



**Financial Services
Commission**

Consultation Paper

Use of Agents and Distributors

Date of Paper : 2 April 2013
Version Number : V1





Table of Contents

Introduction..... 3

Executive Summary 3

Basis of consultation 3

Legal Notice 3

Guidance Notes - Use of Agents and Distributors 5

 Introduction 5

 Definitions and Interpretation 5

 Provision of Services or Establishment of a Branch..... 5

 Register of Agents 7

 Non-EEA Agents and Non-EEA Distributors 7

 Further Information 7

Regulatory objectives and principles of good regulation – checklist..... 9

Introduction

The purpose of this consultation paper is to set out a proposed Guidance Note on the Use of Agents and Distributors (the “Guidance Note”) for stakeholders to consider.

The Guidance Note aims to provide some guidance and clarity to licensed electronic money and payment institutions as to whether they are required to make a notification for the provision of services or the establishment of a branch when appointing agents or distributors to provide services on their behalf in other EEA States.

Executive Summary

This Guidance Note is based on the relevant provisions of the Electronic Money Directive (2009/110/EC) and Payment Services Directive (2007/64/EC) which have been transposed into Gibraltar law via the Financial Services (Electronic Money) Regulations 2011 and the Financial Services (EEA) (Payment Services) Regulations 2010 respectively.

Additionally, the Guidance Note refers to the European Communities Commission Interpretative Communication Sec (97) Final on the Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive, which although applies to credit institutions, may equally serve as guidance for electronic money and payment institutions until equivalent applicable guidance becomes available. It also points out to relevant guidance published by the European Commission on the ‘Your Questions on Single Market Legislation’ section of its website.

Basis of consultation

The consultation paper contains the proposed Guidance Note in full followed by the questions being posed to stakeholders. It is therefore expected that responses to these questions will be received from the industry. However, the FSC welcomes any other comments and / or observations which the industry may have in respect of any points contained in the Guidance Note.

Following the end of the consultation period the FSC will consider the responses and make any appropriate changes. The revised Paper will then be submitted to the Minister with Responsibility for Financial Services for his consideration. Where comments are received during the consultation process, with which the FSC does not concur these will also be advised to the Minister together with the FSC’s reason for not accepting them.

Legal Notice

The advice or interpretation given in this paper represents the views of the FSC as to its expectations of how the requirements of the relevant legislation in question are to be complied with and/or how it falls to be applied. This, however, is not intended as a definitive interpretation of the applicable legislation which is ultimately a matter for the courts to determine. You are, therefore, strongly advised to seek appropriate legal advice before any action or decision is taken.



The FSC does not provide, or purport to offer, legal advice.

Feedback on the consultation paper should be addressed to:

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Head of Banking and Investment Services Supervision
Financial Services Commission
PO Box 940
Gibraltar

e-mail: hbocarisa@fsc.gi

To reach her by no later than close of business on 2 July 2013.

To view the FSC policy on public consultation, please see

<http://www.fsc.gi/fsc/consult.htm>

Guidance Notes - Use of Agents and Distributors

Introduction

1. This Guidance Note applies to: (i) electronic money firms authorised under the Financial Services (Banking) Act 1992 and subject to the Financial Services (Electronic Money) Regulations 2011 (the “E-Money Regulations”) and; (ii) payment institutions authorised under the Financial Services (Investment and Fiduciary Services) Act 1989 and subject to the Financial Services (EEA) (Payment Services) Regulations 2010 (the “Payment Services Regulations”).

Definitions and Interpretation

2. For the purpose of this Guidance Note, please note the following definitions:
 - Agent: is defined in the Payment Services Regulations as a natural or legal person which acts on behalf of a payment institution in providing payment services;
 - EEA Agent: is defined in the E-Money Regulations as an agent through which an authorised electronic money institution, in the exercise of its passport rights, provides payment services in the EEA other than in Gibraltar; and
 - Distributor: is defined in the E-Money Regulations as a person who distributes or redeems electronic money on behalf of an electronic money institution but who does not provide payment services on its behalf.
3. For the avoidance of doubt, a distributor can only provide pure distribution services such as selling or reselling e-money products to the public, providing a means of distributing e-money or of redeeming e-money on the request of customers or of topping up customer’s e-money. A typical example of a distributor is a petrol station that sells pre-paid cards.

Provision of Services or Establishment of a Branch

4. A licensed e-money or payment institution that exercises its passport rights and wishes to appoint an agent to act on the firm’s behalf in other EEA States, should first determine whether it is required to make a notification for the establishment a branch or for the provision of services.
5. The Commission of the European Communities (the “EU Commission”) issued a Commission Interpretative Communication Sec (97) Final on the Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive¹ (the “Interpretative Communication”) which provides guidance on what the EU Commission considers are factors which could determine whether the use of an intermediary (which includes an agent), could require the establishment of a branch. You should note that the Interpretative

¹ http://ec.europa.eu/internal_market/bank/docs/sec-1997-1193/sec-1997-1193_en.pdf

Communication is applicable to credit institutions. However, as there does not seem to be equivalent comprehensive guidance for e-money and payment institutions on this subject, it could be argued that the Interpretative Communication may serve as guidance equally for e-money and payment institutions.

