

February 2007

Irish Stock Exchange Response to CESR's Consultation Paper on Inducements

The Irish Stock Exchange welcomes the opportunity to comment on CESR's consultation paper on potential level 3 guidance on inducements and supports CESR's intention to issue a recommendation to ensure a consistent approach is taken throughout the EU.

Response to CESR Questions

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?

- (i) The ISE is concerned with the narrow interpretation that CESR has taken of Article 26 and in particular that firms will be prohibited from entering into certain payment arrangements, including those which fall outside the definition of a "proper fee", which a firm could enter into in the normal course of its business. In our view payments or non-monetary benefits should only be considered under Article 26 where there is a potential for a conflict of interest or where the firm's duty to act in the best interests of the client may be impaired.
- (ii) In relation to the interpretation of a "proper fee", we agree that in general only items which are of a type similar to the costs mentioned in Article 26 (c) (custody costs, settlement and exchange fees, regulatory levies, or legal fees) fall within the definition of a "proper fee". However we do not believe that this list is exhaustive nor that it is feasible for CESR to develop a complete list of costs which could be considered as "proper fees" under the definition, given that the type of "proper fees" may change over time. As a result we are of the opinion that CESR's guidance should not specifically refer to the list of costs mentioned in MiFID as examples of "proper fees".

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"?

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"?

- (i) We agree with CESR's view that "a person acting on behalf of the client" should only be acting as a mere conduit for the payment or receipt.
- (ii) In practice there may be circumstances, authorised by the client, in which payments are made on a client's account to or from a person other than the client, including a person who is not 'independent' of the client, such as a relative of the client, and we believe that such payments should not be prohibited provided that the client is aware of such payments and the identity of that other person. We therefore believe that transparency to the client is the most important factor to be considered in this case,

notwithstanding that the firm is always required to act fairly, honestly and in the best interests of the client.

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

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?

- (i) The ISE agrees that it is important that all payments/non-monetary benefits received by the firm do “not impair compliance with the firm's duty to act in the best interests of the client”. However we are concerned with CESR’s narrow and perhaps restrictive interpretation of Article 26 (b) which requires a firm to be able to demonstrate that the client has “received benefit” as a result of such payments/non-monetary benefits as some payments/non-monetary benefits by their nature may not have a direct measurable benefit to the client. There is a concern among market participants that if this narrow interpretation is adopted, that it may inadvertently prevent firms from providing a better or more innovative service to their clients if this requirement is to be met in all instances.
- (ii) We would suggest that CESR’s guidance should place greater emphasis on the firm’s obligation to effectively assess and manage conflicts of interest and to ensure that payments/non-monetary benefits do not impair their duty to act in the best interest of the client and that the quality of the relevant service to the client has been enhanced, rather than whether or not the client receives a benefit.
- (iii) Furthermore, we would consider that where such a payment leaves the client in a “neutral” position and therefore the client has not and will not be disadvantaged, then such a payment should not necessarily be prohibited solely on the basis that the client does not receive any benefit.
- (iv) Therefore we believe that the list of factors provided by CESR should be reviewed to reduce the emphasis currently placed on ‘benefit to the client’.
- (v) We agree that although a firm’s assessment of payments is carried out on “a priori” basis, that this does not relieve the firm of its duty to ensure that such payments are used effectively and in a manner that is in the best interests of the client, and therefore it is the firm’s responsibility to review such payments on a periodic basis. However we would suggest that payments that meet the criteria “a priori” should not be prohibited or necessarily be a cause of concern on the basis of an individual exception identified post the firms’ adopting of certain payment/non monetary benefit arrangements.

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?

- (i) We agree that it would not be useful for CESR to seek to develop such guidance.

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?

- (i) Yes we agree with this approach.

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

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

- (i) We would consider it helpful for there to be a common approach to softing and bundling arrangements across the EU to ensure consistency among the industry. Furthermore, any common supervisory approach should be developed with industry consultation to ensure that it is relevant to current practices.