

Summary of reaction to MIFID/MIFIR consultation

On 18 May 2020 the Dutch Banking Association (Nederlandse Vereniging van Banken, abbreviated as NVB) has responded to a consultation paper (CP) that is assessing the overall functioning of the regulatory financial framework governing the functioning and transparency of EU financial markets. This document summarizes the content of the NVB response to the CP. As this document provides a summary that will not cover all topics discussed in our reaction, please find our full response

General

Dutch banks fully subscribe to the overall aim of MiFID II/MiFIR (increasing investor protection and transparency), however the NVB believes that MiFIR/MiFID II on certain topics has not achieved these goals (and in some cases seem to have achieved the opposite). The benefits are rather limited, but costs have increased resulting in a negative cost-benefit balance. This is partly due to 1) the ambiguous and multi-interpretable nature of the MiFIR/MiFID II legislative texts, and 2) timing issues. For example, in the initial phase of MiFID II guidance was urgently sought after. When level 2 and level 3 guidance were published, it was effectively too late as financial market participants already interpreted and implemented MiFID II based on level 1 texts. Due to the different interpretations across Member States, ESMA's level 2 and level 3 guidance caused further confusion and additional burdens as key concepts were not clearly defined. In the upcoming review definitions and timelines should be better aligned.

Investor Protection

In our consultation reaction we highlight several investor protection topics that should be amended. A general concern is 'information overload'. MIFID requires distributors to inform clients better and in more detail. However, recent studies show that investors generally feel more confused and overwhelmed by the sheer amount of information that distributors provided them with. The European Commission did not conduct consumer testing to support the approach taken in MIFID 2 on investor protection. As a result we believe that this has led to a framework that can be overly protective and is not achieving the goal of more transparency.

Cost transparency

We believe cost transparency is important and therefore information should be provided to consumers in a fair, clear and not misleading way. Currently, the amount of information on costs required under MiFID II is overly complex for retail investors. Especially in the area of swing-pricing and bid/ask-spreads (where the definitions of costs are much debated), we believe amendments are necessary in order to effectively protect retail investors. Also, costs-transparency methodologies should be aligned between PRIIPs and MiFID II, which is not the case now.

Issuers/manufacturers

MiFID II relates to investment services and in principle not to the offering/issuance of investment products. Only manufacturers that qualify as investment firms are in scope, meaning investment firms that produce an investment product and provide an investment service regarding to that same investment product. Most investment products (shares, bonds) are *not* manufactured by investment firms, but by companies that issue bonds/shares. Consequence is that most 'producers' of investment products are not legally required to provide target market information, or – in the case of investment funds – information on transaction costs within that fund. This puts the burden to collect target market and cost information on distributors, rather than on the issuers of these investment products. These issuers have no obligation to provide this information. Also, in the context of the consultation on ESG-disclosures, we believe it is important that issuers/manufacturers are included in the MiFIR/MiFID II scope.

Product Governance ('PG')

In general, we support the PG regime but we believe that some amendments could further enhance its effectiveness. For example, the periodic review for non-complex products could be eased, and

the feedback-regime should be reassessed. We also highlight the complex implementation of PG in the area of Execution Only, where little information of the retail investor is known to the distributor.

Telephone trading

MiFID II has insufficiently provided a solution for retail investors who trade by means of telephone communication. We believe all clients that use telephone trading services should be able to opt out to ex-ante cost transparency information, but also to suitability statements or PRIIP KIDs.

Loss reporting

We believe the loss reporting requirements should be amended, because this obligation might be confusing to clients. The notification is 'one size fits all' and is not well suited to apply to all different types of investors. For example, the notification might incentivise clients (not only clients who trade in derivatives or leveraged structured products who possess relative high knowledge/experience) to conduct a trade, whilst it might not be wise to trade. In some cases, the notification could be seen as a disguised investment advice to sell when markets depreciate, actually achieving the opposite of investor protection.

Semi-professional category

Some stakeholders indicated that the creation of an additional client category ('semi-professional investors') might be necessary in order to calibrate investor protection legislation correctly, and to ensure that wealthy and knowledgeable investors are not over-protected and overwhelmed by information. We strongly disagree with the creation of such an additional category of clients as the definition and determination of such a category is highly debatable. Furthermore, the burden of implementation to create an additional category is very high as it means (another) big shift in legal and IT systems (i.e. Product Governance) and comes with a complete suitability reassessment of all current clients as well. We believe a better solution is to reduce the amount of compulsory information overall: not only to wealthy/knowledgeable clients but to every retail investor.

Paperless

The default should in all MiFID II/MiFIR obligations not be paper, but paperless (i.e. electronic by default) as we see no consumer need to receive paper information, it hinders most forms of trading (i.e. telephone or online trading) and is an unsustainable mode of communication.

Ban on inducements

In the Netherlands a ban on inducements has already been introduced in 2014. Because of the current regulatory environment, Dutch banks have experienced foreign firms entering the Dutch market on a non-Dutch MiFID passport. These foreign firms are not subject to a ban on inducements (home-host supervision) and can thus circumvent the ban. This unlevel playing field is unacceptable.

