Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu **by 13 January 2012.**

Name of the person/ organisation responding to the questionnaire	**Vereniging VEB NCVB (Dutch Investors' Association).** **Contacts: Niels Lemmers (nlemmers@veb.net) and Adam Pasaribu (apasaribu@veb.net)** **Address: Amaliastraat 7, 2514JC, The Hague, The Netherlands, T+31703130008**

Preliminary remarks:

The Dutch Investors' Association, Vereniging VEB NCVB (hereinafter: VEB) welcomes the opportunity to express its views with regard to the MiFID/MiFIR 2 proposal. We responded on the European Commission's drafts as well. In our position paper we have made a few suggestions. We point, for example, to having pre- and post-trade transparancy requirements available, not only for shares (and shares-like products), but also for bonds (and bond-like products). Therefore, we would also kindly refer you to our response to the EC Public

Consultation on MiFID, where you will find more explanations of our positions and more evidence. For your convenience, we will send you a copy of our position paper as well.

The VEB is established in 1924 and is currently the largest non-profit association of investors, both retail and institutional, within the Netherlands. Furthermore, the VEB is a founding member of EuroInvestors and EuroShareholders.

Executive summary:

The VEB welcomes the draft proposals of MiFID/MiFIR 2, as it introduces a more level playing field within the Union, foster competition and seeks for better consumer protection. We do, however, find that there are a few areas where improvements can be made.

Best execution – best price for retail investors
Although investment firms trade on regulated markets, MTFs or OTC (including SI), their retail investors at the moment mostly only see their trades executed on one trading venue (a regulated market). Unlike investment firms, retail investors thus do not profit from the introduction of having several types of trading venues available. We believe best execution should entail that investment firms offer their clients comparison of prices on several trading venues. Only in this way, retail investors can obtain best prices.

Best execution – trading on OTFs
Whilst operators of regulated markets and MTFs have to adhere to non-discretionary rules when it comes to the execution of orders, the same is not the case for operators of an OTF. This discretional leeway means that orders do not have to be executed the moment they are entered into the trading system. This means there is a risk involved, namely the risk of not getting the best price if the operator of the OTF waits too long with the execution of an order.

Consolidated tape
The proposals for MiFID 2 introduce the possibility of publishing consolidated tapes. We are not proponents of having multiple tapes available. Competition in this area will not lead to better results, but only to fragmentation. Providers of consolidated tapes will all state that their tape is the most up-to-date, the most reliable and the most comprehensive. We thus believe that only one (mandatory) consolidated tape should be made available.

Inducements

MiFID 2 introduces a ban on inducements for independent advisors and portfolio managers. We urge to introduce a similar ban for dependent advisors. This will prevent conflict of interest situations from occurring.

Theme	**Question**	**Answers**
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	• We find it appropriate that members or participants in a regulated market or MTF now fall within the scope of the directive. • We believe, however, that insurance undertakings should not be exempt from MiFID rules, especially when they sell securities-based products to retail-investors or consumers. • We question the exemption of insurers, "collective investment undertakings" and pension funds, as these are the biggest suppliers of retail investment products in the Union and providers of investment services for employees participation schemes.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	• Yes, it is appropriate to include structured deposits, as many retail-investors take up such products. • We do not see many retail-investors trading directly in emission allowances, but we can imagine that some will trade in derivatives thereof. We therefore appreciate that the EU is willing to offer consumer protection in these cases. • We want to stress our concern that these two are only a tiny part of investment products that are still not covered by MiFID conduct of business rules. Banks' savings

		products, life insurance, personal pension products, etc. are still not covered at all. All retail investment products offered at retail points of sale should be in scope. We are concerned that the EC position to address part of this problem through the IMD revision may not be satisfactory, as it does not provide any guarantee of full harmonization of conduct of business rules whatever the retail investment product is, and whatever distribution channel is used.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	• N/A to retail investors.
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	• Yes, it is appropriate to regulate third country access to EU markets, considering that we live in a globally interconnected world. More than in the past, consumers can buy products (or invest in securities) originating from outside the EU.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	• Especially for funds, asset managers and pension funds it's highly important that there will be no conflicts of interests at executive or supervisory levels. The corporate governance structure of these companies has to provide rules on this. As for investments firms, it's also important for trading venues that there will be sufficient rules on oversight.
(Organisation	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and	• This question can only be answered if it's clear how OTC trading is defined. We propose to include a definition of

