THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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CESR Level 3 Recommendations on Inducements under MiFID

Feedback Statement

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Background

1. This Feedback Statement provides a summary of the main comments received by CESR to its two consultations on its proposals for recommendations on the consistent implementation of Article 26 of the MiFID[1] Level 2 Directive (2006/73/EC), entitled "Inducements", along with some explanation of CESR's final approach to the issues raised in the consultations. It complements CESR's publication of its final recommendations to its members.

2. Article 26 of the MiFID Level 2 Directive sets requirements in relation to the receipt or payment by an investment firm of a fee, commission or non-monetary benefit that could, in certain circumstances, place the firm in a situation where it would not be acting in compliance with the principle stated in MiFID Article 19(1) for a firm to act honestly, fairly and professionally in accordance with the best interest of its clients.

3. In its first consultation paper *Inducements under MiFID* published in December 2006 (CESR/06-687) CESR explained that it was considering issuing recommendations to its members with the aim of fostering supervisory convergence and consistent implementation of Article 26 of the MiFID Level 2 Directive (2006/73/EC) entitled "Inducements". The consultation paper presented proposals and questions the responses to which would enable CESR to develop the recommendations.

4. The public consultation allowed CESR to understand and to take into account the views of market participants (industry and consumers). All public responses are published in the CESR web site in the section "consultations". Following the consultation, CESR decided to issue recommendations to its members for them to apply in their day-to-day supervisory practices. In order to facilitate an open and transparent process CESR decided to consult further on a draft of its recommendations before issuing them to CESR Members.

5. This second consultation paper *Inducements under MiFID: Recommendations* (CESR/07-228) was issued on 13 April 2007 and included a draft of the recommendations that CESR proposed to make to its members. The consultation period closed on April 27 2007. In response to the consultations, CESR received a total of 101 formal responses, 66 to the first consultation paper and 35 to the second. Open hearings were held in Paris to hear views on each of the consultation papers and the first consultation paper was discussed at CESR's Consumer Day. Copies of the formal responses are published on CESR's website. A list of respondents to the consultations is attached in the annex.

[1] The Market in Financial Instruments Directive (2004/39/EC).

CESR

FEEDBACK ON RESPONSES TO THE FIRST CONSULTATION ON INDUCEMENTS

General explanation and relationship with conflicts of interest

1. In its first consultation paper CESR explained its general understanding of Article 26 of the Level 2 Directive and its relationship with Article 21 of the Level 2 Directive which deals with conflicts of interest. CESR asked:

Question 1: Do you agree with CESR that Article 26 applies to all and any fees, commissions and non-monetary benefits that are paid or provided to or by an investment firm in relation to the provision of an investment or ancillary service to a client?

Question 2: Do you agree with our analysis of the general operation of Article 26 of the MiFID Level 2 Implementing Directive and of its interaction with Article 21?

A number of respondents to the consultation did not agree with CESR's approach to the scope of Article 26. They argued that this obligation must be read in the context of Article 21 of the Level 2 Directive such that potential conflicts of interests are the hallmark of whether an inducement exists and that CESR should establish a clear distinction in relation to definition and scope between (i) "standard fees or commissions" that are purely remuneration for services performed which do not ordinarily give rise to conflicts of interest and thus should not be subject to Article 26 and (ii) inducements per se which give rise to conflicts of interest and, alone, should be considered under Article 26 and prohibited where they do not satisfy the requirements of one of the specified exemptions.

2. CESR has considered these comments very carefully as they are fundamental to a proper understanding of the provisions, but considers that the respondents' proposed reading of Article 26 does not have a strong legal basis and is not correct. Whilst Article 26 is entitled "inducements", this terminology does not define the general scope of the provision. Article 26 covers any fee or commission or non-monetary benefit that an investment firm may receive or pay in connection with the provision of investment and ancillary services to clients. It sets the characteristics of these fees and commissions in order for a firm to act honestly, fairly and professionally in accordance with the best interests of its clients under Article 19(1) of the Level 1 Directive. This means that "standard commissions and fees" (for example, those that are customary in and at the usual level in a particular market) are of a nature to fall within Article 26. CESR has discussed this with the Commission, which, in relation to this issue of scope, agrees with CESR.

