AP/SP- n° 2645_12/Div.

Committee of European Securities
Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, 22nd December 2009

AFG response to CESR Consultation Paper
"Inducements: Good and poor practices"

The Association Française de la Gestion financière (AFG)[1] is grateful for the opportunity to comment on CESR consultation paper on "Inducements: Good and poor practices".

GENERAL COMMENTS:

We welcome the purpose of clarifying the Article 26 of the level 2 Directive which is not easy to understand and to apply. However, we would like to stress that ongoing payments to a third party, e.g. a distributor, are to be welcomed when they help to establish a long term and stable relationship in the best interest of the client.

We disagree with CESR's general statement that there are very significant potential conflicts when investment firms receive payments from a third party, e.g. a distributor or product provider. We consider that such a statement is a move back from CESR's recommendations published in 2007.
There is not necessarily a conflict of interest if the investment firm has fulfilled its obligations under the MIFID inducements rules (compliance with Article 26(b) of the Level 2 Directive).

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements.

Our members include 409 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing 2300 billion euros in the field of investment management, making in particular the French industry *the leader in Europe in terms of financial management location* for collective investments (with nearly 1300 billion euros managed from France, i.e. 23% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, *and second at worldwide level after the US*. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated hedge funds/funds of hedge funds as well as a significant part of private equity funds and real estate funds. AFG is of course an active member of the European Fund and Investment Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

Selecting units in CIS, for example in the context of portfolio management services, should be done in the best interest of the client. A larger payment attached to a comparable product is not sufficient to suggest that the investment firm which receives this payment did not act in the best interest of the client. It would be the case only if this investment firm subscribed an excessive amount of the most profitable products and if such products were more expensive, less performing or unsuitable to the client.

DETAILED COMMENTS:

III. Classifying payments and non-monetary benefits and setting up an organisation to be compliant

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

We consider that arrangements and procedures describing whether payments and non-benefits are compliant with MIFID inducements rules are a good practice for investment firms. However, such arrangements and procedures should depend on the investment firm's activities and business and may be included in its conflict of interest policy.

We stress that an evaluation of planned payments can only occur when the contract is agreed and not before each actual payment.

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

We consider that controls should be set up to ensure compliance with the inducements rules set by MIFID. But, if payments are recurrent or if new contracts (or amendments to existing practices) are similar to an existing one, no assessment should be required before the occurrence of the payment. A reference to the ongoing procedure should be sufficient.

Question III: What are your comments about CESR's views 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 France, the compliance officer reports directly to the senior management and senior management is responsible with regards to regulatory authorities.

IV. Proper fees

Question IV: Do you agree with CESR's view that all kinds of fees paid by an investment firm in order to access and operate on a given execution venue can be eligible for the proper fees regime (under the general category of settlement and exchange fees)?

Yes, we agree with CESR's view that all kinds of fees paid by an investment firm in order to access and operate on a given execution venue, as well as specific type of custody-related fees in connection with certain corporate events, are eligible for the proper fees regime.

Question V: Do you agree with CESR's view that specific types of custody-related fees in connection with certain corporate events can be eligible for the proper fees regime?

Yes.

Question VI: Are there any specific examples you can provide of circumstances where a tax sales credit could be eligible for the proper fees regime?

AFG has no comment.

V. Payments and non-monetary benefits authorised subject to certain cumulative conditions – acting in the best interests of the client and designed to enhance the quality of the service provided to the client

Question VII: Do you agree with CESR's view that in the 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?

No. Ongoing payments, specifically those in relation to the distribution of products, often finance a long term and stable relationship with the client and investment advice. This type of payments should not be prohibited as it would force distributors to intensify their one-shot sales ("churning") without acting in the best interest of the client.

Question VIII: 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?

We agree with the CESR's view that appropriate monitoring and control over specific conflicts related to provided or received payments should be included in a general conflict of interest policy.

Question IX: What are your comments on CESR's view that product distribution and order handling services (mentioned in §74) are two highly important instances where payments and non-monetary benefits provided or received can give rise to very significant potential conflicts? Can you mention any other important instances where such potential conflicts also arise?

