

POSITION PAPER



**ESBG response to
CESR consultation paper on inducements: good and
poor practices
(CESR/09-958)**

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The European Savings Banks Group (ESBG) welcomes the opportunity to comment on the CESR's consultation paper "inducements: good and poor practices" and appreciates CESR's aim of assisting regulated firms in gathering a better understanding of some of the main industry practices on inducements and understanding what types of behaviour by firms securities regulators encourage or discourage.

Classifying payments and non-monetary benefits and setting up an organisation to be compliant

Question I: Do you agree with CESR's views about the arrangements and procedures an investment firm should set up?

In general terms, ESBG agrees with CESR's views on this issue. However, contrary to the statement included in paragraph 35, ESBG believes that payments or benefits should be reviewed in case of material changes and not on a standardised periodic basis, as the latter would only constitute a pure formality.

Looking at the concrete example of a good practise on recordkeeping on page 14 (bottom), ESBG considers that it would be too burdensome to record and track every relevant action. Recordkeeping should rather focus on documenting different case groups/ clusters of relevant cases. In addition, as a general rule, the principle of proportionality should be taken into account as far as the investment firm's internal organisation is concerned, aiming at avoiding an excessive administrative burden, incompatible with its business model.

Question II: Do you have any comments on CESR's views that specific responsibilities and compliance controls should be set up by investment firms to ensure compliance with the inducements rules?

ESBG considers that CESR's view is correct.

Question III: What are your comments about CESR's view that at least the general approach the investment firm is going to undertake regarding inducements (its 'inducements policy') should be approved by senior management?

ESBG in principle agrees with CESR's approach. However, it needs to be noted that the way the approval takes place may change between entities according to their internal structure.

Regarding example 1 on page 15, ESBG would like to clarify that the senior management (the board of directors or other persons who effectively conduct the business of the investment firm) approves the



general policy regarding inducements. The evaluation of a firm's practice should be based on the merits and effectiveness of the compliance system in place.

Proper fees:

Question IV: Do you agree with CESR's view that all kinds of fees paid by an investment firm in order to access and operate on a given execution venue can be eligible for the proper fees regime (under the general category of settlement and exchange fees)?

ESBG agrees with CESR's view. Without payment of these fees an order cannot be executed on a certain trading venue (chosen on the basis of the best execution rules).

ESBG clarifies that the list regarding proper fees, as presented in paragraph 43, should not be considered as being exhaustive.

Question V: Do you agree with CESR's view that specific types of custody-related fees in connection with certain corporate events can be eligible for the proper fees regime?

ESBG agrees with CESR's view and with the examples given in paragraph 45, notably regarding fees paid by the investment firm in connection with specific corporate events and payments to information service providers or consultants for the provision of investment related services.

Question VI: Are there any specific examples you can provide of circumstances where a tax sales credit could be eligible for the proper fees regime?

In ESBG's view there are no specific examples of circumstances where a tax sales credit could be eligible for the proper fees regime.

Payments and non-monetary benefits authorised subject to certain cumulative conditions-acting in the best interest of the client and designed to enhance the quality of the service provided to the client:

Question VII: Do you agree with CESR's view that in case of ongoing payments made or received over a period of time while the services are of a one-off nature, there is a greater risk of an investment firm not acting in the best interests of the client?

ESBG considers that the assumption that a fee structure which is based on on-going payments always bears more risk of an investment firm not acting in the best interest of the client than a fee structure based on up-front payments is incorrect and misleading. On the contrary, a fee structure based on ongoing payments may in particular be beneficial for investors who have limited funds to invest and will accordingly be unable or unwilling to pay a high direct up-front fee for investment advice. Moreover, the total amount of fees based on ongoing payments that is charged to the investor during the term of his investment is not necessarily higher than one-off fees. Finally, in case of an independent financial advisor who introduces clients to investment firms, a one-off payment could encourage more



frequent client turn-over whereas ongoing payments align the advisor's interests with those of the client, namely a long-term investment strategy.

Against this background, ESBG recommends applying of the following approach: Whether a fee scheme based on ongoing payments is in the best interest of the client (or not) must be determined on a case by case basis. This determination should take into account (a) whether the investment firm only provides a one-time service or also performs further ongoing services for the client and (b) whether there is an up-front payment at the time of the purchase of the investment product in addition to ongoing fees and, if applicable, what is the ratio between these two fee elements.

