

INVERCO ANSWER TO CESR SECOND CONSULTATION ON INDUCEMENTS
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1.- INTRODUCTION

INVERCO, the Spanish Association of Collective Investment Schemes and Pension Funds, represents more than six thousands collective investment schemes and almost a thousand pension funds, with more than EUR 416 billions in assets under management.

INVERCO welcomes CESR for this reconsultation, as well as for the removal of the proportionality tests (*"to the market"* or *"to the benefit to the client"*), the inclusion of a broader range of examples and its more flexible approach on article 26 c).

However, the main worrying issues for the Spanish industry remain in the draft recommendations, so, despite CESR's request for not to repeat the same arguments that were raised in the first consultation, INVERCO considers essential to highlight its disagreement with CESR's criteria on distribution fees or commissions and the need for keeping the treatment of inducements within the limits of the conflicts of interests, avoiding its application to any other receipts or payments that do not give rise to such a conflict.

In spite of INVERCO's disagreement to CESR's general approach, our Association wants to express some comments on a number of questions that the new document has raised, that are included in the second part of this reply.

2.- SPECIFIC COMMENTS

In particular, INVERCO wants to express its concern about the following items:

a) Discrimination between different types of financial products

CESR argues that these recommendations do not discriminate between different types of financial instruments, because they apply equally to all the instruments included in the Annex I Section C of MIFID.

It is a fact that, according to the Directive itself, there are a number of financial products not included in the list (and therefore not subject to MIFID) that, not only from the investor's perspective, but also according to the distributor's practices, are completely substitutive to others included indeed.

To that extent, it must be acknowledged that the wording of the Directive does not allow a wide scope for action, but precisely because of this, CESR should seek positive and flexible approaches, in those aspects that admit more than one interpretation, rather than choose, between all the possible options, the most restrictive one.

CESR also states that, in case of detecting regulatory arbitrage practices, it will inform to the European Commission. UCITS are, undoubtedly, the most transparent, regulated and well-known investment products, and compete with a number of substitutive products subject to a fewer regulatory requirements, in particular those regarding disclosure to the investors (risks, portfolio, fees, tax treatment, etc). In this sense, the proposed approach discriminates UCITS and implies a serious injury for this product; therefore, it can not be argued that there is no discrimination between products because of their managers, where acting within the scope of the article 2.1 h) exception, are not subject to these rules (4th paragraph in page 6), because the discrimination occurs at the product level and raises largely from the subjection to different rules of products whose distribution is, in a considerable part of Europe, in the hands of the same entities (banks, saving banks or credit cooperatives); if applying different requirements for the distribution of two substitutive products, the distributor –that, in most of the cases, is not the management company – will choose the most opaque and less burdensome in regulatory terms categories.

b) Examples relating UCITS

Related to the preceding issue, it is true that the number of examples has increased and the constant references to UCITS on them have been removed; nevertheless, the first CESR's document was excessively focussed on UCITS, and, as the new examples does not refer to any particular product, in practice everybody will have in

mind UCITS when reading (and probably when applying) these recommendations. So, explicit mentions to particular products should be included.

c) Article 26 c) of LEVEL II MIFID

The following INVERCO's comments regarding article 26 c) refer strictly to the mere distribution of financial instruments, without provision neither of advice or general recommendations, nor in the context of a portfolio management relationship, and to the fees and commissions paid to distributors by the product provider or the issuer of those financial instruments.

According to INVERCO's opinion, such fees or commissions fit perfectly in the scope of article 26 c), since they fulfil both requirements laid down in this article, namely:

- (1) They not only enable, but are also necessary for the provision of investment services;
- (2) They do not give rise by their nature to conflicts with the firm's duties to act according to articles 19.1 of the Level I Directive.

It is a fact that the distribution service complies with the first requirement on article 26 c), and CESR seems to share this opinion, according to paragraph 19 of the second consultation paper, when, in relation to an example of mere distribution without advice nor general recommendation, states that *"[...] in the absence of payment by the product provider or issuer these investment services, most likely, would not be provided"*).

Nevertheless, CESR remains considering that such payments fall under the scope of the article 26 b) rather than c), therefore under the presumption that such payments give rise to conflicts with the firm's duty to act in accordance to article 19.1 of the Level I Directive.

INVERCO does not share this view and considers that it should be necessary to avoid in the text any connection between distribution services and article 26 c), in order to allow the investment firms themselves to be the ones who evaluate if these

payments can impair their duty of acting in accordance with Article 19.1, in the light of the particular investment service and the circumstances in which it is provided.

Otherwise, for a better understanding of the article, CESR should clarify which is the conflict that arises in every mere distribution service - provided under the circumstances in the first paragraph of this section, namely, no advice or general recommendations nor portfolio management relationship- that prevents investment firm to act in accordance with article 19.1 of Level I MIFID.

Madrid, 25th April, 2007