

TB/27-022

BEAMA/Febelfin response to CESR Second Public Consultation on Inducements under MiFID (CESR/07-228)

Introduction

BEAMA/Febelfin have come to the conclusion that several chapters of the document have been vastly improved and that CESR has taken into account many of our remarks, more particularly:

- The extremely negative attitude towards commissions has been replaced by neutral language.
- The proportionality tests have been left out.
- The examples are product-neutral and do no longer focus on the funds industry
- CESR acknowledges that a group of customers instead of specific customers only indeed can take a benefit from commissions (Box 4(b) and §14).

However, CESR has not changed its position on the admissibility of payments under 26(a) and 26(c) and apparently limits its attention as for commission/fee payments to 26(b), including standard commissions.

General comment

MiFID Impact on fund providers

The sector once again draws the attention on the fact that the Directive on UCITS provides adequate regulation concerning the disclosure requirements for CIS. During the Open Hearing on April 24, CESR indeed confirmed that the (MiFID-)disclosure towards the customer is a matter which is left to the distributor, who provides the investment service which falls under MiFID. This does not mean however that the MiFID provisions in the field of disclosure have no consequences for the product providers. We would appreciate if CESR could pay attention to those consequences.

Level Playing Field

We have noticed that in the introduction to the paper, CESR says it is well aware of the threat to the Level Playing Field between several financial instruments. However, we would like to point out once again that spread-driven products, such as structured notes and certificates, are insufficiently dealt with in the text.

We also notice that when potential regulatory arbitrage cannot be dealt with nor be settled under MiFID, CESR will bring this to the attention of the European Commission with a view to steps to be taken in the field of regulation.

I) Comment on the Recommendations

BOX 1

As for b): In the introduction to the text, CESR qualifies this specification as a remedy against the negative consequences of the inducement scheme under Open Architecture. In our opinion, this view is too optimistic. The danger of having to cope with an interpretation of article 26 which is too rigid and which does not take into account the commercial reality of third-party distribution is as present as ever.

BOX 2

In our opinion, the interpretation of article 26(a) as followed by CESR is too restrictive. Article 26(a) refers to “a fee, commission or non-monetary benefit paid or provided to or by the client or a person on behalf of the client”. We think a broader interpretation of (a) can be adopted when the customer gives an order or an instruction or when he explicitly requests that a payment be made on his/her behalf (as long as the other obligations under MiFID have been met). The existence of a contractual relationship between the person who acts as an intermediary, and the investment firm receiving the payment is not a prerequisite for the applicability of article 26(a).

BOX 3

We would like to point out that there are circumstances in which commissions and fees may be considered to be proper fees and consequently must fall under article 26(c), and that proper conflict of interest management and other organizational measures also contribute to transparency to a large extent.

BOX 4

As for c), the question that really matters is whether compliance with the firm’s duty to act in the best interest of the customer is actually impaired. The mere presence of an incentive that will change the firm’s behavior, or a priori speculation about such change cannot be used to rule out the admissibility of a commission. The incentive should be dealt with appropriately in case of conflicts of interest and should be disclosed.

BOX 5

According to our interpretation, b) can also apply to arrangements other than strict distribution arrangements, for example within the framework of portfolio management. We propose to rewrite the second sentence as follows : “It is not exhaustive and does not prohibit other ~~distribution~~ arrangements under which an investment firm ...”.

BOX 6

We would appreciate being given more explanation about the cases to which § 23 actually applies. Furthermore, we would like to have the confirmation that §§ 32-35 as well as the relevant scheme of the first consultation paper are still valid.

We also would like to point to the danger of arbitration, if there are differences from one Member State to another in the interpretation of the obligatory character of the disclosure. This concern becomes even stronger, if we take into account the fact that maybe the rules for disclosure will not be implemented simultaneously in all of the Member States.

II) Comment on the examples

We would like to have explicit confirmation of the fact that the examples are nothing more than illustrations and pertain strictly only to the interpretation of article 26, as stated by CESR during the Open Hearing on April 24. The examples do not take into account the conflict of interest policies.

However, when judging the admissibility of certain types of commissions in concrete cases, it will be necessary to take into account the BOX 4 factors as well as broader measures (e.g. COI).

EX V.

The interpretation for example of V: "...it would be difficult for portfolio managers to meet the other conditions within Article 26..." must be put into its proper context by referring to the usefulness and role of a COI-policy.

In our opinion, the commissions of the product provider to the portfolio manager within the framework of the model below seem to be compliant with the MiFID provisions and hence seem to be admissible:

- Enhancement of service:
 - providing access to broader range of products
 - lower costs/management fee for the customer
 - commissions received are invested in better service for the customers
- Duty to act in best interest of the customer not impaired:
 - Conflict of interests policy: esp. Chinese Wall between
 - the selection of assets/funds for the customer's portfolio, and
 - the negotiation of commissions with the fund managers
- Disclosure: in contract

Furthermore, we would appreciate if CESR could specify what is meant by 'commissions paid out of the product charge' in this example? In what sense does it differ from ex. VII (commissions in advice), where there is no such specification?



Febelfin – the Belgian Finance Federation – was founded on 28 March 2003 by five constituent associations: the Belgian Bankers' and Stockbroking Firms' Association (ABBBVB); the Belgian Asset Managers Association (BEAMA); the Professional Union of Credit Providers (PUCP); the Belgian Association of Stock Exchange Members (BASEM); and the Belgian Leasing Association (BLA). By the end of October 2005, the total number of Febelfin members amounted to more than 230, including Euronext, Banksys and Isabel.

This kind of regrouping of associations within a single Federation is unique in the European Union. Febelfin is the leading representative body of the Belgian world of finance at a national and international level. At Febelfin we are committed to an open and constructive dialogue with political authorities, regulators and key stakeholders, in the interest of a sustainable development of the activities for and by our members.

BEAMA – the Belgian Asset Managers Association – is the professional association of the Belgian fund and asset managers. BEAMA has 52 members, representing €450 billion in assets under management at end 2005. BEAMA aims at promoting and developing asset management in Belgium as well as at defending the professional and moral interests of its members. Asset management includes among other things ensuring the promotion, management, distribution and administrative processing of CIS, as well as portfolio management for institutional and private clients and investment advice. Within the context of this purpose, BEAMA represents its members towards the public authorities and the competent institutions at the Belgian, international and supranational level.

BEAMA is member of Febelfin, the Belgian Financial Sector Federation