We disagree with CESR's general statement that there are very significant potential conflicts when investment firms receive payments from product providers. There is not necessarily a conflict of interest if the portfolio manager has fulfilled his obligations under the MIFID inducements rules (compliance with Article 26(b) of the Level 2 Directive). Selecting units in CIS, for example in the context of portfolio management services, should be done in the best interest of the client. A larger payment than another attached to a comparable product is not sufficient to suggest that the investment firm which receives this payment did not act in the best interest of the client. It would be the case only if this investment firm subscribed an excessive amount of the most profitable products and if such products were more expensive, less performing or unsuitable to the client.

For instance, we disagree with example 6 (p. 26) which describes as systematic poor practices the rebates received from product providers by an investment firm providing portfolio management.

Potential conflicting issues should be tackled with appropriate procedures and monitoring. However, ongoing payments are the basis of a mechanism ensuring long term relationship with the client.

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

Such general comment does not seem compliant with the MIFID rules. The best interest of the client is the fundamental responsibility of investment firms. Investment firms have to analyse each case, and so each type of received or provided payments, under this general principle. Regulators will ascertain the compliance of investment firms' behaviours with this principle.

Good and poor practices: acting in the best interest of the client and designed to enhance the quality of the service provided to the client

Example 3 and its comments: We disagree with CESR's statement that charging clients directly for investment advice is the only option to manage the conflicts of interest described here. Conflicts of interest policy, disclosure to the client and, most importantly, the obligation to provide a suitable advice, are appropriate tools to ensure that the investment firm acts in the best interest of the client.

VI. Payments and non-monetary benefits authorised subject to certain cumulative conditions - Disclosure

Question XI: Do you have any comments on CESR's view of the summary disclosure rule under Article 26(b)(i) of the Level 2 Directive (including when such a disclosure should be made)?
And
Question XIII: Do you have any comments on CESR's views on the use of bands?

In France, asset managers and product distributors published several recommendations on client information in relation to the disclosure rule under Article 26(b)(i) of the Level 2 Directive (see below).

Question XII: What are your comments on CESR's views about detailed disclosures?
And
Question XIV: Do you agree with CESR's views on the documentation through which disclosures are made?

We consider that details included in the disclosure should depend both on the information document provided to the client and on the type of such a client (retail or not). Each investment firm should adapt the disclosure and the document in respect with its activity and each category of clients.

Moreover, as explained in examples 1 and 2 (p. 32), we agree with the fact that the requirement to disclose third party payments in advance and the reporting requirements can be complementary and not alternative. However, we stress that, for example, when providing discretionary portfolio management, it can be difficult or even impossible to know in advance invested financial instruments. Such detailed disclosure provided prior the provision of portfolio management service cannot describe the amount of the actual payment.

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

We agree with such a differentiation (see previous question).

If you need any further information, please don't hesitate to contact Pierre Bollon, Director General, at +33 1 44 94 94 29 (p.bollon@afg.asso.fr) or Alain Pithon, Special Advisor of CEO, at +33 1 44 94 96 61 (a.pithon@afg.asso.fr) or Eric Pagniez, Deputy Chief Executive, at +33 1 44 94 94 06 (e.pagniez@afg.asso.fr).

Signed
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FEDERATION
BANCAIRE
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6 JUILLET 2009

TRANSPARENCE DE LA REMUNERATION DES DISTRIBUTEURS DANS LE CADRE DE LA COMMERCIALISATION DES OPCVM

MISE EN OEUVRE DE LA DIRECTIVE MIF

BONNES PRATIQUES PROFESSIONNELLES

Les OPCVM sont par nature des produits grand public. Aussi la mise en œuvre des dispositions de la Directive MIF, concernant la rémunération des distributeurs, se conçoit dans des conditions similaires pour les réseaux et canaux de distribution, qu'il s'agisse pour les distributeurs de commercialiser les produits d'un unique producteur ou d'une pluralité de producteurs.

La FBF et l'AFG ont élaboré des préconisations concernant les rémunérations de la commercialisation en matière de gestion d'OPCVM, dans le cadre de discussions menées avec l'AMF pour l'application de la Directive MIF.

