COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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FEEDBACK STATEMENT

Inducements: Good and poor practices

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I Executive Summary

CESR has sought in this Feedback Statement (FS) to respond to comments made and points raised in response to its consultation paper (CP) "Inducements: Good and poor practices" (Ref. CESR/09-958). The consultation paper was published on 22 October 2009. This FS covers the same areas as the CP. CESR's final policy position on good and poor practices on inducements has been published in parallel to publishing this FS (ef. CESR/10-295).

This Feedback Statement sets out CESR's response to the issues respondents raised, particularly clarifying the following points:

1. **Flexibility in compliance arrangements (inducements policy):** CESR considers that it is appropriate for investment firms to enjoy a certain degree of flexibility in the approach to be adopted according to the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business. CESR believes that the evaluation of a firm's practice should not be based on the label attached to a "policy" but rather on the effectiveness of the compliance system that is put in place. In addition, CESR considers that Senior Management should be aware of the firm's general policy and practice on inducements and have the flexibility to decide how those arrangements should work with a view to ensuring compliance.

2 **Periodic Review**: CESR considers that the compliance function of the investment firm, by virtue of Article 6 of the Level 2 Directive, should monitor and, on a regular basis, assess the adequacy and effectiveness of the measures and procedures put in place in accordance with the inducements rules.

3 **Ongoing payments and one off payments**: CESR considers that the level of payments and, in instances where the services which have been provided to the client are of a one-off nature, the expectation of ongoing payments to be made/ received over a period of time can exacerbate the risk of the investment firm not meeting the conditions under Article 26(b) of the Level 2 Directive. CESR is therefore of the opinion that firms ought to put in place particularly robust measures to manage this potential exacerbated risk.

4 **Explicit vs Implicit payments to clients:** CESR believes that indirect payments to investment firms providing investment advice can be legitimate only in the case where the firm takes steps to ensure that the incentives it faces because of the varying levels of commissions do not result in investment advice which is biased and is not in the best interests of the client.

II. Overview

1. On 22 October 2009, CESR published a consultation paper (CP) entitled "Inducements: Good and poor practices" (Ref. CESR/09-958). In the CP, CESR sought to assist investment firms in gathering a better understanding of some of the main industry practices on inducements, and to facilitate understanding of what types of behaviours by firms securities regulators encourage (good practices) and discourage (poor practices). CESR considers that this will enable firms to benchmark themselves against industry compliance practices under the MiFID inducements rules, with the additional comfort of knowing whether securities regulators encourage or discourage particular instances of behavior by firms.

2. CESR's final policy position on good and poor practices on inducements has been published in parallel to publishing this Feedback Statement (Ref. CESR/10-295). The report does not propose any legislative or regulatory changes. None of CESR's views, opinions, judgments and statements constitutes European Union legislation.

3. CESR uses the term 'good practice' throughout the report to refer to industry practices observed which CESR considers to be sensible actions for investment firms to follow. CESR endorses and encourages these practices, although it recognises that it is sometimes reasonable for different types of firms to follow different routes to comply with the same legal requirements. The good practices described in the report are practices CESR considers would be an indicator of compliance with the relevant part of the MiFID inducements rules that they refer to.

4. CESR uses the term 'poor practice' throughout the report to refer to industry practices observed which CESR considers to be imprudent actions for investment firms to follow. CESR discourages these practices, which in many cases will lead a firm to be in breach of the MiFID inducements rules.

5. CESR's consultation closed on 22 December 2009. CESR received 33 non confidential responses and one confidential response. CESR is grateful to all the respondents for taking time to give CESR their views. A list of all non-confidential responses can be found in Annex 1, they can be read on CESR's website at http://www.cesr-eu.org/index.php?page=responses&id=153

6. In this Feedback Statement CESR comments on points raised in the responses to the CP.

7. The final CESR report on good and poor practices on inducements is a Lamfalussy Level 3 paper targeted at both regulators and investment firms directly. It considers specific instances of firm behaviour and industry practice and sets out a collective view from securities regulators across Europe on certain practices related to the MiFID inducements rules.

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

8. In this section of the CP, CESR noted that under Article 13(2) of MiFID and 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, including the MiFID inducements rules.

