



## Position of the UKNF on referral programmes and affiliate programmes run by investment firms

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The Polish Financial Supervision Authority (Urząd Komisji Nadzoru Finansowego – UKNF) would like to highlight certain legal aspects of referral programmes and affiliate programmes under which investment firms can ask their clients or third parties to acquire new or potential clients.

### **Referral programmes**

With referral programmes, investment firms engage their clients in promoting investment services the firms provide. In exchange for each successful referral (acquisition of a new client), investment firms award all kinds of ‘benefits’, usually in the form of free financial instruments but also cash for the purchase of such instruments, or discounts on the fees for services.

Acquiring new clients involves, among others, providing third parties with individualised referral codes generated by the investment firm or website addresses (affiliate links). A client makes such codes or links available to other people, e.g. using a profile on a social network site, instant messenger or other means of distance communication. Using the code or the link allows the client’s activity to be associated with the new person the client has attracted.<sup>1</sup>

### **Activities reserved for an investment firm or its tied agent**

In accordance with Article 79(2a) of the Act on Trading<sup>2</sup>, activities consisting in acquiring clients or potential clients of investment services, including providing information about the scope of the investment services provided by the investment firm or about the financial instruments being the object of such services, may only be carried out by the investment firm itself or its tied agent<sup>3</sup>. As stated in the Communication from the UKNF of 19 April 2017, ‘the introduction of new regulations (...) aims to put an end to the activities of non-supervised

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<sup>1</sup> For instance, the referee provides the received code during registration and conclusion of the contract or registers on the website which he or she has accessed via a special link of the referrer.

<sup>2</sup> Act of 29 July 2005 on Trading in Financial Instruments (consolidated text: Journal of Laws 2023, item 646, as amended).

<sup>3</sup> In accordance with Article 79(8a) of the Act on Trading, a tied agent of an investment firm may start carrying out the activities listed in Article 79(2) of the Act on Trading only after being registered by Komisja Nadzoru Finansowego.

entities that used to induce investors to use investment services. Such entities often lacked the adequate knowledge and competence in trading in financial instruments and information that was provided to investors, intended to encourage them to make investments, was inaccurate or misleading'<sup>4</sup>.

For referral programmes, these actions of clients represent active direct marketing in the form of informing specified persons about the services of an investment firm and acquiring them as new clients of such a firm. They also represent activities carried out for and on behalf of an investment firm, since under the programme rules the referrer receives monetary benefit for promoting the services and for acting for the investment firm. Under Article 79(2a) of the Act on Trading, engaging for such purposes entities other than the investment firm itself or its tied agent is prohibited.

An exception from that rule, provided for in Article 79(2b) of the Act on Trading, is the possibility for an entity other than the investment firm itself or its tied agent to attract clients only if information provided in the course of such activities is at the same time addressed to a larger group of clients or potential clients of the investment firm or to an unspecified recipient.

An example of commercial communication covered by that exemption is an act of addressing certain content to the public, including on a publicly available website, or an act of displaying a firm's advertisement in mass media, e.g. on television. However, making available a code or a link in social networks to a specified person or a large group of people affiliated within a social network or instant messenger cannot be treated as providing information to a large group of clients or potential clients.

In particular, a communication may be described as individualised where an interaction takes place between the person directing the message (running a site, fanpage, etc.) and a potential follower. An example is the need for acceptance of a friend request or a follow request. Such actions specify the potential recipient and may indicate that information is being addressed to a specific person or a specified group of identifiable people who know a given client and can assess the usefulness of that client's communications when making decisions.

The presented conclusions regarding prohibited promotional activities apply also where the referrer is not a client of an investment firm but a third party, e.g. a member of an affiliate programme. Activity of any partner, introducing broker, affiliate or other unregulated intermediary fulfilling prerequisites under Article 79(1), (2) and (2a) of the Act on Trading requires an entry in the Register of Tied Agents. Any activity that is carried out without that requirement being met violates the law. Although, the exemption provided for in Article

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<sup>4</sup> Urząd Komisji Nadzoru Finansowego. *Komunikat dotyczący zamkniętego katalogu podmiotów prowadzących marketing usług maklerskich - zmiany w prawie od 29 kwietnia 2017 r.* [Communication on a closed catalogue of entities engaging in the marketing of brokerage services: amendments to legislation after 29 April 2017], [https://www.knf.gov.pl/knf/pl/komponenty/img/knf\\_174191\\_marketing\\_uslugi\\_maklerskie\\_19\\_04\\_2017\\_502\\_00.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/knf_174191_marketing_uslugi_maklerskie_19_04_2017_502_00.pdf)

79(2b) of the Act on Trading may also apply in this case as it allows entities to provide information exclusively to a large group of clients or potential clients of an investment firm or to an unspecified recipient without the need to obtain an entry in the Register as an agent.

