

**INTESA SANPAOLO RESPONSE TO THE CESR CONSULTATION ON
INDUCEMENTS UNDER MiFID – RECOMMENDATIONS
SECOND CONSULTATION PAPER
CESR/07-228**

GENERAL COMMENTS

The Intesa Sanpaolo Group, created as from 1 January 2007 as a result of the merger of the Intesa Group and the Sanpaolo Group, is the largest banking group in Italy and one of the major players in the European market. It is active in the whole range of banking, investment and financial services, both as a distributor and as an originator of these services.

The Intesa Sanpaolo Group appreciates the transparent process followed by CESR to finalise its Level 3 work to ensure a consistent and coherent interpretation of MiFID. In particular, we are pleased to see that CESR has responded to the questions that we have raised in our response to the first consultation paper and in a few cases has made some steps forward in the direction advocated by the industry.

Moreover, we welcome CESR commitment to interpret the rules under this Article so as not to discriminate among different financial instruments and to signal any possible form of regulatory arbitrage to the Commission.

We take note that while CESR has confirmed its initial interpretation of Article 26, by stating that it covers any fee, commission and monetary and non monetary benefit, thus turning down the suggestions put forward by most of the industry, there is still need of clarification in relation to some kind of fees, on which we comment below.

COMMENTS ON THE CONTENT OF THE DRAFT RECOMMENDATIONS

Recommendation 1: General

CESR considers that:

(a) Article 26 of the MiFID Level 2 Directive applies to fees, commissions and non-monetary benefits paid by an investment firm or received by it in relation to the provision of an

investment or ancillary service to a client. Such fees, commissions and non-monetary benefits include commissions or fees that may be paid or provided to or by an investment firm and which are standard in the market;

(b) The application of Article 26 is the same in relation to a payment or non-monetary benefit provided/made to or provided by/received from a legal entity within the same group as the investment firm as it is to one provided/made to or provided by/received from a legal entity not within the same group as the investment firm.

As to paragraph (a) Intesa Sanpaolo takes note that CESR has i) confirmed its initial interpretation of Article 26 of the Level 2 Directive with the result that “any fee or commission or non monetary benefit” falls under its scope and ii) abandoned the “proportionality test” proposed in its first Consultation Paper. Therefore, in our view, commissions or fees that are standard in the market should be considered under a qualitative point of view, rather than under a quantitative one.

In order to provide the industry with more clarity, we would like to suggest, therefore, that the assessment of a standard commission be carried out exclusively on the basis of a qualitative criterion, by making reference to the types of commissions customary to market practices.

Recommendation 3: Article 26 (c) of the Level 2 Directive

CESR considers that:

The list of items mentioned within Article 26(c) of the Level 2 directive is not exhaustive, but in considering whether items that are not specifically mentioned also fall within Article 26(c) the factors that are mentioned within it need to be considered. Of particular importance is whether an item by its nature cannot give rise to conflicts with the firm's duty to act, honestly, fairly and professionally in accordance with the best interests of its clients.

Intesa Sanpaolo welcomes the new interpretation of Article 26 c), which confirms the non exhaustive nature of the items listed therein, which we advocated in our response to the first consultation. However, it should be borne in mind that these guidelines have to be applied in practice to concrete cases, which may vary from Member state to Member state, whose peculiarities should be taken into account by local Regulators.

Recommendation 4: Factors relevant to arrangements within Article 26(b)

CESR considers that among the factors that an investment firm should consider in determining whether an arrangement may be deemed to be designed to enhance the quality of the service provided to the client and not impair the duty of the firm to act in the best interests of the client are the following:

(a) The type of the investment or ancillary service provided by the investment firm to the client, and any specific duties it owes to the client in addition to those under Article 26, including those under a client agreement, if any;

(b) The expected benefit to the client(s) including the nature and extent of that benefit, and any expected benefit to the investment firm; the analysis about the expected benefit, can be performed at the level of the service to the relevant client group;

(c) Whether there will be an incentive for the investment firm to act other than in the best interests of the client and whether the incentive is likely to change the investment firm's behaviour;

(d) The relationship between the investment firm and the entity which is receiving or providing the benefit (although the mere fact that a group relationship exists is not by itself a relevant consideration);

(e) The nature of the item, the circumstances in which it is paid or provided and whether any conditions attach to it.

Intesa Sanpaolo supports CESR's proposed factors enabling investment firms to determine whether arrangements are enhancing the quality of services provided to their clients. However, we would like to point out that clients do not always bear the costs of the payment or receipt of monetary or non monetary payments, since there are cases as for initial public offerings or offers for sale, where these payments are totally supported by issuers. We would like therefore CESR to amend paragraph 13 of the consultative paper accordingly.

