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Submitted by e-mail only to secretariat@cesr.eu

12 February 2007

Dear Sirs

Inducements under MiFID

This response is made by the Regulatory Committee of the British Venture Capital and Private Equity Association. The BVCA represents the overwhelming majority of UK-based private equity and venture capital firms. The UK private equity and venture capital industry is by far the largest in Europe and second only in size in the world to that of the United States. Thank you for agreeing to consider this response even though it is received one day after the deadline.

Question 1: Do you agree with CESR that Article 26 applies to all and any fees, commissions and non-monetary benefits that are paid or provided to or by an investment firm in relation to the provision of an investment or ancillary service to a client?

We do not agree because such an interpretation ignores the title to the Article and Recital 40, both of which use the word "inducement". We consider that the payments which are regulated under Article 26 are those which are in the nature of inducements. In a regulatory context an inducement has to be understood as something which might incentivise a firm to act in a way which is not in its client's interests. The extreme interpretation suggested by CESR would have the potential to adversely affect current market practices without there being any need for potential client detriment. Such an approach cannot be justified on the text, or as a matter of policy. We note that CESR itself is not always consistent -there are elements of the paper which recognise that a key issue is whether the arrangements are the kind that could influence or induce the investment firm as regards the way in which it deals with its clients.



Accordingly Annex B and C omit an important test, namely is the payment in the nature of an inducement.

Question 2: Do you agree with our analysis of the general operation of Article 26 of the MiFID Level 2 Implementing Directive and of its interaction with Article 21?

For the reasons given above, we consider that the analysis of Article 26 is flawed. There is clearly an interaction between Article 21 and 26 because they both address a similar issue.

CESR refers to some commentators taking "a wide interpretation of "proper fee" so that a very wide range of receipts or payments is not subject to the prohibition". We do not think Article 26 (c) can possibly be an exclusive statement of the only payments which a firm is permitted to make or receive, and this is particularly so in the context of CESR's over wide interpretation of the Article. Article 26 (c) is an indication that Article 26 is directed at payments which are in the nature of "inducements" by clarifying the position in relation to certain matters. Given the breadth of the services covered by MiFID it could never be an exclusive statement of the payments which are permitted. Such a provision would be impossible to draft.

Question 3: Do you agree with CESR's view of the circumstances in which an item will be treated as a "fee, commission or non-monetary benefit paid or provided to or by... a person acting on behalf of the client"?

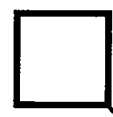
Yes, but we doubt these are the only circumstances.

Question 4: What, if any, other circumstances do you consider there are in which an item will be treated as a "fee, commission or non-monetary benefit paid or provided to or by the client or a person acting on behalf of the client"?

It is impossible to answer this question if Article 26 applies to payments etc. that are not in the nature of inducements, as it would require an examination of practices across all market sectors. Then the number of circumstances of this kind that could exist might well be infinite.

Question 5: Do you have any comments on the CESR analysis of the conditions on third party receipts and payments?

We think that it ought to be made clear that if the firm:



- accounts to its client for the fee/commission received from a third party (i.e. pays it on); or
- deducts the amount of the fee/commission from its own agreed fees; or
- agrees with its client at the outset to set the level of its own fees payable by the client in contemplation of receiving specific categories of fees from third parties in certain specific circumstances;
- agrees with the client at the outset that the overall level of fees received by the firm will include specific categories of fees from third parties in certain specific circumstances which together will be at levels typically payable in the market; or
- uses a combination of these mechanisms;

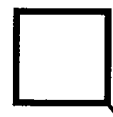
that either this does not fall within Article 26 at all or is within Article 26(a). This seems to be accepted in the discussion of example 3 on page 9 ("There is no condition that the money be repaid to the clients of the investment firm.").

The last sentence in paragraph 22 which prohibits a "disproportionate" payment is not based either on the prescribed tests in Article 26 and we cannot see how it can be relevant-unless CESR accepts that the Article is about inducements – when a disproportionate payment might, in some cases, tend to evidence an inducement.

Question 6: Do you have any comments on the factors that CESR considers relevant to the question whether or not an item will be treated as designed to enhance the quality of a service to the client and not impair the duty to act in the best interests of the client? Do you have any suggestions for further factors?

Recital 39 also suggests that the receipt by a firm of a fee from a third party can "enhance the quality of service to the client". We believe that this is correct and that it should be made expressly clear. An important component of the quality of service provided to a client is the overall amount payable by the client for the service. A payment from a third party which reduces the fee payable by the client (for example in one or more of the circumstances described in our answer to question 5 above) therefore enhances the quality of service to the client. If CESR disagrees with us that payments under such arrangements fall outside Article 26 or are within Article 26(a), then it should be made clear that they fall within Article 26(b).

So far as the factors in paragraph 26 are concerned, we agree with the principles in that paragraph in so far as we believe that CESR should make it clear that in determining whether an item is designed to enhance the quality of service all factors should be taken in to consideration and possible benefits to the client should be considered in the widest sense.



Question 7: Do you agree that it would not be useful for CESR to seek to develop guidance on the detailed content of the summary disclosures beyond stating that:

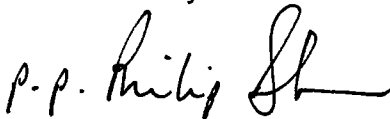
Such a summary disclosure must provide sufficient and adequate information to enable the investor to make an informed decision whether to proceed with the investment or ancillary service; and, that a generic disclosure which refers merely to the possibility that the firm might receive inducements will not be considered as enough?

We agree it would not be useful for CESR to seek to develop guidance on a summary disclosure. There is much in MiFID which is very difficult to apply to private equity and we fear that the same would be true of any guidance. What is appropriate will depend on the business concerned and the nature of its clients.

We believe that a single, clear disclosure of a type of payment that might be received on more than one occasion should be sufficient, provided that it is proportionate to the sophistication of the client.

We would be very happy to discuss this response with CESR. In the first instance, please contact Margaret Chamberlain, Chair of the BVCA Regulatory Committee on +44 20 7295 3233 or margaret.chamberlain@traverssmith.com .

Yours faithfully



Peter Linthwaite
Chief Executive