### **Affiliate programmes**

Under affiliate programmes, investment firms offer third parties an opportunity of engaging in marketing activities and acquiring clients in exchange for monetary benefit. Some of those programmes make the amount of such benefit dependent on the effectiveness of the partner's activity. The payment, for example, may be set in proportion to the number of actual contracts for investment services, the amount of payments made in the account (cost per action) or the value of financial instruments acquired (cost per sale).

Under affiliate programmes, a natural person (e.g. a blogger, influencer or website owner) or a legal person (e.g. a specialised online service, application or investment firm comparison website), after registering with an investment firm as its partner, receives a private 'affiliate link', which redirects to the website of the investment service provider. In addition to an affiliate link, an investment firm may provide its partners with marketing materials, such as videos, banner ads or interactive tools for displaying stock price quotes (including widgets). After clicking on a link or banner, just like in referral programmes, the client is redirected to an investment firm's website where they can enter their details and conclude a contract for investment services. Similarly as for referral programmes, the redirection allows the identification of the entity that has successfully acquired a client.

### **Prohibited inducements**

Investment firms offering participation in affiliate programmes should be aware of the prohibition on giving and receiving prohibited inducements. Under Article 83d(1) of the Act on Trading (subject to the exceptions laid down in that provision) an investment firm must not accept or give any monetary benefit, including fees and commissions, or any non-monetary benefit in connection with providing an investment service.

Making payments to the entities that benefit from the exemption under Article 79(2b) of the Act on Trading in exchange for acquiring clients or potential clients of investment services, including providing information about the scope of the investment services or about the financial instruments being the object of such services<sup>5</sup> – if the payment is in connection with the provision of the investment service – represents awarding a prohibited inducement.<sup>6</sup>

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<sup>5</sup> Including entities such as introducing brokers or other type of partner or affiliate.

<sup>6</sup> Participants in referral or affiliate programmes are not relevant persons as defined in Regulation 2017/565 so payments made for them do not represent remuneration as defined in that Regulation.

Whether or not a payment is connected with an investment service is determined by the relation between the amount of the payment and a specific service provided to the client that has been attracted because in such a case the firm pays the referrer a commission for the possibility of providing an investment service to the client the referrer has acquired. Such payments occur as *cost per action* model and consist in making the amount of payment made to the partner dependent on the number of clients who have taken a concrete action to have investment services provided to them, for example they registered with the investment firm, concluded a contract for investment services or paid funds into an account. In this case, the payment is linked to the service covered by the contract as well as the service of keeping a securities account and a cash account. Another example is making a commission dependent on the sale of a financial instrument to the acquired client and, additionally, the determination of the amount of the commission proportionally to the spread (the firm's commission) or the value of the transaction (*cost per sale* model). In such case, the payment is directly related to the provision of the investment services the financial instruments being purchased pertain to.

In both cases, the payments made to partners or introducing brokers represent inducements under Article 83d(1) of the Act on Trading. Moreover, the payments related to the provision of an investment service made solely in exchange for the partner's or affiliate's marketing activity cannot be considered as payments made to improve the quality of the brokerage service.<sup>7</sup>

However, Article 83d(1) of the Act on Trading allows rewarding partners for making available chargeable content or affiliate links if the amount of the payment does not depend on the number of clients attracted or their activity on the account (e.g. a one-off payment or a fixed monthly instalment for posting a marketing material on a website). Such performance is not related to the provision of an investment service but only to general promotion of an investment firm.

## Summary

Clients of an investment firm or unregulated intermediaries must not undertake, under referral programmes or affiliate programmes, individualised actions to acquire clients or potential clients of investment services. Such persons must also not provide information about the scope of the investment services provided by the investment firm. Such activities, except

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<sup>7</sup> Cf. *Stanowisko UKNF z 21 grudnia 2018 r. w sprawie przyjmowania i przekazywania „zachęt” w związku ze świadczeniem usług przyjmowania i przekazywania zleceń, których przedmiotem są jednostki uczestnictwa funduszy inwestycyjnych* [Position of the UKNF of 21 December 2018 on accepting and giving 'incentives' in connection with the provision of services of acceptance and transmission of orders pertaining to participation units in investment funds].

[https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko\\_UKNF\\_ws\\_przyjmowania\\_i\\_przekazywania\\_zach%C4%99t\\_64186.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko_UKNF_ws_przyjmowania_i_przekazywania_zach%C4%99t_64186.pdf), p. 14

for the provision of information to a large group or an unspecified recipient, may only be performed by the investment firm or its tied agents.

Moreover, in the case of any programme run under Article 79(2b), a scheme of rewarding entities advertising an investment firm, including partners (affiliates), consisting in making the received commission dependent on, for example, the client concluding a contract for investment services or on their activity after the conclusion of the contract is contrary to Article 83d(1) of the Act on Trading and constitutes provision of a prohibited inducement.

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