9. Additionally, CESR stated that in complying with the MiFID inducements rules investment firms should consider the requirement to maintain adequate and orderly records of their business and internal organisation (Article 5(1)(f) of the Level 2 Directive). CESR also noted the inclusion in its minimum list of records (Ref. CESR/07-085) of a record keeping requirement with regard to information to be disclosed to clients with reference to inducements, pursuant to Article 13(6) of MiFID.

10. In the CP CESR asked the following questions:

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

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?

Question III: 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?

11. Most respondents agreed that arrangements and procedures are essential in fulfilling an investment firm's obligations under MIFID. Several respondents wanted CESR to make clearer that it is appropriate for firms to have the flexibility to adopt appropriate and proportionate arrangements and procedures according to the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of their business. In addition, a few respondents said that CESR should make it clearer that not every payment and receipt must be assessed for the purpose of the MiFID inducements rule, but only those that are made or received in connection with investment and ancillary services for a client.

12. In general respondents agreed that the compliance function, by virtue of Article 6 of the Level 2 Directive, should monitor the adequacy and effectiveness of the measures and procedures put in place in accordance with the inducements rules. However several respondents considered that monitoring of payments should track only material changes.

13. Respondents agreed that controls should be set up to ensure compliance with the MiFID inducements rules. In this respect, several firms noted that the compliance function takes a holistic approach to the firm's compliance with regulations and stated that other control functions within firms would also help to ensure a firm is operating within the scope of the MiFID rules.

14. Respondents agreed that the compliance function should have the support of senior management in order to discharge its responsibilities and challenge decisions made by the business, and should also have the skills and knowledge necessary to assist the business in ensuring that the firm's policies are adhered to. Several respondents noted that the responsibilities and controls within a firm should depend completely on

compliance models chosen by the firm and considered that the degree of senior management involvement should depend on the nature, scale and complexity of the firm.

15. A few respondents noted that a separate "inducement policy" document is not required by MiFID. In this respect, some respondents challenged CESR's example 1 of a poor practice regarding the set up of specific arrangements devoted to the MiFID inducement rules, where the investment firm relies exclusively on its conflict of interest policy in order to comply with the MiFID inducements rules. These respondents highlighted that a lack of a specific "inducement policy" should not be considered to be a poor practice per se and firms should have the flexibility to decide to, for example, comply with the inducements requirements in the firm's general conflicts of interest policy document.

CESR's views:

In redrafting the good and poor practice paper CESR has made clearer that the MiFID inducements rules only apply to fees, commissions (hereunder referred to as "payments") and non monetary benefits which investment firms can pay/provide or be paid/provided in relation to the provision of an investment or ancillary service to a client.

CESR reiterates its view that arrangements and procedures are essential in fulfilling investment firms' obligations under the MiFID inducements rules. In this context, nothing CESR said in the report was intended to cast doubt on the fact that firms enjoy a certain degree of flexibility in the approach to be adopted according to the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business.

In relation to standardised recurring payments and non-monetary benefits an investment firm may provide or receive, CESR accepts that it may be proportionate for firms' controls only to reassess them where there is a material change in the payment or benefit, including in the terms of the commercial relationship with the third party or other circumstances surrounding the payment or benefit.

CESR considers that the compliance function of the investment firm, by virtue of Article 6 of the Level 2 Directive, should monitor and, on a regular basis, assess the adequacy and effectiveness of the measures and procedures put in place in accordance with the inducements rules. In addition, Senior Management should be aware of the firm's general policy and practice on inducements and have the flexibility to decide how those arrangements should work with a view to ensuring compliance. CESR agrees that the evaluation of a firm's practice should not be based on the label attached to a "policy" but rather on the effectiveness of the compliance system that is put in place. Therefore CESR agrees that a firm's approach to dealing with inducement issues can be included as an integral part of the firm's general conflict of interest policy or in a separate policy document on inducements. The issue is that where inducements are dealt with in a conflicts of interest policy, the policy has to deal with specifics of the MiFID inducements rules and not just the conflicts aspects of those rules.

CESR considers that example 1 of a poor practice regarding the set up of specific arrangements devoted to the MiFID inducement rules, highlights that the MiFID inducements rules are in addition to and in some respects wider than MiFID rules on conflicts of interest. The MiFID conflicts of interest rules and the MiFID inducements rules are complementary and not substitutes or alternatives.

