Verband der Auslandsbanken
in Deutschland e.V.
Association of Foreign Banks in Germany

Review of the Markets in Financial Instruments Directive

Responses of VAB Germany to the Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Theme	Question	Answers
Scope	Questions 1) – 3)	n.a.
	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?	Our members are specifically exposed to any changes in cross-border market access regulation. So we would especially like to focus on the issue of market access for third country providers addressed in the draft. Such market access rules already exist in Germany. The proposed draft MiFID and MiFIR already reflect a lot of our thoughts we already expressed in our comments to the Commission's consultation paper dated 8 December 2010, so we welcome the basic concepts and provisions set out in the draft. However, we would be happy if three issues could be reassessed: • Third country firms acting through fully licensed subsidiaries/ investment firms instead of branches should not be discriminated against. It should be possible to solicit business with retail clients through an investment firm in the same way as such business may be solicited through a branch under the draft MiFID. • Apart from cross-border services to eligible clients, third country firms which are registered with ESMA should also be allowed to actively solicit professional clients. • The concept of reciprocity vis-à-vis third countries should be abandoned, as this is contrary to GATS.

		We discuss detailed proposals and comments with regard to draft Art. 41 MiFID and draft Art. 36 MiFIR below.
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?	n.a.
Organisation of markets and trading	Questions 6) – 14)	n.a.
Investor protection	Questions 15) – 16)	
	17) What if any changes are needed to the scope of the best 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?	The proposed last sentence of this provision should not be adopted: "Member States shall require investment firms to summarize and make public on an annual basis, for each class of financial instruments, the top five execution venues where they executed client orders in the preceding year." **Justification**: The proposed disclosure does not generate additional benefits for neither clients nor the public, because the information disclosed is much too detailed. The effort of third parties to retrieve and analyse such information is too high. On the other hand, such information in general does not have measurable effects on costs and services for clients of the given investment firm. Bearing this in mind, the costs institutions have to incur for generating

		and disclosing the data is not justifiable.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	We believe that the current client classification regime has worked well and, subject to our comments below, should be retained without adjustment. While no regulatory regime is perfect, in practice it seems to have allowed for a suitably graduated approach to applying regulatory rules (and hence the associated costs), tailored to the sophistication of the clients concerned, while at the same time allowing for adjustments to classification where appropriate relying on the ability to opt "up" and "down". It is therefore not clear what benefit any change would deliver at this stage and, in view of the experience of the industry at the time MiFID was introduced, it could be an expensive exercise to introduce.
Transparency	Questions 20) – 25)	n.a.
Horizontal issues	Questions 26) – 31)	n.a.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article 4(2) MiFID	This provision defines the 'execution of orders on behalf of clients'. The draft should be amended to read as follows: "Execution of orders includes the conclusion of agreements to sell financial instruments issued by a credit institution or an investment firm at the moment of their issuance**, with the exception of tier 1 and tier 2 capital instruments**." **Justification**: Credit institution which are not investment firms should have the possibility to generate own funds by way of issuing tier 1 and/or tier 2 instruments without being subject to additional license requirements and the implementation of organisational and conduct of business rules for investment firms. Cases of application of such exception may be rare, but however there is a justified interest of the institutions concerned not come under the scope of MiFID just because of obtaining own funds. Likewise, the exception should also cover investment firms when issuing tier 1 and/or tier instruments, because in doing so, they do not act as intermediaries providing services. Extending the MiFID rules as to cover these cases would not be appropriate.
Article 37(8) MiFID	Draft Art. 37 (8) MiFID should be amended as follows: "The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 24, 25, 27, 28 of this Directive and Articles 13 to ~~23~~ **22** of Regulation (EU) No …/… [MiFIR] and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory."