An outright ban on inducements has pros and cons, but a level playing field is essential for a well-functioning and transparent European financial market. We share ESMA's view that the Commission should assess the impact the MiFID II inducements regime has had on the distribution of retail investment products across the Union and the impact of such a ban depending on the different distribution models existing in the Union. It should also look at actions to counterbalance the potential of undesired consequences linked to a ban on inducements.

Other topics

In our CP reaction we also answer questions on multiple other topics, like an EU-wide framework for certification requirements for staff providing investment advice (to which we disagree), an ESMA database for comparison of products (on which we agree, but with very strict and close consulting) and the Best Execution regime (which we deem not very effective).

Market Infrastructure

Level playing field between different categories of execution venues such as, in particular, trading venues and investment firms operating as systematic internalisers

Although SI and trading venues are different execution venues which are difficult to compare, the introduction of the trading obligation and the SI transparency regime have contributed to level the playing field between rules applicable to trading venues and to investment firms trading on own account. SI's have been important sources of liquidity in the past and have a crucial role in providing efficient trading alternatives to EU investors and ultimately reinforcing the competitiveness of EU trading venues.

Share trading obligation (STO)

NVB supports ESMA's proposal to reduce the scope of the share trading obligation to exclude third-country shares as the main pool of liquidity of these shares is often on a trading venue outside the EU. Furthermore the EU share trading obligation with regard to third-country shares could potentially conflict with local share trading obligations in third countries. NVB appreciates the difficulty in identifying which shares qualify as third-country shares and therefore are not within scope of the EU share trading obligation. NVB concurs with ESMA's view that this should be the shares for which the main pool of liquidity is outside the EU, which as a rule of thumb can be determined based on the ISINs of the shares in combination with an examination of whether the issuer has sought to have these shares admitted to trading on an EU trading venue. Where both the ISIN and the absence of a request to have the shares admitted to trading on an EU trading venue are determined, these shares could be qualified as third-country shares.

NVB is in favour of remaining SIs as eligible execution venues for the purpose of the share trading obligation in line with the current legal mandate (both liquid and illiquid instruments as long as the instruments are Traded On a Trading Venue).

EU consolidated tape (CT), Market data

MiFID II requires venues and data providers to publish market data on a reasonable commercial basis, provide market data in a disaggregated format, and to make market data available free of charge 15 minutes after publication with the objective to lower the cost for market data.

MiFID II has not delivered on its objective to reduce the cost of market data charged by trading venues and Approved Publication Arrangements (APAs). ESMA has recommended the establishment of a European Union (EU) wide real-time consolidated tape for equity instruments. A CT could help investors regardless of their financial means and position to get an overview of the European trading environment. The main reason why a consolidated tape has not yet emerged would in NVB's view be that the benefits for a provider of a CT do not weigh the costs to set-up and maintain such a consolidated tape. Further to that the data quality is not yet of sufficient quality that a CT could prove to be a reliable instrument.

A CT should not result in another layer of costs but should facilitate a more efficient and less costly collecting of transaction data. Therefore a cost-benefit calculation should be made that the benefits of introducing a CT outweigh the costs. The introduction and maintenance of a CTP should not cause additional costs for market participants who would have to bear the costs for data supplied by the CT and also for data supplied by regulated markets or other trading venues/ data vendors. To the contrary it should lead to more cost efficiency.

NVB would support standardisation of market data to facilitate consolidation of data necessary for the CT. NVB advises to resolve data quality issues, in particular with regard to non-equity instruments to ensure that the CT has added value. NVB does not support mandatory contribution as the focus should be on establishing the conditions that make CT attractive for users to make use of the CT.

The introduction of a CT could lead to better execution practices, however NVB does not support changes to or a more strict best execution regime. Even after the establishment of a CT it should in NVB's view still be possible to apply some flexibility as to the execution practice.

Non-discriminatory access

The further integration of EU capital markets is vital to a stronger European economy. The implementation of open access as now provides for in MiFID is an essential part of this integration. We believe that expanding open access to derivatives will make the EU financial markets more safe and more transparent, and will also make risk management more cost efficient, by reducing the financial burden to central clearing. The current MiFIR framework already provides for any risk considerations that might arise in the future.

We believe that expanding the benefits of open access to derivative markets will come with significant cost efficiencies, which will lower the financial burden to central clearing, and contribute to better and more efficient risk management across capital markets in the EU. Open access and more competition is likely to improve services levels and to decrease the direct cost of fees. Aside from these considerations related to cost efficiencies we believe that open access will improve netting and cross margining, and will lead to deeper liquidity pools.

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About the Dutch Banking Association

The Dutch Banking Association (Nederlandse Vereniging van Banken, or 'NVB') represents all commercial and semi-public, Dutch and foreign banks and credit institutions operating in the Netherlands (approximately 70). The NVB strives to achieve a strong, internationally competitive and sustainable banking system in the Netherlands.