IV. Proper fees

16. In the CP CESR explained "proper fees" as the third party payments defined by Article 26(c) of the Level 2 Directive which (1) "enable" or are "necessary" for the provision of the service and (2) "by their nature cannot give rise to conflicts with the firm's duty to act honestly, fairly and professionally in accordance with the best interests of the client". CESR noted that the second cumulative test is particularly important and needs to be

considered on the "nature" of the item and not on the basis of whether the payment gives rise to such a conflict.

17. In the CP CESR asked the following questions:

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)?

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?

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?

18. The majority of the respondents agreed that all kinds of fees paid by an investment firm in order to access and operate on a given execution venue should be eligible (under the general category of settlement and exchange fees) and custody related fees in connection with certain corporate events can be eligible for the proper fees regime. In addition a few respondents listed other fees they believed should be considered under Article 26 (c), this included; the use of external brokers when executing an order; and other services rendered along the investment fund chain, on the basis that they relate to activities listed as administrative functions under Annex II of the UCITS Directive.

19. We received a number of descriptions on the practical application of underwriting fees, particularly in relation to the institutional primary bond market. A few of these respondents did not consider that these fees could fall within the scope of Article 26 (b) of the Level 2 Directive. One respondent considered underwriting as a service provided to the issuer, whether or not the intermediary undertakes the selling of the financial instrument issued. The respondent considered that in the case where the underwriter also sells on the financial instrument, charges are embedded in the issue and thereby borne by all investors in proportion to their investment and noted that underwriting fees are disclosed in the prospectus. Another respondent considered it difficult to envisage how a pure underwriting fee could be designed to enhance the quality of the service to the client if it will be paid whether or not any sales are made.

20. Compensation of tied agents was seen by some respondents in the same way as internal payments to firms' employees. One respondent considered that it should fall outside the scope of the inducement rules.

21. Some respondents sought clarification of whether specific types of payments should be classified as a proper fee, this included rebates of underwriting commissions for collective investment schemes (CIS), expenses for operations run by depositary banks on securities issued abroad (i.e. in a different country) for which they are custodian; commissions received by security issuers for corporate actions and other operations, such as those on share capital and reserves, long term debt capital, or fixed assets of a company, rights on dividends, general shareholders' meetings; payments (i.e. fees and commissions) to run the relevant investment service or a part of it, provided or received in outsourcing. Other respondents noted that the category of proper fee was intended to be narrow and considered this to be appropriate.

22. One respondent considered that CESR's view that all items considered as eligible for the proper fees regime must be paid by the investment firm to the third party, (i.e. not applied to payments received by a firm from a third party) to be restricting the scope of the Directive.

23. A number of respondents sought clarity on Tax Sales Credits (TSCs). The majority of respondents who provided views on the eligibility of TSCs considered that the credits were either inside or outside the scope of the inducements regime. Respondents that considered as TSCs were outside scope stated that they were under the taxation laws of Member States and that the inducements rules did not apply to international groups when considering their tax position. Where respondents considered TSCs to be within the scope of the inducements rules, respondents considered TSCs could be proper fees, when they are necessary for the provision of the designated investment business or ancillary services, and by their very nature do not give rise to conflicts of interest with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients. Respondents considered that where TSCs did not meet the criteria, they should be subject to the cumulative conditions set out in Article 26 (b) of MiFID.

CESR's views:

Examples of the type of items that fall under the definition of "proper fees" cannot be exhaustive. Therefore CESR considers that investment firms should have in mind that these payments should (1) "enable" or be "necessary" for the provision of the service and (2) "by their nature cannot give rise to conflicts with the firm's duty to act honestly, fairly and professionally in accordance with the best interests of the client". In addition, the category of proper fees was intended to be narrow. It was intended to provide a limited exemption from the application of the criteria for permissible payments under Article 26(b) of the Level 2 Directive and it is not to be used by firms to avoid the application of those criteria, particularly the disclosure requirement.

CESR considers 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) and that specific types of custody-related fees in connection with certain corporate events are eligible for the proper fees regime.

CESR acknowledges respondents' views on the practical application of the inducements rules to underwriting fees and believes that the guidance provided in the report is appropriate.

CESR has made it clear in its final paper that TSCs are intra-group credits made between entities based in different tax jurisdictions. TSCs arise when two companies within the same group are involved in providing a service to a client. They are designed to ensure that income arising from cross-border transactions is attributed for tax purposes. As discussed in the report, CESR's considers that firms will need to assess on a case by case basis whether the credits will need to be categorised under Article 26(b) or Article 26(c) of the Level 2 Directive.

