so wish. In a case of disagreement concerning the allocation of responsibilities, the Member States concerned should consider using the CESR mediation mechanism. Finally, 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.

9. With the exception of the wholesale area as explained above due to the eligible counterparty regime, it is clear that dual supervision of branches is a reality (the same branch is subject to supervision by two different competent authorities depending on the location of the client). This creates a problem for firms that needs to be dealt with.

IV. Suggested approach

10. Without prejudice to the issue of legal responsibility, as a practical solution to this complex issue DG MARKT would propose the following **four common principles for the supervision of branches**:

1) Article 32(7) is a derogation to the general principle of home country supervision. In order to allow for an effective supervision by regulators while avoiding unnecessary

⁴ Articles 22 to 34 of Regulation N° 1287/2006

⁵ Of course, some tasks or "back office" activities, which are not perceived by the client as part of the provision of the service could take place in a Member State which is different from the Member State of the branch (this could be either the home Member State or a third Member State).

burden for firms there should be effective **shared and cooperative supervision** of the branches between the home and host competent authorities. Such shared supervision would be based on Articles 32(7) and (8), 61(2) and, provided that the necessary conditions are met, 62(2) of the MiFID. In this context, taking into account the allocation of supervisory competences as laid down in Article 32 of the MiFID, both the host and the home Member State competent authorities should take all reasonable steps to support each other fully in the discharge of their respective supervisory duties.

2) DG MARKET considers that home and host supervisory authorities have a **legal obligation to co-operate**. Such an obligation should be based on the following articles:

- a) Article 56(1) which imposes a general obligation for competent authorities from different Member States to co-operate with each other whenever necessary for the purpose of carrying out their duties.
- b) Article 57 which deals with the cooperation of competent authorities for supervisory activities, on-the-spot verifications or investigations.
- c) Article 58(1) which imposes an obligation on competent authorities to exchange information.

3) Competent authorities should establish **Memoranda of Understanding** (MoUs) to determine the practical arrangements for their co-operation in the supervision of branches. Such arrangements would indicate how supervision would be shared between the home and the host competent authority; provide information on any delegation of tasks between home and host competent authorities and inform firms about the applicable law (e.g. conduct of business rules). MoUs should acknowledge firms' needs as regards legal certainty and competent authorities should seek at all times to avoid imposing disproportionate supervisory burdens on firms. In particular, reflecting the harmonising nature of MiFID, competent authorities should seek at all times to avoid imposing disproportionate, duplicative or overlapping supervisory burdens on firms. In order to ensure adequate protection of investors, MoUs should also clearly determine which competent authority would be competent for receiving complaints from investors in particular cases and imposing sanctions.

4) To ensure a level playing field across the EU and the convergence in supervisory practices, the Committee of European Securities Regulators (CESR) should begin work immediately on a **Multilateral MoU for the supervision of branches under MiFID or establish a common template for bilateral MoUs** on the supervision of branches under MiFID. Such a template would be the reference for any particular MoU between competent authorities for the supervision of branches.