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ASSOCIAZIONE
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Prot. 89/09

CESR
11-13 avenue de Friedland
75008 – Paris
France

Re: Consultation paper on good and poor practices under inducements rules.

ASSOSIM[1] is grateful for the opportunity to express its view on the consultation hereof and appreciates the work that CESR is carrying out to provide firms with a benchmark against industry compliance with the MiFID inducements rules.

As to the specific questions raised in the consultation paper, please find here below our comments.

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

We agree with CESR's view according to which each intermediary has to adopt a specific inducement procedure. In our view the procedure should:

a. lay down specific guidelines in order to:
   (i) detect any kind of payment or non-monetary benefit paid or received by the intermediary relevant under article 26 Level 2 Directive; and
   (ii) classify any payment or benefit under article 26 Level 2 Directive, letter a), b) or c); in this respect we believe that the procedure should set out some clear examples of what should be classified as inducement under letter a), b) or c);
b. charge front-office functions (herein after "the business") to identify and classify in practice, according to the guidelines, payments and non-monetary benefits paid and/or received by the intermediary;

[1] ASSOSIM (*Associazione Italiana Intermediari Mobiliari*) is the Italian Association of Financial Intermediaries, which represents the majority of financial intermediaries acting in the Italian Markets. ASSOSIM has nearly 80 members represented by banks, investment firms, branches of foreign brokerage houses, active in the Investment Services Industry, mostly in primary and secondary markets of equities, bonds and derivatives, for some 82% of the total trading volume.

c. provide the involvement of legal or compliance functions whenever a new kind of payment or non monetary benefit, not yet included in the guidelines, has to be classified and/or in each case when the classification of payment and/or non monetary benefit is doubtful;
d. assign the duty to perform specific controls over the proper and accurate application of the guidelines to the compliance function.

In general terms, we believe that the way through where intermediaries grant the compliance with the inducements rules should be self governed by each intermediary. CESR'S recommendations should not be so detailed to replace the intermediary's discretion. Hence, it should be highlighted that procedures not based on CESR's recommendations shall be deemed appropriate provided that they are compliant with inducements rules.

According to the above and with reference to paragraphs 35 and 36, we believe that a preliminary survey of all payments and/or non-monetary benefits paid or received by the intermediary is a self-regulation option. However, we believe that such a survey in not necessary in order to define compliance and effective classification criteria. In addition, it should be considered that the mentioned survey could be too time consuming to perform with reference to the amount of payment transactions and non monetary benefits and to the size of the firm.

According to article 6 of the Level 2 Directive, investment firms are required to establish, implement and maintain adequate arrangements and procedures to deal with their obligations under MiFID. According to CESR, these obligations also include the duty to record information and data disclosed to clients on inducements. We agree with CESR's view provided that intermediaries are not obliged or recommended to maintain a dedicated register for the purposes above. As a matter of fact, inducements' disclosure to clients is already performed through durable media (*e.g.* recorded phone calls and/or registered letters) which may be easily conserved without the need of setting up a dedicated register.

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

We agree with CESR's view that specific compliance controls must be set up in order to assess, on an ongoing basis, the adequacy of the measures and procedures put in place in accordance with the inducements' rules. We believe that such controls should be carried out by the compliance department according to the intermediaries' procedures. On the contrary, the assessment under inducements' rules of the payment or non monetary benefits must be performed by the business itself. In the case of complex or doubtful situations, the business may involve a lawyer of the legal department or a compliance officer for advice.

QIII: 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?

In our opinion the adoption of the inducement policy must follow the corporate governance rules which are in force in the relevant country of incorporation of the intermediary.

QVII: 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?

We agree with CESR's view that on-going payments made or received over a period of time while the services are of a one-off nature may impair the investments firm's duty to act in the best interest of the client. However, we believe that on-going payments related to one-off services shall be admissible provided that the distributor or the introducing broker which receives the on-going payments supplies post-sales assistance to the client. Our view is that this kind of assistance increases the quality of the provided services to the client without impairing the duty to act in the best interest of the client.

QVIII: 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?

According to CESR's view, where investments firms provide (i) investment advice and/or general recommendations and/or (ii) portfolio management services to clients, there is a significant risk that payments and/or non-monetary benefits paid or provided by the issuer or the CIS impair the duty of the firm to act in the best interest of the client.

We agree that in all cases where an intermediary distributing a service or a product receives payments from a third party there would be a conflict of interest issue to be managed adequately by the investment service provider.

In our view conflict of interest situations arising from third party payments must be managed through conflict of interest's policies which are already adopted by intermediaries according to the article 18 Level 1 Directive. We believe that controls and monitoring activities aimed at assessing the compliance of payments and/or non monetary benefits paid or received should be embedded in the ordinary control-monitoring system of the intermediary. The nature of the conflict of interest arising from inducements is no different from other conflicts of interest. Therefore, those conflicts do not require specific handling tools or procedures other than those already in force by the intermediary.