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

24. In this section of the CP, CESR made it clear that the MiFID inducements rules cover a broad range of payments and non-monetary benefits that investment firms might provide or receive in relation to providing investment services to clients. CESR stated that aside from payments and non-monetary benefits provided to or by clients and those under the narrow category of proper fees (under Article 26a and Article 26c respectively), all other applicable payments and non-monetary benefits in relation to the provision of an investment service will be categorised under Article 26b (ii).

25. CESR clarified that the other payments and non-monetary benefits classified under Article 26(b) (ii) can only take place if; they are designed to enhance the quality of the relevant service; and do not impair compliance with the firm's duty to act in the best

interests of the client. In addition, CESR commented that it appeared the MiFID inducements rules were not targeted at specific practices or arrangements but were designed to ensure that all relevant payments and non-monetary benefits were reviewed on a case by case basis to see whether or not they met the cumulative conditions.

26. In the CP CESR asked the following questions:

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?

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?

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?

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?

27. Many respondents disagreed with CESR's view there was exacerbated risks of conflicts of interest for investment firms where the services provided to the client are of a one-off nature and the payments made/received were ongoing over a period of time.

28. In particular, some respondents did not see a connection between the structure of fees and an increase in the risk that the firm will not act in the best interests of the client, nor, did a number of respondents consider there to be any grounds for deeming there to be greater risk.

29. Respondents considered that the Directive should not be interpreted as favouring one distribution model over another. Some respondents considered that financial products are typically bought with a long term investment horizon in mind, and considered that it is normal practice for payments to be made over a period of time.

30. Respondents also considered that larger one-off payments could possibly create undesirable incentives to encourage more frequent client transactions (churning) if no payments were allowed for post sale client service. One example provided was in relation to the distribution of products that often finance a long term and advisory relationship with the client. It was considered that such payments should not be prohibited as they would force distributors to intensify their one-shot sales/ churning without acting in the best interest of the client. These respondents also considered that ongoing payments tended to align the advisor's interest with those of the client, looking for suitable long-term investment products and services.

31. Other respondents also noted that Article 26 of the Level 2 Directive does not differentiate between ongoing payments and other payments, and does not imply that conflicts of interest are likely to grow if a third party receives or gives ongoing payments. Overall respondents noted that the most important consideration should be whether

there is adequate compliance with the rules, including sufficient client disclosure prior to the provision of the service to enable the client to make an informed investment decision.

32. Several respondents also reiterated that a firm's compliance function should have a degree of flexibility to appropriately and proportionally deal with any conflicts that may rise. One respondent considered the existence of the compliance function should be interpreted to mean that that function is sufficiently equipped.

33. Several respondents noted that potential conflicts should be tackled by appropriate procedures and monitoring to manage each conflict. These respondents noted that each payment must be evaluated on its merits and that product distribution and order handling services should not be deemed to be principally problematic. Several other respondents noted other areas were they considered conflicts were significantly prevalent, this included;

    - initial public offerings (IPOs);
    - the distribution of CISs;
    - investment advisors receiving benefits from product providers;
    - portfolio managers receiving benefits from product providers and firms offering brokerage services; and
    - rebates by product providers (UCITS management companies) to investment firms (asset managers) within the framework of investment advice or portfolio management.

34. One respondent also disagreed with the poor practice in example 5, on page 24[1] of the report. The example describes as systematic poor practices the rebates received from product providers by an investment firm providing portfolio management, where the rebate is not given to the client, and the rebates received for picking funds provided by a group company are significantly higher than those provided by third parties. The respondent considered that potential conflict issues should be tackled with appropriate procedures and monitoring and that ongoing payments are the basis of a mechanism for ensuring a long-term relationship with the client.

35. A number of respondents agreed with CESR's view that the fact that a payment covers costs that would otherwise have to be charged to the client is not sufficient for a payment to be judged to be designed to enhance the quality of service. However some respondents considered that the relevant consideration should be whether a payment is designed to enhance the quality of the service to the client (including enabling the service to be provided at all) rather than whether the costs would have been charged to the client. These respondents considered that from a client's perspective there is a clear link between the quality of service and the cost, such that, if payments are made to cover the costs that would otherwise have to be charged to the client, it is likely that the client would benefit from having these charges paid.

