

Consumer Panel response to CESR's public consultation CESR/06-687 Inducements under MiFID

Introduction

The Consumer Panel was established under the Financial Services and Markets Act 2000 by the Financial Services Authority to represent the interests of consumers. The Panel is independent of the FSA. The main function of the Panel is to provide advice to the FSA, but it also looks at the impact on consumers of activities outside the FSA's remit. The Panel represents the interests of all groups of consumers.

Overview

This is the Panel's response to CESR's public consultation on Inducements under MiFID. This is an area in which the Panel has taken great interest in recent years – mystery shopper research in the UK has repeatedly demonstrated that inappropriate inducements lie behind much poor advice and mis-selling, and the topic has quite rightly become central to the FSA's Retail Distribution Review. At the level of the Single Market, we consider it critically important that all necessary measures are taken to maintain and boost consumer confidence. Failure to set the right framework will do significant damage to the long term credibility of the industry and to the market as a whole.

The Panel therefore strongly supports CESR's proposed approach and we agree with the analyses set out in the paper. The consumer protection mechanisms incorporated in Articles 21 and 26 of the Directive are important and we would like to see post implementation work undertaken to establish the effectiveness of the guidance to be provided. In principle we also support the extension of these protections beyond UCITS to competing products such as unit-linked insurance and structured products.

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?

We agree with this interpretation of Article 26.

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?

We agree with this analysis.

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 the client or a person acting on behalf of the client"?

We agree that the circumstances in which Article 26(a) is likely to be relevant are limited and we support CESR's view.

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"?

We have no comments on this question.

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

The examples provided in the paper illustrate very well the issues that are likely to arise when firms consider the question of whether a monetary or non-monetary benefit is 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. This is an important area for consumers and one which we would like to see researched after, say, twelve months to determine how firms' have structured their internal policies and procedures to take account of this particular aspect of the MiFID requirements.

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 designated to enhance the quality of a service to the clients and not impair the duty to act in the best interests of the client? Do you have any suggestions for further factors?

We have nothing additional to suggest.

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 investors 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 inducement will not be considered as enough?**

Guidance to the effect that a summary disclosure must provide sufficient and adequate information to enable the investors to make an informed decision is entirely sensible. However, this is another area where we would like see how this guidance is interpreted by firms.

We agree that a generic disclosure that refers only to the possibility that a firm might receive an inducement would be totally inadequate.

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?

Although ideally we would like to see Article 26 applied to all firms in a long or complex 'chain' of firms, we understand that this would not be practicable. Consequently we do not object to the approach adopted by CESR.

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?

We agree with this analysis. From the consumer perspective a tied agent will often be seen as a part of the investment firm.

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

We have no further issues to raise.

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

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

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

We welcome the news that CESR is to carry out a programme of work so that it can better understand whether it is necessary to adopt a common approach to the supervision of the proposed arrangements across the EU. We have no further comments to make at this stage.

Financial Services Consumer Panel

9 February 2007