3. Further, the legal basis of Article 21 is in Articles 13(3) and 18 of MiFID regarding the organisational requirements and the operating conditions for investment firms (Section 1 of MiFID). According to these articles investment firms are required to maintain and operate effective organisational and administrative arrangements to prevent conflicts of interest from adversely affecting the interests of clients. The steps that a firm should take are specified further within the Level 2 Directive.

4. The legal basis of Article 26 of the Level 2 Directive is Article 19(1) of MiFID which has a wider scope. Article 19(1) forms part of Section 2 of the MiFID entitled "Provisions to ensure investor protection". According to this provision, investment firms must act honestly, fairly

and professionally in accordance with the best interests of its clients. The wording of the Article as well as the fact that it is included in the section regarding investor protection shows that its scope goes beyond the identification and management of conflicts of interest.

5. The requirement under the duty to act in accordance with the best interest of the client is addressed to specific cases in which the firm might act in a way that is not in the best interests of the client. Whereas, the conflicts management provisions are concerned with the divided loyalties that are likely in practice to lead a firm to act contrary to the best interests of its clients. They seek to mitigate this risk by requiring the firm to put in place organisational requirements to manage such divided loyalties (and in certain cases to disclose those conflicts of interest to the client).

6. In addition, Article 21 contains a non-exhaustive list of circumstances firms should take into account when identifying conflicts of interest. Article 21(e) deals with inducements received from somebody other than the client and can be read to exclude standard commission or fees from consideration under article 21. However, CESR's view is that this provision should not be read to mean that standard fees and commission can never give rise to a conflict for the purposes of the directive.

7. Likewise, Article 26 does not limit its application in this way and opens by stating that it applies to "any fee or commission or … non-monetary benefit". This does not imply that every item that falls to be considered under Article 26 (whether Article 26(b) or otherwise) is automatically an "inducement" – that is, an item that if received or paid by the firm would improperly influence its actions – or, that it is not permitted. The breadth of Article 26 (and, of Article 26(b) in particular) is such to capture many payments and receipts that are permitted, as well as setting conditions for those that are not.

   Some respondents explained that in their opinion CESR's approach to the scope of Article 26 was or might be correct but that its interpretation of Article 26 (c) was too narrow.

8. Respondents' primary reason for considering that Article 26 (c) has wide application is a wide interpretation of "proper fee" so that a very wide range of receipts or payments falls to be treated under Article 26(c) rather than 26(b). CESR does not consider this interpretation to be correct. Although the list of items mentioned within Article 26 (c) cannot be exhaustive (and, therefore other cases will be relevant) the types of payment or receipt to which Article 26 (c) refers must be proper fees which "enable or are necessary for the provision of investment services" and "which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients". But, it is clear that the possibility of a receipt of a standard commission or fee is generally of a nature to act as an incentive for an investment firm to act other than in the best interests of its client. An example of this is where there are differentials between the fees offered by different third parties. In this situation, there is a risk of product bias and even where there is only one fee on offer, there is a risk of transaction bias (where the firm recommends unnecessary transactions to generate additional fees). Each of these scenarios presents a clear challenge to the client's best interests. So, in CESR's view, any items that are not of a type similar to the costs it mentions - custody costs, settlement and exchange fees, regulatory levies or legal fees – are unlikely to fall within this exception. Further, recital 39 is expressly concerned with the inducements regime and by virtue of its reference to payments "designed to enhance the quality of investment advice" refers to Article 26(b). The wording of recital 39 therefore supports the view that commission paid to an advisor will fall under Article 26(b).

It was suggested that fees paid by a management company to an investment firm do not represent payments in relation to the provision of a service to the individual client, but rather are remuneration for services performed by the investment firm on behalf of the management company, and, therefore are not within the scope of Article 26.