36. A number of respondents also did not agree with examples 3 of a poor practice on page 24 of the report. These respondents did not regard the example as a poor practice in respect of the MiFID rules on inducements. These respondents stated that Recital 39 considers a receipt by an investment firm of a commission in connection with investment advice or general recommendations as being designed to enhance the quality of the investment advice to the client in circumstances where the advice or recommendations is not biased as a result of the commission.

37. In addition, one respondent considered that there were circumstances as well as market structures and segments where a structure with payments and/or non-monetary benefits

[1] The example related to the section on 'acting in the best interests of the client and designed to enhance the quality of the service provided to the client'.

from product providers is the only possibility for large groups of investors, mainly retail investors with limited funds to invest, to have access to quality investment advice. The respondent considered that these clients would not be willing and able to pay an adequate direct charge for investment advice and, therefore, in these circumstances payments and/or non-monetary benefits would be designed to enhance the quality of the investment advice. This respondent did not consider that such fee structures could be labeled as 'potentially bad and dangerous or a "good practice" or "poor practice" for clients' as long as the advice is not biased and the practice is judged on the merits and risks of each system on a case by case basis of meeting the requirements. In addition, a number of respondents disagreed with CESR's view that an investment firm can avoid this conflict by charging directly for investment advice.

CESR's views:

Article 26 of the Level 2 Directive does not differentiate between ongoing payments and other payments. In addition, CESR does not favour one payment scheme over another. CESR has made it clear in its final paper that the level of payments and, in instances where the services which have been provided to the client are of a one-off nature, the expectation of ongoing payments to be made/ received over a period of time can exacerbate the risk of the firm not meeting the conditions under Article 26(b) of the Level 2 Directive. CESR is therefore of the opinion that investment firms ought to put in place particularly robust measures to manage any potential exacerbated risks.

When a firm provides ongoing services complementary to the one-off service of execution of orders without providing investment advice, CESR considers that it can be legitimate for that firm to receive ongoing payments if the firm takes adequate measures to ensure that this does not impair its duty to act in the best interest of the client and enhances the quality of the service provided. This could only be so if the ongoing services add value for the client.

Recital 39 of the Level 2 Directive makes clear that indirect payments to firms providing investment advice can be legitimate. CESR considers that this is only the case where the firm takes steps to ensure that the incentives it faces because of the varying levels of commissions do not result in investment advice which is biased and is not in the best interests of the client. The most relevant specific control here is the arrangements that an investment firm has for ensuring compliance with the rule requiring suitability assessments in relation to investment advice under Article 19(4) of MiFID. To avoid bias firms will also need to think whether there are additional steps they need to take to ensure that they are acting in the best interests of their clients and effectively managing the conflicts of interest.

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

38. In its recommendations on inducements under MiFID, CESR noted that Article 26(b)(i) of the Level 2 Directive 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". An investment firm may, however, by virtue of the final paragraph of Article 26, disclose only the "essential terms of the arrangements" provided that further details are disclosed at the request of the client and the client is informed of this right.

39. In CESR's view, a generic disclosure which refers merely to the fact that the investment firm may or will receive inducements cannot be considered as providing the "essential terms of the arrangements" referred to in Article 26 of the Level 2 Directive. In order to contain the "essential terms", a summary disclosure must provide adequate information to enable the investor to relate the disclosure to the particular investment or ancillary service that is provided to him, or to the products to which it relates. This is necessary to

enable the client to make an informed decision whether to proceed with the investment or ancillary service and, whether to ask for the full information[2].

40. Where more than one investment firm is involved in the distribution process, each entity that is providing an investment or ancillary service must comply with its obligation of disclosure to its clients in relation to the services that it provides[3].

41. Disclosures relating to third party payments and non-monetary benefits should also comply with Article 19(2) of MiFID, according to which "all information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading"[4].

42. In the CP CESR asked the following questions:

Question XI: Do you have any comments on CESR's views about summary disclosures (including when they should be made)?

Question XII: What are your comments on CESR's views about detailed disclosures?

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

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

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

43. The majority of respondents agreed with CESR´s views on summary and detailed disclosures. However a number of respondents provided additional comments.