	Justification: An issue which is of importance to a lot of our members operating through branches under the EU passport is transaction reporting. Such reporting is largely IT driven and can most effectively be tackled on the level of the head office. Nevertheless, Art. 32(7) MiFID (Art. 37(8) of the draft MiFID recast) provides for transaction reporting duties of branches. The interpretation and implementation of this provision will remain difficult. In our view, it would be the best solution to abolish the branches' transaction reporting duties and oblige their head offices to report on behalf of them to their home state authorities. This requires of course, as a first step, a maximum harmonisation of reporting procedures and data to be reported. Hence, we welcome the further harmonisation envisaged in the draft MiFIR, but we feel that such harmonisation should be used to enable effective cross-border data exchange arrangements between competent authorities and to release branches from transaction reporting. As a further step, a pan-European reporting system should be introduced.
Article 41(2) MiFID:	Draft Art. 41 (2) MiFID should be amended as follows: "Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services to retail clients in those Member States' territory shall establish a branch in the Union **or provide such services or activities through an investment firm authorised in the Union; in the latter case, paragraphs 1 and 4 and Articles 42(a) and 43 to 46 shall apply mutatis mutandis**." **Justification**: Pursuant to draft Art. 41 (1) MiFID, a third country firm may render its services to EU retail clients through a branch. The respective supervision and investor protection is ensured by the criteria listed in draft Art. 41 (1) (a) to (g) MiFID, which notably comprise equivalence of supervision in that third country and supervisory cooperation. We understand that the provision of services "through a branch" not only encompasses full service branches, but also the close cooperation of a branch and its head office. Under the draft, it would be possible to use a branch as a point of sale as outlined in the following examples: • The branch acquires orders in financial instruments and then transfers them to the head office for execution, or • The branch acquires individual portfolio management mandates, and the portfolio management services are actually

	processed and performed at the head office. Provided that an investment firm cooperates with a third country firm and meets the same prudential criteria as a branch, cross-border cooperation of investment firms should also be allowed for. Otherwise, investment firms establishing fully licensed subsidiaries under European supervision would be discriminated against, despite fully compliant with MiFID rules, because they would not be able to solicit cross-border business through such subsidiary. Consequently, using an EU investment firm as a point of sale should be permissible under the same rules as applicable to branches. In Germany, BaFin provides for rules on cross-border services to retail clients in its respective Guidelines (http://www.bafin.de/nn_720784/SharedDocs/Veroeffentlichungen/EN/Service/Bulletins/mb__050400__crossborder__en.html), in accordance with which any entity fully licensed under EU law is an eligible intermediary, including separate institutions domiciled in Germany (see page 6, an extract is enclosed to this letter). This supervisory practise has proved successful and effective.
Article 41(3) MiFID, Art. 37(1) MiFIR	Market access for third country firms should not be made subject to any kind of reciprocity provisions. Therefore, draft Art. 41 (3) MiFID should be amended as follows: "The Commission may adopt a decision in accordance with the procedure referred to in Article 95 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third **country** comply with legally binding requirements which have equivalent effect to the requirements set out in this Directive, […] ~~and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive~~." Draft Art. 37 (1) MiFIR should be amended accordingly. **Justification**: Market access for third country firms should not be made subject to any kind of reciprocity provision. Such reciprocity clauses contravene the General Agreement on Trade in Services (GATS), which is has a multilateral and cross-sectoral nature and which is legally binding for the EU. GATS would not allow for bilateral complementary market access requirements and/or agreements, for this contradicts its multilateral character.

	Some GATS provisions enable contracting states to enact supervisory rules to safeguard investor protection (prudential carve-out). However, this "prudential carve-out" clause under GATS only allows for measures aimed at investor and financial markets protection insofar as they are appropriate and can be justified for these purposes. A reciprocity clause, however, would not be acceptable under this GATS provision, because it does not protect investors and markets within the EU, but serves other purposes (i.e. negotiating outbound market access of EU firms in third countries).
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 23(3) MiFIR	Draft Art. 23 (3) MiFIR should be clarified as follows: "The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms **in the meaning of Art. 4 (3) [MiFID]** within the investment firm responsible for the investment decision and the execution of the transaction, and means of identifying the investment firms concerned. […]" **Justification**: The draft wording also covers computer algorithms used for the purposes of best execution. We doubt that this was intended. Instead, we propose to include a referral to Art. 4 (30) MiFID which states that such IT-based best execution arrangements are excluded from the scope of algorithmic trading; they should also be exempt from Art. 23 (3) MiFIR.

Article 36(1) MiFIR	Draft Art. 36 (1) MiFIR should be amended as follows: "A third country firm may provide the services listed in Article 30 of Directive [new MiFID] to eligible counterparties **or professional clients** established in the Union without the establishment of a branch only where it is registered in the register of third country firms kept by ESMA in accordance with Article 37." **Justification**: In our view, there is no plausible reason for obliging professional clients to refrain from entering into transactions with third country firms on a cross-border basis. If the wording was not changed as proposed, every kind of marketing activity of respective third country firms targeting eligible counterparties in the Union would already rule out professional clients approaching such third country firm pursuant to Art. 36 (4) in conjunction with Recital 36 MiFIR. According to the Commission proposal, such restriction would even apply where a given professional client establishes the contact solely upon own initiative. Any marketing activities whatsoever would rule out the possibility for such own initiative of professional clients which, as a consequence, would bear an unwarranted restriction in the choice of investment services providers.