9. CESR agrees that the fact that a product management company makes a payment to an investment firm is not in itself sufficient to conclude that the payment is made in relation to the provision of an investment or ancillary service to a client. An investment firm can act for a product management company in more than one capacity (for example, as provider of broking services and as distributor). A payment that has no connection with the relationship between investment firm, product company and client may not be in connection with the provision of an investment or ancillary service to a client. It is hard to make such argument, however, when such a payment has some dependence on or relationship with current, past or prospective product acquisitions by clients of the investment firm. Similarly, the mere naming of a payment or holding it out as a service provided to the product management company by the investment firm does not remove it from being treated as being " in connection with the provision of an investment or ancillary service to a client".

Article 26(a): items "provided to or by the client"

10. Article 26(a) of MiFID Level 2 provides for one type of circumstance in which an investment firm is not prohibited from paying or receiving a fee, commission or non-monetary benefit in relation to an investment or ancillary service provided to a client. This is where the item is a "fee, commission or non-monetary benefit paid or provided to or by the client or a person acting on behalf of the client". In its first consultation paper CESR explained its view of the circumstances under which Article 26(a) would apply.

Question 3: Do you agree with CESR's view of the circumstances in which an item will be treated as a "fee, commission or non-monetary benefit paid or provided to or by a person acting on behalf of the client"?

Question 4: What, if any, other circumstances do you consider there are in which an item will be treated as a "fee, commission or non-monetary benefit paid or provided to or by the client or a person acting on behalf of the client?

Some respondents considered that CESR had taken too narrow an approach to the operation of Article 26(a).

11. CESR considers that for an item to be considered to be "paid or provided to or by the client or a person acting on behalf of the client" it is not sufficient just for the economic cost of the item to be borne by the client. Nor is it sufficient that the "person" is acting on behalf of the client relating to the service; it is necessary for the person to be acting for the firm's client in relation to the payment service provided to the client.

12. Some commentators noted that this approach imposes a higher duty on investment firms with respect to the sale of financial instruments within the scope of MiFID than on investment firms and other firms regarding other products or markets, especially insurance products. This is because where Article 26(b) of the MiFID Level 2 applies the investment firm will have to provide information about its receipt of commission from third parties in respect of the sale of financial instruments; but, there is no similar directive obligation with respect to the sale of insurance products. CESR considers this is a problem that should be considered by the legislators and has signalled the potential arbitrage to the Commission for possible European regulatory intervention.

Article 26(b): conditions on third party receipts and payments

13. In its first consultation CESR discussed its view of the conditions that have to be met in order not to be prohibited when an item falls within Article 26(b) of the Level 2 Directive. That is, for items that are neither "proper fees" within Article 26(c) nor payments to or receipts from clients under Article 26(a). The conditions are that:

- the item must be designed to enhance the quality of the relevant service to the client and it must not impair compliance with the firm's duty to act in the best interests of the client; and,

- there must be clear, prior disclosure to the firm's client.

14. Within its first consultation CESR also provided a number of examples to illustrate how article 26(b) operated and provided a list of factors that that it considered might assist in determining whether or not an item will be treated as designed to enhance the quality of the service to the client and not impair the duty to act in the best interests of the client.

Question 5: Do you have any comments on the CESR analysis of the conditions on third party receipts and payments?

Question 6: Do you have any comments on the factors that CESR considers relevant to the question whether or not an item will be treated as designed to enhance the quality of a service to the client and not impair the duty to act in the best interests of the client? Do you have any suggestions for further factors?

Some respondents suggested that CESR's recommendations should reflect that "designed" is the operative word in the test that the item be "designed to enhance the quality of the service to the client" so that the assessment can be made before the item is received or provided.

15. CESR agrees with this comment and has reflected the view in its second consultation paper and in the final recommendations.

Some respondents suggested that it would be too narrow a view to stipulate that in each case it was necessary for the payment or receipt to be proved to enhance the service provided to a particular client.

