



FONDBOLAGENS
FÖRENING

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Committee of European Securities Regulators (CESR)

11-13 Avenue de Friedland

75008 PARIS FRANCE

Comments on CESR: s consultation on inducements under MIFID

The Swedish Investment Fund Association¹ (below referred to as SIFA) has been given the opportunity to comment on the above-mentioned CESR consultation and would like to make the following remarks.

SIFA strongly believes that the issues raised in the consultation paper are of great significance for the fund industry and need to be treated with great care, in order not to hinder existing structures and mechanisms proven to be of great value for both the industry and the investors.

Background on the Swedish market

In order to account for the positions of SIFA we think it is helpful to have in mind the structure of the Swedish fund market. The market is still dominated by a few large fund managers within banking groups and with “in-house” distribution systems, but there are also many smaller managers not linked to banking groups being dependent on external distribution. SIFA regards it as essential that the outcome of the CESR consultation will allow for competition among fund managers irrespective of the “infrastructure” of the distribution. The possibility to use external sources for the distribution is indispensable for the “independent” fund managers, but is also important for the larger players.

As regards retail sales, almost every operator on the market uses external (in the sense of a legal entity other than the fund manager) distribution sources. The services these distributors provide are mainly of two kinds. A major part of the funds are sold to distributors acting as a nominees for the unit holders and the distributor often provides a full range of services to the customer in the form of customer support, distribution of material etc. In these cases the nominee is the client of the fund manager. In Swedish law this is expressed i.a. in that requirements regarding information to the unit holder, rules on anti money laundering and complaints handling as well as on tax reporting etc. define the nominee as the “end” client. Another common business model is the “simple distribution” where the distributor merely transmits subscriptions and redemptions. Which distribution model the fund manager chooses depends of

¹ The Swedish Investment Fund Association is an association of 36 fund management companies representing app. 95 percent of the Swedish fund market.

course on business considerations in each case and on the level of “control” the manager wishes to exercise over the client base.

General comments

SIFA is of the opinion that one could argue that CESR’s analysis is not based on a correct interpretation of MIFID provisions. Nowhere in connection with para. 16-26 does CESR discuss recital 40. and that the effect of Articles 26(a) and 26(c), read together with Recital 40, could well be to limit Article 26 only to fees, commissions, and non-monetary benefits that are intended to induce someone to act in a way that they would not otherwise have done, and as a result materially affects a client to whom a firm owes a duty. CESR’s interpretation would in this case convert Article 26 from a provision intended to regulate inducements into a provision regulating almost any third party payment or receipt. SIFA suggests that the CESR interpretation is reconsidered and is inclined to concur with what is referred to in p 5 of the consultation, namely that Article 26 (c) has a broad application so that the other elements of Article 26 should be treated as applying only to payments that in some way are made with the purpose of influencing the investment firm.

Should the above interpretation not be sustainable, SIFA is of the opinion that most of the commissions paid to investment firms under distribution agreements on the Swedish market would fall under Article 26 a) as a major/large part of the distribution is made to investment firms acting as nominees and being the sole and “end” clients of the fund manager. Where the distribution is made via investment firms not acting as nominees but only performing the task of transmitting subscriptions and redemptions, most of the fees paid out would, in our opinion, fall under Article 26 c) in their capacity of “proper fees”. The reason for this is that the distribution in most cases is necessary in order for the client to be able to purchase fund units without having to turn to the fund manager without recourse to an in-house sales organisation.

In some circumstances, to be determined in each case, e.g. where there is advice or customer support, distribution of material etc. linked to the service, the fees could fall under Article 26 b). The services so provided would in our view certainly qualify as “enhancing the quality of the service”.

SIFA also wishes to point out that, from the examples cited, it is somewhat unclear whether the consultation is made on the assumption that the remuneration paid to the distributor automatically results in a higher cost being charged to the end client. The remuneration structure used by many fund managers ensures that the remuneration is given directly to the distributor from what otherwise would have been the manager’s profit, so that the end client shall be charged the same costs irrespective of whether the client subscribes units directly from the manager or via a distributor.

For further comments we wish to refer to the reply to the consultation by EFAMA.



Comments regarding the questions posed by CESR

We believe that CESR goes beyond the MiFID directive when it links the firm's compliance with its duty to act in the best interests of the client and the proportionality of the commission to the value of the service provided to the client or to the market. The last sentence of Paragraph 22 should, in our opinion, be deleted.

The combination of the requirements could definitely create a market restriction. Not only by introducing requirements that shreds the level playing field between competing financial products and providers, but by seriously hampering the ability of fund managers not having recourse to in-house distribution channels (Article 21 only manages conflict of interests) to compete with other players with such resources.

In Paragraphs 19 and 23, CESR stresses that the investment firm/fund manager's "a priori" assessment of payments in no way guarantees compliance with MiFID in the future. We wish in this context to stress the importance of legal risks being foreseeable also in a long term perspective and believe that this statement creates some legal uncertainty.

Comments on the Examples 1 and 2

As commented on above, we think that the statement regarding the "disproportionate benefit to the firm relative to the value of the service provided to the client" could be seen as a restriction to market economy. Such proportionality tests are not imposed on other financial services. It is also difficult to see how such a "test" could be implemented, especially vis-à-vis other market participants.

As further regards Example 2, we believe the statement that "it is not the intention of MiFID altogether to prohibit such arrangements" is leading in the wrong direction in that it implies that such arrangements a priori are questionable. We have not perceived that the intention of MiFID would be to hinder perfectly straightforward distribution agreements.

Questions 5- 6

Question 5 is treated in our comments above. As for further factors designed to enhance the quality of the service, we wish to suggest the availability of the service, as is the case with distribution of funds where there is no in-house sales organisation.

Question 7

With regard to disclosure of the remuneration being paid to the investment firm, we would be in favour of a more general disclosure obligation stating that the customer shall be informed of the fact that the investment firm receives remuneration for the service, without disclosing the exact construction of the fee or the amount on cus-



tomer level. One could also state the consequences for the client – i.e. if the cost of the remuneration is passed on to the customer.

We agree with CESR's statement that it would not be useful for CESR to develop guidance on detailed content of the summary disclosure. Instead from our perspective it would be essential that the integrity of the information provisions in the UCITS directive (full prospectus, fund rules and simplified prospectus) is preserved and viewed as satisfactory from a MiFID perspective in regard to the "summary form" passed on to an end client. If CESR believes that further information is required by MiFID, then the process of changing the information provisions in the UCITS-directive should start.

Question 8

Yes, we agree with CESR's approach.

Questions 11-13 Softing and unbundling

At this point we do not favour a common approach to softing and unbundling but welcome a CESR study of the topic. It would be wise to await future cost-benefit studies from these jurisdictions that may have rules on the issue, not least since a common approach to unbundling could affect other EU legislation such as the VAT-rules. The current harmonized securities legislation does not hinder Member States wishing to introduce these concepts to do so on a national level. In certain countries such as Sweden a first step to regulate softing has been made through self regulation by the trade association

SWEDISH INVESTMENT FUND ASSOCIATION

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