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Mr. Fabrice Demarigny
Secretary General
CESR the Committee of
European Securities Regulators
11-13 avenue de Friedland
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Via CESR's website

Subject: Inducements under MiFID – Second consultation paper.

Assoreti – National association of Companies (mainly, banks and investment firms) that provide outside their premises financial instruments and investment services through financial promoters – has carefully read the second consultation paper and wishes to express its utter appreciation for the hard work executed by the CESR in developing recommendations that take into account the views of market participants.

Assoreti is now interested in focusing its responses on the innovative parts of the Second consultation document.

Question 1: Do you have any comments on the content of the draft recommendations?

According to draft recommendation 5, recital 39 to the Level 2 Commission Directive 2006/73/EC – that clearly refers to cases in which an investment firm receives a commission in connection with the provision of investment advice or general recommendations – is also relevant to cases in which an investment firm receives a commission, without giving investment advice or general recommendations: therefore, the conditions of art. 26 (b) must be met.

In this respect, Assoreti – in sharing the representation underlying the mentioned analogy – desires to examine the case in which the placement and maintenance commissions are paid *directly* by the client to the investment firm for the provision of placement services and that the investment firm (for purely organizational choices, standardized on the basis of honest market practices) pays to the product providers that will repay to the investment firm.



These commissions represent the remuneration paid by the client for: i) the placement of financial instruments and financial services (placement/distribution fees) and ii) the activity of customer care (management fees). The commission to enter, less and less applied, represents the remuneration for the first placement of financial services, whereas the maintenance commission represents the remuneration for the activity of customer care provided during the contract; actually these latter commissions answer to the needs of retail investors.

There is no doubt that – as clearly stated in recital 39 to the Level 2 Commission Directive – those commissions should be considered as designed to enhance the quality of the service to the client by allowing the investment service to be performed over a wider range of financial instruments and to guarantee customer care during the contract.

Indeed, the case in issue is beyond the case provided for by the mentioned recital 39: in the case in issue commissions are the remuneration that the client pays to the distributor in relation to the provision of the activity of customer care, that the client expects. In fact, in Italy the client is informed of the circumstance that the commissions he pays to the distributor are designed to remunerate both, the distributor and the product provider. The prospectus for retail clients buying units in a UCITS includes disclosure of all commissions (in percentage rates) that the client pays to the distributor. This is also the view that this Committee seems to shares in the *Questionnaire on simplified prospectus for retail investors* (ref. CESR/07-214, question 6, where it refers to the disclosure of the commission split between the fund's producer and distributor).

Therefore, the disclosure requirement, provided for by art. 26 (b), i), is already met in Italian legal system with *ad hoc* rules. Should rules on inducements be applied to those commissions, these national rules will become useless.

The assessment of the factors that an investment firm should consider, *ex draft recommendation 4*, confirms the circumstance that the case in issue is beyond the scope of recital 39 to the Level 2 Directive.

In CESR's view, within draft recommendation 4, factor (c) is particularly relevant (factors (a), (b), (d) and (e) are likely to be met): this factor (c) (according to which it has to be assessed 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) demonstrates exactly that the case in issue is beyond the scope of inducements regulation. Then, the remuneration (disclosed and proper) in relation of the provision of placement service cannot constitute *per se* an incentive, moreover when it is disclosed to client and paid by the client to the distributor.

The mere fact that the commission passes through the bank account of the product provider, instead of being paid directly to the distributor, is clearly immaterial. In such a case, as said, the client directly pays the commission; so that it



falls within the scope of art. 26 (a) of the Level 2 Directive (different being the case, provided for by in the recital 39, in which the commission is paid by the product provider).

A different approach would engrave the remuneration of the placement service, which is standardised according to formalities that have nothing to do with public law, and would direct investment firms' behaviour, imposing different organizational solutions from those in use.

Question 2: Will the examples prove helpful in determining how Article 26 applies in practice? What other examples should be covered or omitted?

Question 3: Do you have any comments on the analysis of the examples?

That being stated, it has to be noted that the Italian industry of distributors of financial products is keen to clarify that placement and maintenance commissions are the remuneration for the provision of financial services and that they do not constitute inducements.

In this contest, Assoreti would ask CESR to provide other examples in which art. 26 of the Level 2 Directive is not relevant; more particularly, to provide examples in which it is clear that placement and maintenance commissions are not *per se* inducements when they are paid by the client as remuneration of the placement of financial instruments and financial services and for the activity of customer care (even when these commissions pass through the product provider and are repaid pro rata from the product provider to the distributor).

Indeed, it is true that certain ways of remuneration's determination may likely impair compliance with the firm's duty to act in the best interest of the client: these cases are anomalous cases that may not be confused with the remuneration (lawful and worthy in consideration) paid to the industry of distributors of financial products.

In this contest, Assoreti would like that CESR provides for the following example.

An investment firm has distribution or placing agreement with several product providers to distribute their products, in return for commissions that are different from one to another.

In this case, rigidly reasoning according to formal schemes that don't keep in mind market practices, it could be believed that investment firms can have an incentive to distribute first of all the products of the product providers that offer the highest commissions. This approach, however, would entail the return of the placing of "one brand" products and, consequently, would reduce the competition in the market. This approach would also induce to appraise as a negative circumstance the existence of different commissions and would induce the investment firms to a



levelling of commissions, that certainly does not comply with market rules. Assoreti is, therefore, absolutely convinced of the fact that the case in issue cannot be looked at as inducement; otherwise, CESR's recommendations would impair Italian legal schemes (as well as the freedom of the market to operate in regime of free commissions) and would unequivocally address the organizational and operational choices of the investment firms.

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In conclusion, Assoreti hopes that this Authority, in its final recommendations, will clarify that placement and maintenance commissions are the remuneration for the provision of financial services and that they may not be confused with inducement.

Thank you in advance for your kind attention on the above-mentioned considerations.

Yours sincerely.


Marco Tofanelli