16. CESR agrees that a purposive interpretation should be adopted here, so that the payment or receipt can benefit other clients or groups or clients apart from the individual client receiving the service and that the assessment could be made at the level of a particular service provided to a group of clients. However, the assessment must be meaningful and not interpreted too widely to convert the test into a meaningless exercise. Competent authorities are also able to assess the requirement on the basis of the effective use made of inducements received by a given firm. This is reflected within CESR's second consultation and in the final recommendations.

A number of respondents commented that the examples CESR provided focussed too much on UCITS schemes and were presented in a very negative way.

17. CESR's intention in its examples was not to discriminate between different types of financial instrument. A different set of examples was provided within the second consultation and also in the final recommendations and these were presented in a more neutral way. Within its second consultation and final recommendations CESR looked to present the interpretation of the conditions applied by Article 26(b) in a more flexible way and also provided a number of more "positive" examples.

A number of respondents disagreed with the introduction of what they referred to as a "proportionality test", factor (iii) of the proposed factors (which indicated a relevant factor would be "Any benefit that the investment firm receives and the extent to which it is proportionate to the benefit receivable by the client"). They argued that CESR's proposal went beyond what MiFID intended and the introduction of such tests could also result in effective regulatory price controls with no legislative basis. It was also noted that Article 26 does not impose a proportionality test to be applied in determining if a specific payment should be regarded as a prohibited inducement. Practical problems of implementation and enforcement of this requirement were also identified.

18. CESR's intention in suggesting factor (iii) among the factors was not to impose new obligations on investment forms or regulatory price controls. The strong disagreement with this factor and the fact that CESR's intention with it was not understood has led CESR not to include this factor within the Recommendations presented within its second consultation, nor to include it within its final Recommendations.

Respondents also expressed concern about how the factors were intended to be used by supervisors, the extent to which they would be seen as separate standalone obligations and whether they would be strictly enforced by supervisors.

19. CESR has made clear in its final recommendations that the factors are tools to be used to help investment firms and CESR members to assess whether different payments and non monetary benefits are consistent with Article 26 (b) and therefore are legitimate (within the terms of Article 26) as long as the further disclosure obligations are met. They do not represent a "one size fits all approach" and are not intended to apply uniformly to all situations. They are not strict or exhaustive factors that must be taken into account in all cases nor are they standalone obligations or new requirements.

Article 26(b): disclosure

20. Article 26(b) recognises prior disclosure to the firm's client as one of the conditions for receipts or payments paid or provided to or by a third party to be permitted. Article 26 (b) (i) is clear in setting out the information that an investment firm should provide, that is: "the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount". The final paragraph of Article 26, however, allows for an investment firm to provide summary disclosure ("the essential terms of the arrangements … in summary form") rather than the full information.

21. In its first consultation CESR discussed what might be provided in a summary disclosure and, where chains of intermediaries are involved, which one might have the obligation to provide disclosure to the client.

Question 7: Do you agree that it would not be useful for CESR to seek to develop guidance on the detailed content of the summary disclosures beyond stating that: such a summary disclosure must provide sufficient and adequate information to enable the investor to make an informed decision whether to proceed with the investment or ancillary service; and, that a generic disclosure which refers merely to the possibility that the firm might receive inducements will not be considered as enough?

Question 8: Do you agree with CESR's approach that when a number of entities are involved in the distribution channel, Article 26 applies in relation to fees, commissions and non-monetary benefits that can influence or induce the intermediary that has the direct relationship with the client?

Respondents' views were mixed as to whether it would be useful or not for CESR to seek to provide detailed guidance on the content of the summary disclosures. Some felt very strongly that it would be useful for CESR to do so but others not.

22. CESR's view remains that it will not be useful for it to develop detailed guidance on the content of the summary disclosure. As stated within the first consultation paper it seems unlikely that CESR would be able to produce material that would fit all circumstances and situations, so that the cost of such prescription might outweigh the benefits. CESR consulted on a Recommendation for Disclosure as Recommendation 6 within its second consultation.

