COMMENTS ON THE CESR DOCUMENT ON INDUCEMENTS DRAWN UP BY THE WORKING GROUP ON MIFID ESTABLISHED BY THE FOGAIN MANAGING ENTITY, COMPRISING FIFTEEN SPANISH INVESTMENT FIRMS

I.- General considerations:

The FOGAIN working group considers that it is important to make the following comments on the general shortcomings in the document proposed by CESR:

1.1.- Collecting a certain amount of money is not the same as an inducement. It is only when this collection implies a position of conflict of interests, this concept being understood to be as described by the Whereas Clause 24 of the Directive 2006/73/EC, "it is not sufficient (for there to exist a conflict of interest) that the entity may obtain a benefit if there is not, at the same time, a possible disadvantage for the client. Consequently, it is only when a situation objectively produces this effect that one can talk of a conflict of interest. And this situation does not arise when a client invests in non-complex securities or in complex securities that are adapted to its appropriateness profile. In this sense, the objectification of the existence of a conflict of interest at the moment of providing the service to a client is essential, as the subscription for one fund (marketed by the entity) or another (not marketed by the entity) does not in any way represent a disadvantage for the client, who may potentially obtain a better return with the one subscribed to than with the one no longer subscribed to.

1.2.- If there is no conflict in interest in the sense referred to above, one cannot talk of an inducement, because of a question of the concept and purpose of the regulation. If there is not a conflict of interest, and even in this case, the payment were considered as an inducement, it would be an inducement for the entity to do or not to do...What? In what manner does it affect the client interests? Certainly, a payment or a collection is not in any way the same as an inducement.

1.3.- The above should lead to an analysis of everything referring to inducements from the conflict of interest point of view and submit the collections and payments to an analysis by the entities so as to be able to identify when an entity is placed in a conflict of interest situation so that it can manage this in accordance with its conflict of interest policy.

1.4.- This type of conflict of interest occurs only with regard to the advisory and portfolio management relations, when there exists a genuine obligation to know in detail everything about the client's investment requirements and through the corresponding contract between client and entity. This kind of conflict of interest does not arise in the marketing activity.

1.5.- The CESR document, therefore, has as its basis and incorrect interpretation of the regulation by being based on "whenever a payment is received there is the danger that the entity does not comply with its obligations for honest, professional and impartial treatment", a principle that can in no way be shared.

1.6.- The product marketing schemes, based on marketing agreements between the product provider and the marketers, do not come within the scope of inducements. These are commercial schemes in which a service is provided to the provider of the product and not to the client who is subscribing. This is the case both for distribution schemes for Collective Investment Schemes, and for the distribution of securities in the ambit of a Public Offer. This separation has to be clear in the final CESR document.

1.7.- From all of the above, it arises that the complex conceptual analyses on when a collection improves the quality of service or prejudices the possibility of honest, professional and impartial treatment of the client, were found to be out of focus in the CESR document, as such analyses should be carried out in respect of "inducements" and not in respect of "payments" arising from marketing relations. This type of payment is nowadays transparent for the regulator, does not create any conflict of interest in itself and has not presented any problems to date.

1.8.- The CESR report is of concern in that it upholds a broad interpretation of the concept of inducement, incorrect as mentioned above, which implies a radical alteration to the current schemes for marketing financial products, schemes that – being transparent to date for the regulator – have not posed problems for the honest, professional and impartial treatment of the client. Consequently, it should be concluded in the CESR document that current usual market practices are correct and concentrate on combating specific situations considered to be undesirable and in which conflicts of interest do arise. Similarly, a mechanism needs to be established that makes it possible to make all European Union entities know these practices qualified as undesirable. CESR could play an important role in this task.
The contrary would have counter-productive effects for clients, to the extent that the prohibition on current legitimate commercial practices that, we insist, have posed no problems, would imply a final increase in the cost of the product and service for the client.

II.- Answers to the questionnaire:

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?**

No. We refer to the general comments set out in section I of this document.

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?**

No. We refer to the comments set out in section I of this document.

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 on the client?**

No comment on this point. We refer to what is stated in section I of this document.

Question 4: **What, if any 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”?**

No comment on this point. We refer to what is stated in section I of this document.

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

As stated above, the consideration of a payment as an inducement should imply the prior existence of a conflict of interest, such that this payment effectively supposes an inducement for incorrect treatment of the client, and that the latter suffers a correlative disadvantage, which does not exist in the marketing activities where the client subscribes to non-complex products or that that meet the test of appropriateness.

CESR should provided higher levels of legal security to the entities by specifying what it understands by “disproportionate commissions”, in a way that aspects such as the way the commissions are set and the moment these are set (the time of initial launch of a product, for example) need to be taken into consideration.

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?

The factors are correct but taking into account that they should only be applied as established in section I of this document, i.e. in situations of genuine conflict of interest.

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?**

It would be positive for the entities to have a guideline on this point, although on the basis that (i) the information is useful for the client and not excessive, (ii) they do not unnecessarily prejudice the entities' legitimate commercial interests and (iii) the requirement to provide information is limited to those situations in which a genuine conflict of interest situation arises.

As for section (ii), this is of special concern and one should avoid by all means the possibility that any person, by the mere fact of approaching an investment firm is entitled to know the commercial terms of all of its contracts with third party entities, whether these are product providers or intermediaries.

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?**

Yes

Question 9: **Do you have any comments on CESR´s analysis of how payments between an investment firm and a tied agent should be taken into account under Article 26 of the Level 2 Directive?**

No comment on this point.

Question 10: **Are there any other issues in relation to Article 26 and tied agents that it would be helpful for CESR to consider?**

No comment on this point.

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

In accordance with what is stated in Section I of this document, this will be applicable when there exists a genuine conflict of interest (under the terms of the Whereas Clause 24 of Directive 2006/73/CE) between the entity and the client for the collection of the soft commission.

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

Yes, but taking the practices in the international financial markets into account.

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

Yes