

Brussels,

21.03.2007 D/000643

Mr Paul Richards,
Senior Adviser,
Regulatory Policy
International Capital Market Association

By email Paul.Richards@icmagroup.org

Dear Mr Richards,

Thank you for your e-mail of 9th March concerning supervision of branches under directive 2004/39/EC (the 'MiFID'). You express your concerns about the expected practical difficulties with respect to cross-border operations carried out by branches. I fully understand the position of the industry in seeking practical, business oriented solutions.

In recent months we have been exploring ways of obtaining a combination of legal clarity and practical efficiency. We have had several discussions with Member States at the European Securities Committee (ESC), as well as discussions with the industry and regulators. The purpose of these discussions has been to find the most consensual and workable approach.

On the legal side, a significant number of Member States consider that earlier suggested approaches (such as the more pragmatic so called "characteristic performance test) are inconsistent with agreements reached during the negotiation of the MiFID. The provision of Article 32(7) MiFID is quite clear; it contains a limited number of exceptions from the general principle of home State control. These exceptions were introduced to give responsibilities for the supervision and enforcement of conduct of business and transaction reporting obligations to the authority closest to the branch since it is better placed to supervise the activities of the branch. The critical issue is the meaning of "within the territory" in Article 32(7) MiFID.

Following these discussions, we are exploring an interpretation (still under consideration) of "within the territory" with the following in mind: The competent authority of the host Member State is responsible for supervising compliance with the obligations specified in Article 32(7) when the elements related to the provision of a service to a client through a branch (the branch itself, the client and the staff and facilities directly involved in the provision of the service) are located in the Member State of the branch.

Whatever legal approach is followed to interpret Article 32 (7) of the MiFID (and we are awaiting comments by Member States) dual supervision is a reality. Therefore, we have been working hard on exploring workable practical arrangements.

At this stage we are focusing on a Multilateral Memorandum of Understanding to be endorsed and applied by all CESR Members to avoid a patchwork of solutions that could hamper the smooth functioning of financial services markets. To assist CESR in this difficult task we are exploring a series of arrangements, within the legal limits set by the text of the MiFID (which was agreed unanimously by the Member States). These arrangements could include delegation of tasks (without altering allocation of responsibility) among competent authorities, joint supervision etc. The purpose of these arrangements should be to identify one competent authority for the obligations referred to in Article 32(7) to which firms operating through branches should address themselves, regardless of where the investment service or activity provided through the branch is provided.

I would like to encourage you to work closely with my services. The outcome of the best execution discussions are an encouraging example. We should try to follow it here too. So I look forward to receiving your practical suggestions as soon as possible to achieve workable arrangements which fully respect the MIFID legal texts.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Charlie McCreevy', written in a cursive style.

Charlie McCreevy