Most respondents agreed with CESR's approach that when a number of entities are involved in the distribution channel, Article 26 applies in relation to fees, commissions and non-monetary benefits that can influence or induce the intermediary that has the direct relationship with the client. There was some suggestion that CESR should seek to develop anti-avoidance provisions to ensure Article 26 could not be avoided by using subsidiaries and affiliates and other devices.

23. CESR's view remains that it is for each investment firm to apply Article 26 in relation to each of its clients. The concept of "non-monetary benefit" is a wide one, so it is possible that some attempted avoidance mechanisms might fail. However, Article 26 applies only to investment firms in relation to an investment or ancillary service provided to a client. CESR has no power to alter the Level 2 legislation but notes that the disclosure obligations under Article 26 appear to fit better with some modes of distribution – for example, where an investment

firm is distributing third party financial instruments - than others – for example, where a bank or bank subsidiary distributes "in-house" products, where payments to the final distributor in the chain might not reflect the full costs of distribution.

Tied agents

24. Article 26 of the MiFID Level 2 Directive does not refer to tied agents, so it is necessary to determine how they are treated.

25. In its first consultation paper CESR indicated its view that where an investment firm is unconditionally responsible for the activities of a tied agent then for the purposes of disclosure to a client under Article 26(b) it is the total of the third party amounts received that need to be disclosed, whether received by the tied agent or the investment firm.

Question 9: Do you have any comments on CESR's analysis of how payments between an investment firm and a tied agent should be taken into account under Article 26 of the Level 2 Directive?

Question 10: Are there are any other issues in relation to Article 26 and tied agents that it would be helpful for CESR to consider?

Respondents' views differed on the conclusions reached by CESR and on the reasoning provided. Some respondents suggested that a payment by an investment firm to its tied agent should not be considered as an inducement.

26. An investment firm is unconditionally responsible for the actions of its tied agents. Thus, where an investment firm operates through a tied agent CESR considers that for disclosure purposes it is the total of the third party items that ought to be taken into account.

Softing and bundling arrangements

27. In its first consultation paper CESR noted that softing and bundling arrangements were regulated differently by different Member States. It noted that CESR intends to carry out a programme of work so that it can understand whether it is necessary to have a common approach across the EU to the supervision of these arrangements and, if appropriate, develop an appropriate common approach.

Question 11: What will be the impact of Article 26 of the MiFID Level 2 Directive on current softing and bundling arrangements?

Question 12: Would it be helpful for there to be a common supervisory approach across the EU to softing and bundling arrangements?

Question 13: Would it be helpful for CESR to develop that common approach?

No respondents considered that softing and bundling arrangements would be altogether prohibited or would cease through the implementation of Article 26. A couple of respondents mentioned the particular arrangements there are in the UK and suggested they could continue.

Respondents were divided as to whether there should be a common supervisory approach across the EU. Some supported the suggestion. One supported the idea but suggested it should be limited to disclosure requirements only. Others suggested that regulation on softing and bundling reflects the particularities of specific markets and investors in those markets and that the local regulator is best placed to effect appropriate supervision of such arrangements.

There were relatively few responses to Question 13. The majority supported CESR developing such an approach, but there were also views to the contrary. Other comments were that an industry driven approach would be more pragmatic and that any common approach should be developed only after full consultation and research to discover the exact nature of practices in the various Member States.

28. CESR will consider whether further work in this area is needed in its work program for 2008.

FEEDBACK ON RESPONSES TO THE SECOND CONSULTATION ON INDUCEMENTS

29. In its second consultation paper CESR stated that it was not necessary for respondents to repeat arguments that were raised in response to the first consultation. To the extent that they did so, however, CESR's feedback on responses to the first consultation deals with the points raised. CESR invited market participants to focus their responses on the innovative parts of the second consultation.

30. CESR asked:

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

General

Many of the respondents welcomed CESR's second consultation, suggesting it was more balanced than the first.

Respondents also noted the following two general issues:

- The "level playing field" issue that commission disclosure requirements are imposed on MiFID firms in respect of MiFID financial instruments, but, at Directive level at least, not on other firms or other investment instruments, such as insurance based investments.