44. One respondent noted that CESR should set out clearly that intermediaries are free to decide whether to provide prior to the provision of the service, a single detailed disclosure rather than firstly a summary disclosure followed by a detailed disclosure.

45. In relation to detailed disclosures, a few respondents emphasised that further details may not be known prior to the provision of the service; an example provided was the cost of research. Some respondents considered that the clients are not interested in this type of detailed disclosure. Where further details were known, some respondents considered that it was difficult in practice to calculate the exact amount of third party payments made or received on an individual basis for each investor, or not always technically possible to attach an exact amount of related non-monetary benefit to a specific transaction, an example of training received from product providers was provided. Another respondent considered that a narrative description regarding the calculation of such payments would be sufficient to provide clients with more in depth information compared to summary disclosures, as far as amounts can not be ascertained and called for disclosures to be proportionate.

46. In addition, other respondents considered that disclosing the differences between payments from in-group and third party products was inappropriate and could distort the level playing field among products and interfere with commercial negotiations between product providers and distributors. Such respondents considered that it was

[2] See Recommendation 6, CESR/07-228b, Inducements under MiFID, Annex III
[3] See Recommendation 6, CESR/07-228b, Inducements under MiFID, Annex III
[4] This includes the conditions which information for retail clients must comply with to meet these criteria as set out in Article 27 of the MiFID Level 2 Implementing Directive.

likely to lead to fee increases to the detriment of the client, as the distributor receiving lower payments would demand an increase.

47. In relation to the timing of disclosures, one respondent thought that CESR's statement about where a client requests a detailed disclosure after the provision of the service gives the impression that an investment firm is obliged to provide a disclosure to a client after having provided a service to a client. The respondent did not consider this to be in line with the MiFID rules and considered that this would lead to further practical issues. This respondent considered that CESR should make it clear that with reference to Art. 26 (b) of the Level 2 Directive, payments or non-monetary benefits must be clearly disclosed generally prior to the provision of the relevant investment or ancillary service in order to provide sufficient opportunity for the client to make an informed decision.

48. One respondent considered that it is extremely difficult for entities to guarantee that a client has 'made an informed decision in relation to a service'. This respondent considered that information to a client should be objective to enable the average client to understand the nature and scope of the incentive. It considered that firms should not be obliged to guarantee (i) that the information provided to the client is understood correctly by him; (ii) that the 'service' is understood by the client. The respondent considered that the client's understanding of the service offered falls outside the MiFID inducements rules.

49. Several respondents considered the use of bands in an investment firm's disclosure should be permissible and, in particular that it is necessary in the summary disclosure. Respondents generally considered that the firm's use of bands should be undertaken in a sensible and reasonable manner to enable the client to make an informed investment decision.

50. Several firms commented on the documentation through which disclosures are made. Some respondents pointed out that the MiFID Level 2 Directive does not prescribe how firms should provide information on inducements to clients and considered that firms should be free to use different media for inducements disclosures, insofar as the disclosures are made in a manner that is comprehensive, accurate and understandable.

51. Another respondent considered that the delivery of information in a number of complimentary documents should not always constitute a poor practice, and should only be considered a poor practice if it can be demonstrated objectively that it greatly complicates the client's access to information.

52. Respondents generally agreed with CESR's view that it is legitimate for firms to take into account that professional clients have the knowledge and experience to make their own investment decisions under the MiFID inducements rules when drafting summary and detailed disclosures. In understanding client views with respect to disclosures, one respondent called for CESR to undertake an extensive consumer/client testing to obtain consumer views.

CESR's views:

Nothing CESR said in the report was intended to cast doubt on the fact that firms have the flexibility to decide whether to provide clients with a detailed or a summary disclosure prior to the provision of the service.

As highlighted in CESR's 2007 recommendations on inducements under MiFID, CESR considers that a summary disclosure must provide adequate information to the client to enable the client (i) to relate the disclosure to the particular investment or ancillary service that is provided to him, or to the products to which it relates, (ii) to make an informed decision whether to proceed with the

investment or ancillary service prior to the provision of the service and (iii) to decide whether to ask for the full information.

