

TO: CESR - Committee of European
Securities Regulators
11-13 Avenue de Friedland
75008 Paris

Ref: CESR / 07-228

Milan, 27th April 2007

ANASF COMMENTS ON

“Inducements under MiFID” Second Consultation Paper

ANASF (Associazione nazionale promotori finanziari) is the main professional association which represents the Italian financial advisors (promotori finanziari) and has about 12.000 members. ANASF is pleased to have the opportunity to take part in the second public consultation on ‘Inducements under Mifid’ and to offer its opinion.

1) Preliminary comments

First of all, request is made to make a preliminary comment on the method and merit.

1.1. Preliminary comment on the method

The second consultation document on *inducements* was published with the aiming of diffusing recommendations for facilitating a uniform application of Art. 26 of the second level Directive. The recommendations will be used by the competent Authorities, members of CESR, on a voluntary basis, in their daily activities of control on qualified intermediaries.

It is considered that, on a matter as important as *inducements*, it is necessary to clarify the content of the definition and the sphere of application. However, this must comply with the formulation of the first and second level Directives and, as a result, to the implementation regulations of first and second level of the Member States, even before concerning the supervision activity of the control Authorities.

Considering that the terms for the implementation have expired (31 January 2007) and many Member States and, consequently, many control Authorities, CESR members, to whom the task of diffusing the secondary implementation regulations was attributed, have still not complied with that requirement, there is a serious risk that the consultation document on the application during supervision, in reality becomes a direction tool in the diffusion of the implementation regulations on *inducements*.

As a result, it is considered that it would preferable proceed in a more appropriate place where amendments to the MIFID and second level Directives can be discussed.

1.2 Preliminary comment on merit

The comment above becomes even more important if it is considered that CESR has reiterated the opinion that fees and standard commissions fall within the provisions in the context of Art. 26 of the second level Directive. In particular, CESR believes that this article should be interpreted in the light of Art. 19 of MIFID and, therefore, Art. 26 covers all fee, commission and non-monetary benefit that an investment firm may receive or pay, connected to the provision of an investment or ancillary service, taking into account that investment firm must act honestly, fairly and professionally in the best interests of the client.

The association writing intends to re-iterate, however, that the payment of commissions and fees, including non-monetary ones, which are the direct payment for a service carried out in favour of a client, should not fall under the regulations of *inducements*. Subjecting these payments to *inducement* regulations will create distorting effects and, in fact, many of the hermeneutic problems connected with the interpretation of Art. 26 do not arise so much from its content or the conduct set out as, on the contrary, from an incorrect initial interpretation which tends to make it subject to the patrimonial attribution regulation which, by their nature, should remain extraneous.

In other words if, only commission payments and fees, including non-monetary ones, which don't arise from the direct provision of investment or ancillary services, were brought under Art. 26, there would be a discussion on the treatment and transparency of true commission refunds or the payment of *hard* and *soft commissions*, which have always been a feature of the best interpretation of the subject of *inducements*.

2) Placing agreements between product provider and placing intermediary. Example IX of the document

Reference is made in example IX of the consultation document to the case in which a financial intermediary, who does not provide investment advice or general recommendations, has a placing agreement with a product provider or a issuer for the collocation of its products and, in accordance with this agreement, commissions are paid by the product provider, the issuer or a company of the group. In the example, it is recognised that in this case the placing intermediary provides an investment service for the final clients. It then states that, if no payment is made, these services would not have been made and therefore, these payments can be seen as a way of increasing the quality of the customer's service. According to CESR, such payments fall under the

regulation of *inducements* and are legitimate, on condition that, Art. 26, (b) and Recommendation 4 of the consultation document are respected.

Disagreement is expressed for two reasons. Firstly, it should be noted that, based on placing agreements like, for example, those between a management company and the placing intermediary, the product provider undertakes to make the placing intermediary a payment of an amount proportionate to the entrance and/or performance and/or management commissions received by the company. Recognition of this payment is the remuneration for the service given by the placing intermediary and, as a result, is not an *inducement*.

It is the payment for the activity of the placing intermediary which consists of both the promotion and placement of products and care of the investor in the stage after signature (collection and transmission to the product provider of any successive operations organised by the investor). That being said, it seems consistent that the placing intermediary is paid in proportion to the overall activity carried out and receives, therefore, a payment for each of the functions performed in providing that activity.

Further, if it is considered that the notion of *inducement*, noted on the subject of conflict of interest by Article 21, paragraph 1, (e) of the second level Directive (i.e. performance of money, assets or services other than the commissions or fees normally invoiced for the investment service), the conclusion that the payment of commissions to the placing intermediary by the product provider should not fall into that notion, is strengthened. It is payment which is not different from the commissions or fees normally invoiced for the service given by the placing intermediary in the interest of the product provider, for which it is the normal payment.

In the second place it is noted that, even if there was the intention to accept the interpretative position of the CESR, according to which all payments received by an intermediary are relevant, for the purposes of *inducements*, the statement in example IX, in which payment of the sum should respect the requirements set out in (b) of Art. 26, is not shared. Payment to the intermediary in this case would not be made by a third party or on his behalf, as is supposed by (b) of Art. 26 of the second level Directive (which states “*fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied:...*”).

On the contrary, payment is made by the product provider which is a client of the placing intermediary, to the extent that there is a contract, the placing agreement, which orders the relationship between the parties in terms of behaviour, responsibility, sureties and economics. Therefore, the same result would be achieved if it was believed that the product provider paid on behalf of the final clients. They, too, are clients of the placing intermediary who, by definition, carries out his services for third parties and, therefore, the final clients, who are clients of the intermediary as destinees of the distribution service for which the intermediary was originally authorised.

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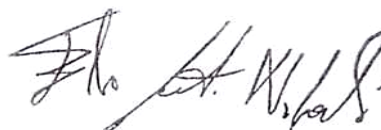
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From the above, it follows that, even if monetary and non-monetary payments made by the product provider to the placing intermediary were made subject to the regulations of *inducements*, the only result would be the confirmation of their legitimacy as per Art. 26, para. 1, (a). Neither the requirements of Art. 26 (b) nor the duty to disclose to client set out in (b) (i) and clarified by the last sentence of Art. 26, would not be applied for the above reasons.

As a result, request is made through this note to exclude the above remunerations from the regulation of *inducements* or, subordinately, to rephrase example IX excluding applicability to the requirements of (b).

We remain available for any further clarification you may require.

With kindest regards.



The Chairman
Elio Conti Nibali