- And, that although there is no exemption from disclosure the MiFID requirements do not fit well with distribution through group structures.

31. CESR will be considering in what way to carry forward these issues with the Commission.

Some respondents expressed concerns that as drafted the recommendations, in particular Recommendations 4 and 6, appeared as if they were additional expectations on firms that were not provided for in the Directive.

32. CESR has reviewed the way the Recommendations are expressed, to make it clear that they are directed to CESR members and do not constitute European Union legislation and not require national legislative action.

Some respondents suggested that CESR should define the term 'inducement'.

33. CESR considers that it would not be helpful to seek to define this term. Although it is used in the title to Article 26, its definition forms no part of the Article itself.

Recommendation 1: General

Some respondents expressed concern that there would be increased transparency in the distribution through investment firms of financial instruments but such transparency was not matched by commission legislative developments in other sectors. This, they suggested would lead firms to move to distribution of products that were not treated as MiFID financial instruments – for example, insurance-wrapped products – which would defeat the object of CESR's work.

34. CESR's views derive from a natural reading of the Level 2 Directive. To change those views therefore depends upon a change of legislation. CESR supports the goals of greater transparency in the distribution of investment products, but is concerned about 'level playing field' issues. CESR is considering what further work it would be appropriate for it to do in this area, noting that products such as insurance-based products are outside its remit and that legislative initiative resides with the Commission.

Recommendation 2: Article 26(a)

Some respondents noted that whether the client has issued a specific instruction to the investment firm and has the power to vary the arrangement without reference to the investment firm may be a relevant matter in determining whether Article 26(a) applied but not alone determinative, for example, portfolio managers often make payments on behalf of their clients without direct reference to them.

35. CESR confirms that having power to vary the arrangement is one of a number of indicators that an item may be within Article 26(a) but is not in isolation determinative of the position.

Some respondents noted that CESR had added the word "acting" into its citation of Article 26(a) and in Recommendation 2. They urged deletion of the word "acting" and suggested this change might significantly alter the interpretation of 26(a) and Article 2.

36. CESR has removed the extra word "acting" from its recommendation. However, we do not believe this should make significant difference to the interpretation.

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

Some respondents noted that the receipt or payment of a standard commission or fee does not always give rise to a conflict, for example it may be paid to a third party to provide a service that is necessary to complete a deal.

37. CESR agrees that such items, but only if they meet the relevant conditions, may fall within Article 26(c). Many standard commissions or fees, however, fall within Article 26(b).

Some respondents repeated comments made in the first consultation that CESR had taken too narrow a view of the interpretation of Article 26(c).

38. As we explained earlier in this Feedback Statement Respondents' primary arguments rest on a wide interpretation of the words "proper fee" used within Article 26(c) so as to have the effect that a wide range of receipts or payments falls to be treated under Article 26(c) rather than 26(b). CESR does not consider this interpretation to be correct. Although the list of items mentioned within Article 26 (c) cannot be exhaustive (and, therefore other cases will be relevant) the types of payment or receipt to which Article 26 (c) refers must be proper fees which "enable or are necessary for the provision of investment services" and "which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients". But, it is clear that the possibility of a receipt of a standard commission or fee is generally of a nature to act as an incentive for an investment firm to act other than in the best interests of its client. So, in CESR's view any items that are not of a type similar to the costs it mentions - custody costs, settlement and exchange fees, regulatory levies or legal fees – are unlikely to fall within this exception.

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

A number of respondents welcomed CESR's reformulation of proposed Recommendation 4 and in particular deletion of the reference to proportionality.

Some respondents suggested that an additional factor that could be taken into account and noted in the Recommendation is consideration of the extent to which a firm has applied conflicts of interest management methods to mitigate the potential for conflict with the best interests of the client.

39. CESR agrees that the application of conflicts of interest management procedures may reduce the extent to which there is incentive to act other than in the best interests of the client. The application alone of such procedures however will not act as a safe harbour in respect of Article 26(b) nor will it affect the firm's duty of disclosure under Article 26(b).

