

February 9, 2007

By website post to: www.cesr.eu

The Committee of European Securities Regulators
11-13 avenue de Friedland
Paris, FRANCE 75008

**RE: Public Consultation, “Inducements under MiFID” (December 2006),
CESR/06-687**

Ladies and Gentlemen:

Bloomberg L.P. welcomes the opportunity to respond to CESR’s request for comment on its Public Consultation, “Inducements under MiFID” (December 2006). We hope our comments will be useful to CESR.

Inducements –scope of Article 26- Questions 1 and 2

We do not 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. If it did, Article 26 would not have been entitled “Inducements”, which evidently was intended to have narrower scope. Moreover, Recital 40 of the Level 2 Implementing Directive provides:

This Directive permits investment firms to give or receive certain *inducements* only subject to specific conditions, and provided they are disclosed to the client, or are given to or by the client or a person on behalf of the client [emphasis added].

The CESR consultation does not address at all the issue of what is an inducement, and it proceeds to go far afield of true inducements, apparently on the basis that the heading to the Article is irrelevant. We do not consider this is the correct approach. There is much in the CESR paper that should be supported, but the failure to address the meaning of “inducement” is a major omission, one that detracts from other valuable material in the paper. Article 26 can apply only to payments etc. that are in the nature of an inducement, and it is the meaning of this that must be explored. If Article 26 applied as widely as CESR suggests,

it would have a significant impact on ordinary commercial structures operating in the markets in which there is no client detriment.

We believe that much of the criticism that is directed at CESR's interpretation would be resolved if there were a recognition that there has to be an "inducement" issue before Article 26 is relevant. This needs to be built into Annex B and Annex C; without it, the annexes omit an important step. An inducement issue clearly arises in situations that provide the potential for a real conflict of interest or for action that is not in the best interests of the client, and it is this area that should be considered further. The CESR paper does in part address this, for example, in paragraph 35, which refers to the fact that CESR considers that the arrangements that need to be considered and disclosed are those that can influence or induce the investment firm that has the direct relationship with the client. Comments of this kind need to form part of the core of the final advice on this issue.

We respectfully recommend that CESR not attempt to regulate ordinary commercial payment mechanisms. MiFID does not provide any basis for such an interpretation and, indeed, it would cause havoc in the financial markets.

It follows that we do not consider that Article 26(c) is an exclusive statement of the only permitted payments from or to investment firms. It was, we believe, intended as a provision "for the avoidance of doubt", not as a provision that exhaustively defines the payments outside the scope of the Article.

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"?

We agree that the circumstances CESR describes fall into this category. We do not agree that these are the only circumstances.

The example given by CESR in paragraphs 11 to 14, of a payment made by or on behalf of the client, is interesting, but it will not always reflect the reality of the way in which payments are structured, for overseas regulatory or similar good reasons, with the full knowledge and consent of the client. We refer here, of course, to circumstances where there is no issue of an inducement. For example, a client who is transacting in derivatives traded on a U.S. exchange will have a clearing account with a U.S. broker (directly or indirectly through an E.U. investment firm). He may have his instructions transmitted to the U.S. broker by an E.U. investment firm that may either act as a receiver and transmitter of his order or as the entity executing the order. We do not see any reason why, in any such case, the client cannot agree the amount of commission for trades that he will pay, that he should

make arrangements for payment of that commission to the U.S. clearing broker and agree to part of that payment being shared with the E.U. entity. There is clearly no issue of an inducement and this is a fairly common arrangement for a number of perfectly legitimate reasons. We do not think it is necessary for the payment from the U.S. firm to the E.U. firm to have to be constructed as if it were a payment on behalf of the client in order for it to be clear that no Article 26 issue arises.

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?

Under FSA Rules, services that are related to the execution of orders and investment research are considered as enhancing the quality of investment management services to a client and we consider that this concept, which has been subject to exhaustive analysis and consultation, is a good one and should continue to be recognised.

The wording “enhances the quality of service to the client” is not entirely apposite in the case of a firm receiving a fee from a third party — it is difficult to see how, conceptually, that can enhance the quality of service to the client. As a result, we think the provision has to be interpreted purposively in the context of payments of this nature. In practical terms. The question is less to do with the quality of service and whether such a payment gives rise to a conflict with obligations to the client or impairs compliance with the duty to act in the client’s best interests, for example, by inducing a firm to place business in a particular direction.

We do not consider that the statements made about “disproportionate benefits”, for example in paragraph 22 have any legal basis. There is no such concept in Article 26. Proportionality seems to us to be a difficult if not impossible principle to measure and apply in practice and it is potentially a trap for litigation.

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:

We agree it would not be useful because the nature of any summary disclosure, and whether it is adequate, will depend on the factual matrix, which is infinitely variable. The burden is on the firm to show that its summary disclosure was appropriate.

Question 8: Do you agree with CESR’s approach that when a number of entities are involved in the distribution channel, Article 26 applies in relation to fees, commissions

and non-monetary benefits that can influence or induce the intermediary that has the direct relationship with the client?

We agree with CESR.

Softing and Bundling Arrangements

We believe it is essential for the fair and transparent functioning of the markets that CESR's interpretation of Article 26 not result in an unintended "un-level playing field" between independent research providers and multi-function firms. We also think CESR needs to clarify its definitions of "softing" and "bundling". Bundled brokerage is usually associated with multi-function houses that provide brokerage and research services directly to a portfolio. The research services might include access to analysts and trading ideas as well as written research. No specific charge is made for these additional services; they are paid for through the dealing commission — hence the term "bundling".

The term "softing" refers to payments by a broker to a third party out of commissions paid to the broker. We respectfully recommend that CESR look at the ways in which the FSA in the U.K. and the Securities and Exchange Commission in the U.S. handled these issues. They scrupulously avoid applying different standards to third-party research than to in-house brokerage in order to avoid competitively disadvantaging those investment firms that compete for brokerage with the multi-function houses by buying research from independent third parties and providing it to their institutional and other customers as part of the overall brokerage service in much the same way as the multi-function houses supply the research generated by their own employees. Avoiding that discrimination may also tend to avoid disadvantaging the producers of "independent" research, research that is not affected by commercial considerations such as could be present in the case of a multi-function house keen on maintaining relationships with investment banking clients and the like.

Question 11: What would be the impact of Article 26 of the MiFID Level 2 Directive on current softing and bundling arrangements?

We are familiar with the UK restrictions on softing and bundling, we believe they will be capable of existing under Article 26 and commend the approach taken by the FSA to this issue.

Question 12: Would it be helpful for there to be a common supervisory approach across the E.U. to softing and bundling arrangements?

Yes, on the assumption that there are similar practices across the E.U.

Question 13: Would it be helpful for CESR to develop that common approach?

Yes, after consultation and research to discover the exact nature of practices in the various Member States.

We do hope that our comments are helpful to CESR and, once again, we appreciate the opportunity to offer them.

Respectfully submitted,

Alexander Clode by R.D.B.