Recommendation 5: Recital 39 to the Level 2 Directive

CESR considers that:

(a) Recital 39 makes clear that where an investment firm provides investment advice or general recommendations which are not biased as a result of the receipt of commission then the advice or recommendations should be considered as having met the condition of being designed to enhance the quality of the service to the client. The other conditions of Article 26 (b) – disclosure, and, the obligation not to impair compliance with the duty to act in the best interests of the client – must be met;

(b) Recital 39 is relevant to cases in which an investment firm is giving unbiased investment advice or general recommendations. It is not exhaustive and does not prohibit other distribution arrangements under which an investment firm receives a commission (from, for example, a product provider or issuer) without giving investment advice or general recommendations. For these cases, payments can be seen as being designed to enhance the quality of the service to the client by allowing a given investment service to be performed over a wider range of financial instruments. The other conditions of Article 26 (b) – disclosure, and, the obligation not to impair compliance with the duty act in the best interests of the client – must be met.

As to part b) of Recommendation 5, Intesa Sanpaolo appreciates the wider reading of Recital 39 thus allowing also the possible inclusion of other cases under its scope, as fees and commissions paid by the issuer for the placement of its products.

However, in our view, this kind of fees should rather fall under Article 26 a), since the fees are paid by the issuer to the service provider. An example to support our view would be the case of a client placing an order with an investment firm in connection with an offer for sale or a takeover bid: here the client does not bear any cost, since

the investment firm is remunerated by the issuer/offerer on the basis of a contract. This case should fall, in our view, within Article 26 a), since it can be considered as a payment made by the client i.e. by the issuer/offerer to the investment firm for the services it provides, that is placement or reception and transmission of orders. We would appreciate if CESR could confirm this and insert our example in the illustrative list.

Moreover, we would be pleased if CESR could confirm that the so called *commissioni di mantenimento*, i.e. management fees charged to the mutual funds assets and part of which is paid by the asset management company to its distributors on a regular basis, can be contemplated by Recital 39. In fact, in our view, such distribution arrangements allow investors to benefit from a larger range of products and thus from an enhancement of the quality of the service to clients. We would suggest CESR to modify example IX accordingly (see modified text below) in order to avoid any doubt in its interpretation.

Recommendation 6: Disclosure under Article 26(b) of the Level 2 Directive

CESR considers that:

(a) in order to contain the "essential terms" a summary disclosure must provide adequate information to enable the investor to relate the disclosure to the particular investment or ancillary service that is provided to him, or, to the products to which it relates, to make an informed decision whether to proceed with the investment or ancillary service and, whether to ask for the full information;

(b) a generic disclosure which refers merely to the possibility that the firm will or may receive or pay or provide items within Article 26(b) is not sufficient to enable a client to make an informed decision and therefore will not be considered as providing the "essential terms of the arrangements" referred to in Article 26 of the Level 2 Directive;

(c) when a number of entities are involved in the distribution channel, each investment firm that is providing an investment or ancillary service must comply with its obligation of disclosure to its clients.

As to the explanatory text of paragraph 23 of the consultation paper, Intesa Sanpaolo believes that CESR text by referring to each firm in the chain departs from paragraph 32 of the first consultation paper in relation to the case of a chain of intermediaries. We rather believe that, as stated by CESR in its first consultation paper, "the items that Article 26 requires to be disclosed in relation to the final client, are those received by or provided by the last intermediary in the chain – that is, the investment firm that is providing the service to that client".

ILLUSTRATIVE EXAMPLES TO SHOW THE APPLICATION OF THE RECOMMENDATIONS

Intesa Sanpaolo would like CESR to modify example IX as proposed below, in order to specifically taking into account commissions paid *una tantum or periodically* by the product provider or a member of its group.

- IX. An investment firm that is not providing investment advice or general recommendations has a distribution or placing agreement with a product provider or issuer to distribute its products in return for commission paid, una tantum or periodically, for by the product provider or a member of its group.*

In such a case the investment firm will be providing an investment service to its end clients; in the absence of payment by the product provider or issuer these investment services, most likely, would not be provided; therefore, the payments may be seen as being designed to enhance the quality of the service to the client. The other elements of Article 26 (b) must also be met and in considering this, Recommendation 4(c) in particular may be relevant.

For any further comments or questions, please contact:

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Brussels, 27th April 2007