Some respondents suggested that for the purpose of Recommendation 4(b) a benefit need not be quantified or quantifiable.

40. CESR agrees that non-monetary benefits need not be put into monetary terms, although this may often be helpful.

There was a suggestion that for the purposes of the tests under Article 26(b) it was not correct that the expected benefit to the client can be performed at the level of the service to the relevant client group. In particular commission payments should directly benefit the client in relation to the provided service and not in relation to an unspecified group of clients.

41. CESR agrees that in some cases it will be necessary for a commission payment to directly benefit the specific client from whom the commission is derived. In other cases, however, this might not be necessary as the benefits accrue to a group or type of clients (to which "the" client belongs). For example, the receipt of a benefit that enables an investment firm to make better investment management decisions will assist a group of clients of which "the" client is a part.

Recommendation 5: Recital 39 to the Level 2 Directive

Respondents welcomed the additional clarity this Recommendation provided.
One respondent requested confirmation that the payment of periodical and regular fees can also fall with in Recital 39 and Recommendation 5.

42. CESR agrees that this is the case.

One respondent suggested that there are circumstances when an investment firm would be paid a fee or commission by an issuer rather than the client when it is acting as a distributor and providing a service to those who become investors.

43. CESR confirms that where no investment or ancillary service is provided to a client then Article 26 will not apply.

One respondent suggested that there is no presumption that where investment advice is remunerated by commission, it will be unbiased.

44. CESR agrees that there can be no such presumption.

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

One respondent suggested that it was important for CESR to provide guidance to its members on the make-up of intra-group monetary and, more particularly, non-monetary benefits, and to how this could be adequately incorporated into a summary disclosure of the essential terms, suggesting standardisation would be important.

45. CESR has considered this suggestion but decided not to define the disclosure requirements more precisely. Where relevant, this is a matter for national regulators.

One respondent suggested that in Recommendation 6 (b) CESR should take into account that a generic statement may refer to the certainty that items will or may be received or paid as well as to the possibility that they may be.

46. CESR has considered this and made clear in the Recommendation that such a generic statement will not be considered sufficient to provide the "essential terms of the arrangements".

It was suggested that the first consultation paper had a very clear statement that the responsibility for disclosure rested with the intermediary that had the relationship with the client, but that this was missing from the second consultation.

47. CESR confirms its view that all and any firm that is providing an investment or ancillary service to a client has the responsibility for disclosure.

CESR also asked:

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?

General

Respondents generally welcomed the illustrative examples provided in the consultation paper and considered that they provided broad coverage and would be helpful. Some respondents considered that despite the examples application of Article 26 and of the Recommendations would still be complex in practice and subject to interpretation. There was a suggestion that in some of the examples it would be helpful to take a more objective and rounded view of the enhancement test. There were few concrete suggestions for further examples. There were a number of detailed comments on the examples provided.

48. CESR has reviewed the examples it provided and decided to keep them within its recommendations to its members. It has decided not to present further new examples.

Example VIII

One respondent noted that this example deals with differential commission payments and suggests that these will not always be as difficult to justify as suggested in the example.

49. CESR agrees that there may be less of an issue where commission levels are tiered (that is one rate applies to sales up to a certain level and another rate to sales beyond that level). The circumstances of each case would have to be considered. The case considered within example VIII however is where the firm receives a bonus payment for taking sales above a particular level.

Example XI

One respondent suggested that this example is not necessarily linked to the issue of inducements as long as the client is not affected. Training should only be considered as falling within Article 26(b) if it is provided in association with such benefits (e.g. travel) as might reasonably be assumed to influence the recipient's placing of future business.

50. CESR considers that the provision of training to an investment firm is no different from the provision of any other monetary or non-monetary benefit. Example XI makes clear that the receipt of training can meet the tests within Article 26(b) but whether it does depends upon the circumstances of the case.

Example XII

One respondent suggested that in circumstances where the benefit is provided to a portfolio manager, which is the client of the broker, the benefit falls under Article 26(a), even if the fund manager instructs the broker to use a portion of the commissions generated from its orders to pay for services that are provided by a third party to the fund manager.