Question VIII: Do you have any comments regarding CESR's view that measures such as an effective compliance function should be backed up with appropriate monitoring and controls to deal with the specific conflicts that payments and non-monetary benefits provided or received by an investment firm can give rise to?

No comment.

Question IX: What are your comments on CESR's view that product distribution and order handling services (see §74) are two highly important instances where payments and non-monetary benefits received give rise to very significant potential conflicts? Can you mention any other important instances where such potential conflicts also arise?

ESBG recognizes that the described instances may give rise to potential conflicts of interest. ESBG, however, stresses that MiFID provides various mechanisms to deal with conflicts of interest where they actually occur.

Question X: What are your comments on CESR's view that where a payment covers costs that would otherwise have to be charged to the client this is not sufficient for a payment to be judged to be designed to enhance the quality of the service?

The fact that a payment covers costs that would otherwise have to be charged to the client is in itself not sufficient to determine whether such a payment is designed to enhance the quality of the service. It is not justified to generally label such fee structure as disadvantageous for clients. Against this background, ESBG proposes to abstain from a general classification of certain fee schemes as good or poor practice, but rather advocates for judging each system on a case by case basis. Accordingly, examples 2 and 3 (on page 25) should not imperatively be regarded as poor practices in respect of the MiFID rules on inducements. ESBG refers to Recital 39 of the MiFID Implementing Directive which states that *"For the purposes of the provisions of this Directive concerning inducements, the receipt by an investment firm of a commission in connection with investment advice or general recommendations, in circumstances where the advice or recommendations are not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the investment advice to the client."*



Payments and non-monetary benefits authorised subject to certain cumulative conditions-disclosures:

Question XI: Do you have any comments on CESR's views about summary disclosures (including when they should be made)?

No comment.

Question XII: What are your comments on CESR's views about detailed disclosures?

No comment.

Question XIII: Do you have any comments on CESR's views on the use of bands?

ESBG welcomes that CESR qualifies the use of bands in summary disclosures as permissible as long as the information enables an investor to make an informed decision whether to proceed with the service or ask for more information. Simultaneously ESBG highlights that contrary to what is mentioned in the last sentence of paragraph 114, the use of bands should be permitted beyond those situations where a firm cannot provide the amount prior to the provision of the relevant service. The use of very limited bands, contrary to poor practice 1 on page 35, would materialise in complex statistics for different asset classes, which would be difficult to understand for the client. A balance needs to be found between the understandable wish of having limited bands and giving overly complex information.

Question XIV: Do you agree with CESR's views on the documentation through which disclosures are made?

ESBG notes that CESR recognises that the Level 2 Directive does not prescribe how the information should be provided. ESBG agrees to the principles suggested in relation information provision, i.e. clear, comprehensive, understandable and non-misleading information. ESBG does, however, not share CESR's assessment regarding example 1 on page 38, being presented as a poor practise. The crucial element is that the client has complete access to the information in line with the principles quoted above; its inclusion in several documents should not be regarded as to the detriment of a fair and clear way to inform clients. Furthermore, ESBG does not agree that the use of an investment calculator, as presented in example 1 on page 37, is a good practice. Such a practice is in ESBG's view disproportionate in relation to the transaction volume or business model of smaller investment firms. The form of the provision of information should be left at the discretion of the investment firm as long as the information meets the conditions set out in MiFID (fair, clear and not misleading) and that the information is precise and meaningful for the clients.

Looking at paragraph 125 ESBG would like to clarify that not in all cases detailed disclosures (the last step) are provided to the client at the point of sale, as in some cases the client is asked whether he wishes to obtain detailed information or not.



Question XV: Do you agree with CESR's views on the difference of treatment between retail and professional clients?

ESBG agrees with CESR's view on the difference of treatment between retail and professional clients.



About ESBG (European Savings Banks Group)

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of € 5967 billion (1 January 2008). It represents the interest of its Members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG Members are typically savings and retail banks or associations thereof. They are often organized in decentralized networks and offer their services throughout their region. ESBG Member banks have reinvested responsibly in their region for many decades and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



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