Les préconisations faites par la FBF et l'AFG en matière d'information de la clientèle relative à la rémunération des établissements distributeurs pour la commercialisation des OPCVM sont les suivantes :

I- LE CADRE DE REFERENCE

- Selon la situation spécifique de chaque établissement distributeur et si cela est pertinent, distinguer les investisseurs, entre la clientèle de détail et les grands investisseurs (institutionnels, entreprises) ;

- utiliser pour référence la classification des OPCVM réalisée par l'AMF dans son instruction n°2005-02 du 25 janvier 2005[2] ;

[2] Toute remise à jour de cette classification par l'AMF entraînerait dans l'année qui suit une remise à jour des modalités de calcul par les établissements. Pour 2009, la classification retenue était celle en vigueur au 31 décembre 2008.

- utiliser pour référentiel les frais de gestion et de fonctionnement, en excluant les droits d'entrée[3].

Il est effectivement possible de fournir une information sur les frais de gestion et de fonctionnement *ex ante* à la différence des frais de transaction et des frais sur performance qui font partie du TFE (Total des Frais sur Encours) et qui ne sont connus qu'*ex post*. Utiliser les frais de gestion pour l'information permettrait de trouver un équilibre d'affichage. Il serait par ailleurs opportun de communiquer sur un taux Toutes Taxes Comprises car c'est ce qui est payé par le client au final. En revanche, il convient de constater que la notion de frais de gestion n'est pas normalisée en Europe.

D'une manière générale, il convient de rappeler que la possibilité pour un distributeur de percevoir des rétrocessions de commissions suppose, outre la transparence de ces rétrocessions, la justification que ces rétrocessions améliorent la qualité du service rendu et ne nuisent pas à l'obligation d'agir au mieux des intérêts du client.

II- LE CAS DE LA DISTRIBUTION DIRECTE

1) L'information sur les rémunérations de commercialisation

Deux possibilités existent, la modalité retenue s'imposant à l'ensemble de l'établissement distributeur :

- soit donner les fourchettes, basées sur un taux minimum et un taux maximum, si elles sont dans un intervalle raisonnable pour la clientèle ;

- soit donner une fourchette fondée sur un taux moyen pondéré par les encours, avec un taux maximum de *X* %.

Lorsque cela améliore la pertinence de l'information donnée au client, il est possible de différencier l'information selon que l'OPCVM commercialisé est celui d'un producteur interne (le distributeur et le producteur sont intégrés dans un même groupe) ou d'un producteur externe.

Pour une même catégorie d'OPCVM, en cas de pluralité de producteurs internes et/ou externes, il convient de retenir la moyenne des rétrocessions faites par les producteurs internes d'une part et externes d'autre part.

Lorsque cela est pertinent, les distributeurs peuvent communiquer sur un taux unique plutôt que sur une fourchette de rémunération ; c'est le cas, par exemple, pour des produits spécifiques qui ne permettent pas de calculer une moyenne tels que les FCPI.

Précisions supplémentaires à la demande du client :

Il convient que les documents commerciaux des distributeurs comportent une mention destinée à informer l'investisseur sur la possibilité qu'il a de demander une information détaillée sur la rémunération. Cette mention peut être libellée de la manière suivante :

[3] Sans préjudice des autres catégories de frais pouvant entrer dans le dispositif mais non traitées par le présent document.

« *Conformément à l'article 314-76 du règlement général de l'AMF, le client peut recevoir, sur demande de sa part, des précisions sur les rémunérations relatives à la commercialisation du présent produit.* ».

2) Les supports de l'information

Une liberté de choix est souhaitée pour tenir compte des différents modèles de commercialisation retenus par les établissements distributeurs ainsi que des relations entre producteurs et distributeurs.

Les supports de l'information retenus par les distributeurs sont notamment :

- une fiche produit conforme aux exigences du rapport Delmas-Marsalet ;

ou

- un bulletin de souscription ;

ou

- un document promotionnel et la plaquette tarifaire ;

ou

- le site Internet, étant souligné que ce vecteur ne peut être exclusif que dans le cas d'une vente conclue par ce canal ou si le client a préalablement donné son accord exprès pour une telle diffusion.