

MiFID

Responsibilities for branches

EFLMG

New-York Meeting

Hubert de Vauplane

G.C Calyon, Crédit Agricole Group

Principle : Supervision of branches is divided between home and host State regulators

- **Home State : by principle, home State regulator is competent.**
 - Prudential and organisational systems and controls requirements;
- **Host State : by exception, host State is competent :**
 - Art. 37.2 MiFID : services provided by the branch « within its territory » comply with conduct of business, market integrity, transaction reporting and market transparency

Important : The rules which apply to a branch in relation to the provision of a service usually determine the competence of the the supervising regulator.

2 separate notions :

- Notion of applicable rules (Member State rule)**
- Notion of supervision of these rules (Member State control)**

SUPERVISION UNDER MiFID

For supervision purposes, Mc Creevy proposed cumulative criteria to localise a Service “provided” by a branch:

- a) - the branch itself,
- b) - the client and the staff and
- c) - facilities directly involved in the provision of the service must be located in the state of the branch.

EU Commission allocates responsibility for the supervision of an EEA branch by distinguishing 3 cases :

- **EEA branch provides a service to a client situated in the same State as that EEA branch :**
 - The local regulator of the EEA branch supervises to ensure that the branch complies with the branch State rules
- **EEA branch provides a service to a client situated in the home State :**
 - The home regulator supervises to ensure that EEA branch complies with home State rules

SUPERVISION UNDER MiFID

- **EEA branch provides a service to a client situated (i) in another EEA State or (ii) outside the EEA (cf. European Commission position) :**

- according to the Commission, this is a « grey area », but it seems that in these cases, the home State regulator should ensure that EEA branch complies with the home State rules.

- The Commission stated that in cases where neither the local regulator nor the home State regulator claims responsibility, responsibility should rest with the home State regulator.

These cases were assessed by the Commission for all provisions of MiFID except for transaction reporting where CESR proposed solution (see below). This leads to dual supervision. The Commission asked for a Protocol on those matters and CESR delivered a framework agreement for regulators

- Concerning transactions reporting, a practical solution has been agreed by regulators within CESR that allows branches to report all their transactions to the local regulator applying the branch State rules (with an option to make dual reports).

SUPERVISION UNDER MiFID

- But what happens for rules other than transactions reporting ?

– The CESR Protocol on branch supervision :

Regulators agree that there is « no settled view at European level on the definition of services provided by a branch « within its territory ». See letter from Mc Creevy to LIBA of 21 March 2007

Protocol on Supervision of Branches under MiFID. The Protocol provides a framework for cooperation within which home and host state regulators can bilaterally agree on an appropriate supervisory approach for MiFID

The approaches set out in the Protocol describe as to how, and by whom, branches will be supervised on a day-to-day basis.

The Protocol set out two models of cooperation :

- A standing Request for Assistance
- A Common Oversight Request

Branch or Home State rules

- **When does MiFID not apply ? Clients outside EEA**

- Clear for everybody ?

- **When does MiFID apply ? Provision of a service to an EEA client**

- Branch State rules : As a general matter, the regulator of the State where the relevant EEA branch is situated must ensure that the provision of the service to clients « within its territory » complies with certain MiFID rules (i.e, in brief, conduct of business, best execution, transaction reporting and post trade disclosure rule).

In brief, when providing « onshore » services (clients situated within its territory) an EEA branch must apply most of the State Rules where it is located

Branch or Home State rules

–What does « within its territory » mean ? Which are the clients concerned?

Take exemple of a French bank with a branch in London.

- Service provided to a French client by London branch : French Rules
- Services provided to a UK client by London branch : UK rules
- Services provided to an Italian client by London branch : UK, French or Italian Rules ?
 - a) - In my example, the answer should be French Rules
 - b) –but In practice, this is not the case. Why ?

CONCLUSION

Needs for clarification :

- (i) Supervision regulator when a branch provides services to an EEA client outside Host and Home country
(« *grey area* »)
- (ii) Definition of « within its territory » and which rules applies (home or host) when a EEA branch provides services to an EEA client outside Host and Home country
- (iii) Scope of MiFID outside EEA and which rule applies when EEA branch provides services to an non EEA client