CESR also believes that in order to be accurate, detailed disclosures should not only mention all the types of third party payments and non-monetary benefits provided or received (as should the summary disclosure) but also should always provide the exact amount of the third party payments and non-monetary benefits. In cases where the detailed disclosure is provided prior to the provision of the service to the client and where the amount of the payments cannot be ascertained before the provision of the service, a reasonable band range of the payments may be provided in the detailed disclosure, in conjunction with the method of calculating the amount. In such situations, it cannot be excluded that after the provision of the service the client might ask for more information about the exact amount at stake. CESR is of the opinion that the firm should then provide the exact amount of the third party payments and non-monetary benefits. Detailed disclosures should be written concisely in unambiguous language.

CESR considers that the use of bands in summary disclosures is permissible as long as the information enables an investor to make an informed decision whether to proceed with the service or to ask for more information. In detailed disclosures, CESR reiterates that the use of bands should be limited to those situations where a firm cannot provide the amount prior to the provision of the relevant service. In addition, as stated in the report, CESR is of the opinion that investment firms should take particular care to ensure that when using bands the information presented is meaningful and not misleading.

The MiFID Level 2 Directive requires disclosures to clients to be made in a durable medium and should include sufficient detail, taking into account the nature of the client. CESR is of the opinion that the information must be provided for free in an easily accessible and in a user friendly format. In addition, in its 2007 recommendations CESR stated firms' disclosures to clients must be fair, clear and not misleading and must contain enough information to enable the client to make an informed decision. CESR's report on inducements makes it clear that what constitutes a fair, clear and not misleading disclosure can vary between retail and professional clients. In this respect, CESR considers that it is legitimate for firms, in their disclosure to professional clients, to take into account the fact that these clients should have more knowledge and experience than retail clients to make their own investment decisions.

VII. Experience of firms' cross border implementation

53. In the CP CESR stated that investment firms in a minority of Member States have not reported about their experience of cross border implementation as the firms responding to the questionnaire in these Member States had no cross-border activity. The majority of investment firms, who provided a view, stated that they did not have to adopt any different arrangements and procedures across the Member States concerned to comply with Article 26 of the Level 2 Directive. A small minority of firms reported that they had to make changes to comply with Article 26 of the Level 2 Directive. These investment firms tend to develop a uniform group approach.

54. The vast majority of respondents did not provide any comments in relation to this section. One respondent considered that a harmonised EU approach was required in relation to the treatment of override or tiered commissions.

CESR views:

CESR considers that regarding tiered commission levels (that is one rate applies to sales up to a certain level and another rate to sales beyond that level), the same approach should be taken by EU Supervisors and it refers to example VIII of its 2007 recommendations. CESR also recalls that the

level of payments made or received can exacerbate the risk of the firm not meeting the conditions under Article 26(b) of the Level 2 Directive. CESR is therefore of the opinion that firms ought to put in place particularly robust measures to manage this potential exacerbated risk.

ANNEX I- LIST OF RESPONSES:

Activity	Respondents
Banking	ABI - Associazione Bancaria Italiana
Banking	Advisory Committee of the CNMV
Banking	ANASF
Banking	The British Bankers' Assocaition (BBA)
Banking	Caixa Geral de Depósitos
Banking	CFA Institute
Banking	Deutsche Bank
Banking	Division Bank and Insurance
Banking	European Banking Federation
Banking	European Savings Banks Group
Banking	Für den ZKA Bundesverband der Deutschen Volksbanken und Raiffeisenbanken
Government regulatory & enforcement	The Danish FSA
Insurance, pension & asset management	ALFI
Insurance, pension & asset management	Association Française de la gestion financière - AFG
Insurance, pension & asset management	Association of British Insurers
Insurance, pension & asset management	Assogestioni
Insurance, pension & asset management	BEAMA
Insurance, pension & asset management	Dutch Association of Insurers
Insurance, pension & asset management	EFAMA
Insurance, pension & asset management	Fidelity International
Insurance, pension & asset management	FIDIN
Insurance, pension & asset management	IFDS
Insurance, pension & asset management	IMA
Insurance, pension & asset	Raiffeisen Kapitalanlage GmbH

management	
Investment services	**Amafi**
Investment services	**Assoreti**
Investment services	**ASSOSIM**
Investment services	**Brewin Dolphin Limited**
Investment services	**BVI Bundesverband Investment und Asset Management e.V.**
Investment services	**Fogain**
Investment services	**Joint response by AFME, ICMA, FOA**
Investment services	**NSA**
Legal & Accountancy	**The City of London Law Society**

http://www.cesr-eu.org/index.php?page=responses&id=153