6. Licensed entities should note that the Interpretative Communication does not necessarily represent the views taken by all EEA States.
7. Licensed e-money and payment institutions are advised to familiarise themselves with the Interpretative Communication which sets out the guidance on this area and makes references to relevant case law of the Court of Justice.
8. In accordance with the Interpretative Communication, the following three criteria must be met at one and the same time in order for the use of an agent to result in a licensed institution to possibly fall within the scope of the right of establishment of a branch:
 - The intermediary must have a **permanent** mandate;
 - The intermediary must be subject to the **management and control** of the credit institution he represents. To ascertain whether this condition is met, it is necessary to determine whether the intermediary is free to organise his own work and decide what proportion of his time to devote to the licensed entity which he is representing. Another indicating factor is to consider whether the intermediary would be bound by an exclusive agreement to the licensed entity and would not be able to represent other firms; and
 - The intermediary must be able to **commit** the credit institution. The intermediary should be able to make a complete offer on behalf of the licensed institution with only the licensed institution retaining the power to sign the contract. This criterion is not met if the licensed entity can reject the proposal submitted by the intermediary and signed by the customer.
9. Further, according to Article 3(1) of the E-Money Directive (2009/110/EC), Articles 10(9), 17 and 25 of Directive 2007/64/EC (which have been transposed into local law via regulations 10(9), 17 and 25 of the Payment Services Regulations) apply to E-money firms *mutatis mutandis*. On this basis, the European Commission has published, on the 'Your Questions on Single Market Legislation' section of its website, guidance effectively stating that licensed e-money or payment institutions may use agents or distributors via the establishment of a branch or via the provision of services depending on the entity's business model and/or its organisation structure. Therefore, licensed firms should decide on a case by case basis whether if by engaging an agent or a distributor in another EEA State, they are required to passport by establishing a branch or simply by providing services.
10. The licensed firms will have to complete either the establishment of a branch notification or the provision of services notification form depending on whether the firm will be establishing a branch or providing services. Such notification forms can be obtained from the relevant Forms and Returns sections on the FSC website.



Register of Agents

11. Licensed e-money firms (which also intend to provide payment services) and payment institutions who wish to engage an agent are subject to additional notification requirements. Under regulation 34 of the E-Money Regulations and regulation 13 of the Payment Services Regulations, agents of e-money and payment institutions are required to be included on the FSC's register.
12. The following information is required for the registration of an agent:
 - the name and address of the agent;
 - a description of the internal control mechanisms that will be used by the agent to comply with anti-money laundering requirements; and
 - the identity of directors and persons responsible for the management of the agent and evidence that they are fit and proper persons.

Additionally, the FSC may request any further information which it may reasonably require before including an agent in its register. Firms should note the requirements set out in regulation 17 of the Payment Services Regulation in respect of the use of agents or distributors.
13. You should also note that the licensed entity retains the ultimate responsibility for anything done, or omitted by, an agent or a distributor. The FSC will therefore expect the licensed entity to have appropriate systems and controls in place to effectively oversee their agents' activities.

Non-EEA Agents and Non-EEA Distributors

14. The FSC needs to be satisfied that a non-EEA agent or non-EEA distributor which is engaged for the provision of services or for the establishment of a branch in another EEA State will comply with all the relevant laws of the EEA State in which it is engaged. The FSC may request any further information from the licensed entity which it considers necessary in order to ensure such compliance on a case by case basis.

Further Information

15. Any enquiries or requests for further information may be addressed to the Banking Supervisor at the Financial Services Commission, P.O. Box 940, Suite 3, Ground Floor, Atlantic Suites, Gibraltar (tel (350) 200 40284; fax (350) 200 40282).

- Q1. Do stakeholders consider the guidance contained in this Guidance Note useful?
- Q2. Do stakeholders agree with the interpretation of the FSC?



Q3. Do stakeholders have any additional comments / observations in respect of this Guidance Note which should be brought to the FSC's attention?

Financial Services Commission
PO Box 940, Suite 3, Ground Floor,
Atlantic Suites, Europort Avenue,
Gibraltar



Regulatory objectives and principles of good regulation – checklist

| | |
|--|--|
| Which regulatory objectives are the proposals aimed to facilitate? | |
| (a) To promote market confidence; | Yes |
| (b) The reduction of systemic risk; | Yes |
| (c) To promote public awareness; | No – not applicable |
| (d) The protection of the reputation of Gibraltar; | Yes |
| (e) The protection of consumers; | Yes |
| (f) The reduction of financial crime, including the funding of terrorism; | No – not applicable |
| Do the proposals accord with the following principles of good regulation? | |
| 1. The need to use our resources in the most efficient, effective and economic way; | Yes – to ensure consistent guidance and application in respect of information gathering with regards to the use of agents. |
| 2. The principle that the duty to manage a business falls upon the senior management of that business. The Directors of a licence holder, both executive and non-executive have ultimate responsibility for ensuring that the business is properly run and operates in accordance with regulatory requirements; | Yes – provides guidance based on relevant EU Directives and EU interpretation which senior management needs to comply and act in accordance with. |
| 3. The principle that a burden or restriction which is imposed upon authorised firms should be commensurate with the benefits expected to result from such action, so ensuring that the Authority is striking the right balance between achieving the statutory objectives and ensuring that the impact on those being regulated is not such as to be counterproductive; | Yes – provides some guidance to authorised firms in respect of the use of agents and distributors and highlights distinguishing factors between ‘passporting’ via the provision of services or establishment of a branch. Also, firms need to ensure that EEA or non-EEA agents engaged in other EEA States comply with all relevant laws. |
| 4. The desirability of facilitating innovation in connection with regulated activities; | Not applicable. |
| 5. The international character of financial services and markets and the desirability of maintaining the competitive position of Gibraltar; and | Yes – provides guidance which needs to be applied consistently and FSC will need to be satisfied that agents engaged in other EEA States will comply with all relevant laws. |
| 6. The need to consider the adverse | Yes – provides comprehensive |



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| effects of regulation on competition and consumer choice. | guidance. |
| 7. Does this match UK supervisory practices | Yes – This is based on relevant EU Directives and EU interpretation / guidance. |