of markets and trading	from systematic internalisers in the proposal? If not, what changes are needed and why?	'OTC trading' in MiFID-2.
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	• We believe OTC trading should be very limited. In our view trading should take place on regulated venues, or SI. Except for some specific exemptions (large trades, unusual packages etc.), all trades should go to regulated venues or MTF's and financial institutions not complying should be reprimanded by the supervisors. In particular ESMA should be granted investigation powers to check if trades classified as "dark" or "OTC" by investment firms are appropriate and comply with the requirements for such classification.
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	• We believe the proposed requirements are appropriate. The risks associated with algorithmic trading are risks of market abuse. For example: an order is retracted a few (mili)seconds before opening or closing of the market. Such retraction leads to different than expected price forming. • Individual investors usually do not have access to algorithmic trading techniques, and even less to HFT ones. We think that ESMA or national regulators should focus more on the possibility of market abuse by using HFT-techniques. The legislator should therefore ensure that HFT is properly checked and supervised. We have not seen any evidence provided in the MiFID review on this point.

	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	• We believe they are appropriate.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	• In light of the prevention of market abuse, we welcome this requirement. • Second of all, these requirements also enable clients to check whether or not best execution principles have been applied. • Third, they are appropriate to verify that they have not been subject to any conflict of interest.
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	• We believe trading should place on regulated venues. As such, we welcome the requirement of trading certain derivatives on organised venues.
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	• We imagine this to be the case. We worry, however, whether or not retail investors will be able to gather sufficient information (as SMEs will be allowed to publish less information than regular enterprises). SME can be black boxes when it comes to investor information and protection of shareholder rights. • Nevertheless, we believe it would be better to force all regulated venues (RMs + MTFs to follow minimum requirements in terms of listing SMEs and trading SMEs securities, so that RMs and MTFs are on a level playing field. Indeed, the MiFID review does not provide

		evidence on the existing MTFs activities on listed SMEs (shares of listings, shares of trading volumes, etc.).
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	• Non-discriminatory access alone is not enough to ensure that competition will take place. For example, the costs of accessing a venue can skyrocket when one has to use a proprietary system that is being used by the venue which provide 'non-discriminatory access'.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	• Yes, we agree on the absolute necessity to be able to take these measures in order to protect the market against manipulations and excessive speculation. Added to the fixation of more restrictive positions' limits there could be also a sharp increase in deposits requirements.
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	• We welcome the ban on monetary benefits for independent advisors and portfolio managers. We recommend to impose a similar ban for dependent advisors. • In VEB's view the new requirements of Article 24 of the Directive are not sufficient to protect investors from conflicts of interest in the provision of such services. The article 24.3 introduces the notion of "independent" advice. Article 24.5 states that the advisors labelling themselves as "independent" should not receive third party commissions. The major part of the distribution channels (banks, insurers networks, tied brokers, etc.)

		already do not label themselves as "independent". Therefore, the proposed legislation will most likely have no impact on about 90% of retail distributors. • Moreover, the EC proposal targets only the small distribution segment that is at least consisting of multi-providers (most bank networks and their so called "advisors" sell only in-house products), and are on average more trained and experienced than bank retail sales personnel ("advice"). • Finally, the EC proposal creates two categories of "advice": independent" (no commissions) and "dependent" (commissions allowed). We believe that "dependent advice" is not "advice" and find the labelling "advice" and/or "advisor" very misleading since in most of the cases it is actually marketing and selling of the commissioned products. • We support the two amendments proposed by Euroinvestors. They proposed: - that the new article 24 should forbid any retail financial distributor to label him/herself as "advisor" or financial advisor" if the major part of his/her compensation comes directly or indirectly from the products' sales. - that ESMA should get a legislative mandate to set up technical standards on article 26 and to monitor the enforcement of article 26. EuroInvestors pointed out that MiFID implementation

