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Guidelines on certain aspects of the MIFID compliance function requirements

UNI Europa Finance is the European-level trade union body for the finance sector. It represents 100 unions with 1.5 million workers in the banking and insurance industries. It is part of UNI Global Union and recognised by the European Union as a social partner. UNI Europa Finance welcomes the initiative of ESMA to undertake a consultation on the compliance function, which is of utmost importance for MIFID.

Our responses are based on a European project done in 2011 under Italian leadership. Trade unions in France, the UK, Spain, Greece, Slovakia, the Czech Republic and Hungary have participated in it¹. It gives an indication about the problems which arise for employees in the finance sector when complying to MIFID. Importantly, the issues facing employees following the implementation of MiFID 1 are directly correlated to investor protection issues and are undermining a major MiFID objective. For further information, please refer to the project website: <http://apf.fiba.it/mifid.nsf>.

Question 1:

¹The trade unions which have participated in the project are : FIBA-CISL (Italy), leader of the project, BBDSZ (Hungary), CFDT-Banques (France), FES-UGT (Spain), OSPPP (Czech Rep.), OTOE (Greece), OZPPaP (Slovakia), UNITE, and UNI Europa. The website of the project is : <http://apf.fiba.it/mifid.nsf>

UNI Europa Finance welcomes the fact that the compliance function is associated to the process of introduction of new business fields and changes in the investment firm structure. It might be useful to clarify that it is important to extend the compliance function also to the authorization of new products. Compliance could then issue an expert opinion on their usefulness and compliance with investment rules.

Sales objectives are widely used in banks and are potentially damaging the provision of objective services. According to our survey, they do not necessarily take into account client profiling. For employees, the use of these targets (and the associated incentive systems, see below) puts employees in a catch 22 situation: either the relationship officer takes into account the profiling and “misses” a sales opportunity, or he/she gives correct advice and may have difficulties in meeting the objectives. Therefore, we would advocate that compliance looks at the appropriateness of sales objectives, and their potential detrimental effect on investor protection.

It is of utmost importance that incentive systems are monitored by the compliance department. Our survey shows that the current situation with the imposition of individual goals is forcing employees to sell the wrong product to a client in order to meet objectives and receive the largest amount of variable pay. It should further be insured that incentive systems are made public and that clients know if a relationship officer receives commissions for MIFID products. Conflict of interest in the sales situation and in particular the issue of remuneration based directly or indirectly on the sale of investment products should be addressed by compliance with a view to ban these practices.

Question 3:

In the reporting obligations, article 20.(a) states that ...desk based review including breaches and deficiencies in the investment firms’ organization...”should be performed by compliance.

In our survey, it appears that compliance with internal rules is sometimes impossible due to the way work is designed. For example, the pressure and the lack of time to develop well the work obliges in some cases employees to fill in the questionnaires of suitability and appropriateness in place of the clients, because some clients do not understand them. This would generally constitute a breach of internal rules. For the employee, total compliance is a catch 22 situation (see above): either he forces the client to fill in the questionnaire himself, despite his unwillingness, and loses a sales opportunity, or he sells the product and breaches the rules. Therefore, compliance should also ensure that work is organized in a way which enables employees to respect the rules. As employees are the ones who know work best, this should be done in consultation with employees or their representatives. All too often, management of banks or investment firms just discharge themselves from responsibility by editing new rules and disregard the fact whether the rules are applicable or not.

Point 23: “additional reporting lines”: reporting is often used to hide problems which should be resolved in a different way. Our study shows that reporting has increased with MIFID. For employees, this means an increase of workload, because no additional hires have been made in order to tackle the additional workload.

Adding reporting does not necessarily mean that management has a better insight. On the contrary, it may even lead to an overflow of information and cannot be used. As a basic

rule, it should be ensured that hierarchy has in depth experience of the work which is performed. In this case, management does not need a huge amount of reporting. Indeed, with the technique of "management by objectives", hierarchy often manage their teams with excel sheets and reporting rather than with competent advice. This has a direct influence on work conditions and employee health.

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Question 4: Training

Our survey has shown that many employees feel that they have not received sufficient training. Often, MIFID regulations are taught by e-learning. This is not sufficient for a real appropriation of the topic.

In addition, employees also complain about a lack of product training, although the employee is supposed to know perfectly all the products he sells.

This introduces again the problem of product complexity: if employees, as salespersons in banks, do not understand a product, the compliance should be able to prohibit the sale of these types of products.

Question 7 and 8: Independence of the compliance officer

Yes, we agree.

The compliance officer has by all means to be independent both from an organizational point of view and from business units.

In this paragraph IV.III , it is important to introduce the whistle blowing function, which is generally performed through the compliance officer. This function is covered by Article 77 of the new directive "Reporting of breaches". Banks generally use the compliance officer for reporting of breaches. In order to ensure confidentiality, it is important that the compliance function is absolutely independent and has the highest moral values. Moreover, the compliance function should ensure that there is (i) adequate protection for employees who report the breaches, (ii) protection for both the whistleblower, the person who is allegedly responsible for the breach and any further witnesses and (iii) a procedure which gives access to legal assistance to the whistleblower and the allegedly responsible person.

Question 10:

We agree with the fact that the compliance function shall be as independent as possible. In particular point 52. "Compliance staff should not be involved in the activities they monitor." is of special importance. See above comment on whistle blowing.

Question 11: Outsourcing

Compliance functions should not be outsourced. An institution has to ensure for itself that it is compliant to business standards and rules and regulations. A centralized compliance function may exist in order to coordinate compliance in the different subsidiaries of a group.