51. CESR's view is that relevant here is the benefit provided to the fund manager in relation to the services provided to its clients. In a case where the commissions charged by brokers are recharged to the fund manager's clients, then benefits received by the fund manager in relation to those commissions fall to be treated within Article 26(b).

Annex – Answers received to CESR's consultations on Inducements under MiFID

Consultation on Inducements under MiFID (Ref. CESR/06-687)

Banking

ABBL
ABN AMRO Bank
Banco Santander
BBA
BNP PARIBAS GROUP
EACB (European Association of Cooperative Banks)
ESBG
European Association of Public Banks (EAPB)
European Banking Federation
French Banking Federation
Intesa Sanpaolo
Irish Banking Federation
Italian Banking Association
Spanish Banking Association
State Street
UBS AG
Zentraler Kreditausschuss

Insurance, pension & asset management

AFG
Association of British Insurers
assogestioni
ASSOSIM
Aviva plc
BEAMA
BidRoute Limited
BlackRock Investment Management (UK) Limited
VI Bundesverband Investment und Asset Management e.V
Fidelity International
INVESCO
EFAMA
Investment Company Institute
Investment Management Association
Irish Association of Investment Managers
KBC Asset Management NV
Pioneer Investment
Schroders
SGAM
The Swedish Investment fund Association
Threadneedle Investments

Investment services

AFEI
ASSORETI
Bloomberg L.P.

British Venture Capital and Private Equity Association
Crystal Finance Investments
EFFAS
FOGAIN
Raiffeisen Capital Management

Investor relations

FAIDER
Federation of German Consumer Organisations

Issuers

IG Markets Limited

Legal & Accountancy

City of London Law Society

Others

Advisory Committee of the Spanish Securities Regulator
ALFI
Association of Foreign Banks in Germany
Danish Shareholders Association
Davenport Chadwick (CIFSA)
Deutsches Aktieninstitut
European Financial Planning Association
FECIF
Financial Services Consumer Panel
ISDA, ICMA, AMF, APCIMS, AFB, BWF, DSDA, Euribor, FASD, FOA, IFSA, NSDA, LIBA, SIFMA, SSDA
Millennium bcp
V/F/I Verband der Finanzdienstleistungsinsitute e.V
VuV Verband der unabhängigen Vermögensverwalter Deutschland e.V.

Regulated markets, exchanges & trading systems

Association of Members of the Athens Exchanges
FESE
Irish Stock Exchange

Second consultation on Inducements under MiFID (Ref. CESR/07-228)

Banking

Bank and Insurance Division of the Austrian Federal Economic Chamber
BBA
ESBG
European Association of Cooperative Banks (EACB)
European Association of Public Banks (EAPB)
European Banking Federation
Intesa Sanpaolo S.p.A.
Irish Banking Federation

Italian Banking Association
Spanish Banking Association
UBS AG
Zentraler Kreditausschuss (ZKA)

Insurance, pension & asset management

ALFI
Association of British Insurers
ASSOGESTIONI
BVCA
BVI Bundesverband Investment und Asset Management e.V.
Dutch Fund and Asset Management Association (DUFAS)
EFAMA
Febelfin/BEAMA
Fidelity International
Fortis Invesments
Investment Management Association
Irish Association of Investment Managers
The Swedish Investment Fund Association

Investment services

ANASF
Assoreti
Bloomberg

Investor relations

FOGAIN
Danish Shareholders Association
Federation of German Consumer Organisations
INKA

Issuers

LIBA, ISDA, ICMA, AMF, APCIMS, AFB, BWF, DSDA, Euribor ACI, FASD, FOA, IFSA, NSDA, SIFMA, and SSDA

Legal & Accountancy

City of London Law Society/ Regulatory Committee

Others

INVERCO (Spanish Association of Collective Investment Schemes and Pension Funds)

Regulated markets, exchanges & trading systems

Deutsche Börse Group