In addition, we would like to point out that a strict application of conflict of interest's policy, suitability test, and execution or transmission policies must be considered sufficient to ensure that the firm is acting in the best interest of the client according to article 26, letter b), item ii) Level 2 Directive.
In particular, execution and transmission policies are adopted with the sole purpose of ensuring that intermediaries act, in any case, in the best interest of the clients by selecting and choosing brokers or execution venues on the bases of the quality of the services provided. Payments or non monetary benefits received by brokers, transmitters of orders and asset managers are not considered as execution factors in the selection process. Therefore there is no risk that such payments or non monetary benefits affect the intermediary's duty to act in best interest of the client.

With reference to the investment advice service, the advisor is required to perform a suitability test in order to assess the suitability of the product or service recommended. Payment or non monetary benefit received by the advisor does not impair its duty to act in the best interest of the client. In fact, if only one product is suitable among those recommendable by the advisor, no conflict of interest may arise from inducements paid to the advisor by the issuer or CIS. In the event that more than one product is suitable for the client, the duty of care bearing upon the advisor, according to the advisory mandate, obliges the advisor to recommend the most suitable product. Therefore, also in this case, the selection of the product is not affected by inducements received by the advisor.

QIX: What are your comments on CESR's view that product distribution and order handling services (see paragraph 74) are two highly important instances where payment 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?

In general terms, we agree with CESR's view that payment and non-monetary benefits received by order handling service providers and/or distributors may give rise to conflict of interest. Moreover, we do not see compliance risks to be no higher than those relative to the other investment services. Furthermore, a strict application of execution and transmission policies, conflict of interest's policy and suitability test, if any, should be deemed sufficient to ensure that the firm is acting in the best interest of the clients.

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

In general terms, we do not believe that the total or partial coverage by third parties of costs otherwise to be charged to clients would not be sufficient to enhance the quality of the service provided. The compliance under inducements' rules of such payments should be assessed on a case by case basis. In particular if the coverage of such cost is effective and it is not indirectly paid by the client we believe that the enhancement of the quality of services must be matched.

QXI: Do you have any comments on CESR's views about summary disclosure (including when they should be made)?
QXII: What are your comments on CESR's views about detailed disclosures?

We agree with CESR's view that detailed disclosure should mention the exact amount of third party payments and non-monetary benefits provided or received by the intermediary. When the amount of the payments cannot be calculated in advance than a reasonable band range payment can be disclosed, together with the calculation method, before the service is provided. The exact amount of the inducement will be disclosed once the same is paid or received.

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

We would like to point out that, in particular situations, it could be necessary to use large bands in the summary disclosure for commercial reasons. It should be noted that summary disclosure is circulated through standard documentation that may likely become public. Setting out inducement percentages in such documentation implies that the same become public too while it would be sufficient that inducements are disclosed only to the clients. This may affect competition among different distributors of the same product which normally receive different rebate percentages with a negative impacts for the issuer and, subsequently, for the clients. For this reason, and considering that the client may request a detailed disclosure at any time, we believe that using large bands in the summary disclosure should be considered acceptable.

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

In general terms, we agree with CESR's view. However, we believe it is acceptable that, in some circumstances, the summary or detailed information provided to clients is included in a combination of more than two documents which, together, may be considered as matching the required information.

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

We agree with CESR's view that professional clients have the knowledge and experience to make independent investment decisions and are not completely affected by the information disclosed through the summary and detailed disclosure. Therefore, we believe that investment firms should take this into account when providing professional clients with the summary and detailed disclosure.

Further comments

According to article 26 Level 2 Directive, discount of exchange, brokerage, custodian fees and other payments may fall under the inducements discipline. In this regard, we would like to point out that such discounts should not necessarily be considered as inducements under article 26 letter b) L2 Directive. We believe that discounts and the relevant payments must be viewed as a single transaction. Therefore, we think that it is more appropriate that such discounts should be classified under letter a), b) or c) depending on the previous classification (under letter a), b) or c)) of the payments to which the discounts pertain.

With respect to paragraph 65 of the consultation paper, we believe that marketing material provided to distributors should not be classified under article 26. As per MiFID principle of "know your merchandise", the complete understanding of the products distributed to clients is a key issue for the distributor who is in charge of performing suitability and, if this is the case, appropriateness tests. Therefore, marketing material (*e.g.* brochures and illustrative material related to the specific products or distributed services) should be considered as a binding part of the understanding process in order to allow the distributor to operate in the best interest of the clients.

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We remain at your disposal for any further information and clarification.

Yours sincerely,

Gianluigi Gugliotta
Secretary General