		Directive already bans commissions if they are not in the primary interest of clients (article 26 of the MiFID Implementation Directive). It has just not been properly enforced (it seems that these "inducements" rules have been even forgotten by CESR in its "Consumer guide to MiFID"), which they believe should have been mentioned in the MiFID Review. We support this note.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	• In our view, the proposed non-complex products are indeed non-complex in nature. Unfortunately, it seems that it will no longer be possible to invest in non-UCITS collective investments undertakings, on an execution-only basis. A retail investment product can be complex, but if its expected performance is clearly understandable (for example a synthetic index ETF), there is no reason to prevent retail investors from buying them on the secondary markets. But only when the investment firm checked if these products are appropriate for retail investors' portfolio. • The main problem is that the complex products, like retail structured funds, are not "bought, they are "sold" or "dependently advised" to use the new jargon of the EC. Therefore, we believe article 25 should be reconsidered. We think that the current formulation of the article 25 would even reinforce the role of the "dependent" advisors vis-à-vis retail clients and would further discriminate against execution only-channels.
	17) What if any changes are needed to the scope of the best	• We believe that best execution entails a requirement for

	execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	investment firms to check prices on several trading venues. Currently, investment firms are not required to check prices on more than one platform. Clearly, that can't be the idea behind best execution. Our research shows that up to 17 % of retail trades do not get the best price available. • The proposals for MiFID 2 introduce the possibility of publishing consolidated tapes. We are not proponents of having multiple tapes available. Competition in this area will not lead to better results, but only to fragmentation. Providers of consolidated tapes will all state that their tape is the most up-to-date, the most reliable and the most comprehensive. We thus believe that only one (mandatory) consolidated tape should be made available.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	• We believe they are.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	• We believe that national regulators can use their existing powers to protect individual investors better. But they don't seem to act very progressive. For instance, it's already possible for regulators to ban specific misleading products. So far, only the Belgian supervisor acted accordingly and banned some complex, misleading products. This should be taken to an European level. The ESA's should step up and set up rules and regulations for banning products and more investigation powers. • We note that the stakeholders group of ESA's are

		controlled by the industry and its suppliers as the EuroInvestors complaints to the European Ombudsman demonstrate. ESMA is the only exception.
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	• We foresee that the stated requirements will mostly be sufficient. But this also depends on the further implementation of the requirements.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	• No, we find the stated requirements sufficient. This should not be changed by the European Parliament because it will be amended by any special interest group from the industry.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	• We find the requirements appropriate. This should not be changed by the European Parliament because it will be amended by any special interest group from the industry.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	• We find the pre-trade waiver requirements appropriate. We find, however, that post-trade waivers should be abolished. As the transactions have taken place, we do not see a reason for deferral.

	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	• There is a strong and urgent need across Europe for a consolidated tape. Currently the lack of this information in Europe – especially with regard to post-trading data leads to the fact that investors are not able to find specific data in order to measure the performance with respect to best execution of their orders. • **Therefore we urge the European parliament to introduce a mandatory "consolidated tape" including all important consolidated trading data, which is accessible to all participants of the capital markets including the investors.** • We are not proponents of having multiple tapes available. Competition in this area will not lead to better results, but only to fragmentation. Providers of consolidated tapes will all state that their tape is the most up-to-date, the most reliable and the most comprehensive. We thus believe that only one (mandatory) consolidated tape should be made available. • Therefore we have a proposal in order to improve the current situation: *The establishment of such a single mandatory "consolidated tape" on the EU level should follow in order to reach a higher level of transparency for the investors and to guarantee the best execution. The consolidated trade data should be made freely available to individual investors within 3 minutes.* • Art. 19 of MIFIR would be the right place to introduce such a obligation.

	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	• See above: post-trade waivers should be abolished.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	• The ESAs rank customer protection as their sixth and very last objective because they follow the traditional supervisory model of mixing sometimes conflicting objectives of firms' solvency on the one hand and customer protection on the other hand. The more appropriate "twin peaks" approach already adopted by the USA, Belgium and soon by the Netherlands and the UK is the way to go to effectively protect end-users. • Moreover, the ESAs function in silos whereas the same distribution channels are selling products that are supervised by three totally different European supervisors. The role of the joint committee must be much more developed to ensure a minimum harmonization of the retail distribution supervision.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	• No comments.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	• We suggest to consider: UCITS, Market Abuse and EMIR.

	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	• As many retail investors trade in financial instruments with a US origin or on US markets, we believe US regulation should be borne in mind.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	• We believe so.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	• Obviously ESMA will be even more overloaded with legislative "technical standards" to design. This can raise very serious issues in terms of timing, legislative quality and legal effectiveness.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article ... :	N/A
Article ... :	N/A
Article ... :	N/A
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	N/A
Article ... :	N/A
Article ... :	N/A