



Triodos Bank N.V.  
Executive Board and Supervisory Board  
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The Hague, 4 May 2022

Reference: 2022 007

Re: EI-VEB - Triodos, (additional) objections within the meaning of Book 2 Article 349 of the Dutch Civil Code,

Dear Messrs De Geus and Rijpkema,

Thank you for your response to the letter sent to you by European Investors-VEB ('EI-VEB') on 17 March 2022. I have read your letter carefully, both the factual account of the trade in depository receipts for shares in Triodos Bank ('Depository Receipts') and the answers you give to the questions and objections raised by EI-VEB. Unfortunately, these answers are not convincing.

## **1. EI-VEB and its members**

EI-VEB is an association in the sense of Book 3 Article 305a of the Dutch Civil Code and may independently initiate legal proceedings for the protection of similar interests of other persons insofar as it promotes those interests.

In line with its objects, EI-VEB promotes the interests of all investors, including investors holding Depository Receipts from Triodos Bank N.V. ('Triodos').

## **2. Objections to the course of events within the meaning of Book 2 Article 349 of the Dutch Civil Code.**

In this letter, EI-VEB reiterates the previously mentioned objections to the policy and course of affairs within the meaning of Book 2 Article 349 of the Dutch Civil Code and extends these objections further.

EI-VEB's objections focus on (1) acting contrary to the law and/or the articles of association, (2) mismanagement of the business and (3) the failure of the management board to provide information properly.

In EI-VEB's opinion, these objections qualify as legitimate reasons to doubt the correctness of the policy and should therefore be sufficient reason for the Enterprise Chamber to grant a request for an investigation into Triodos' policy and business management.

I will briefly explain these objections below.

(1) Acting contrary to the law and/or articles of association

On 18 March 2020, Triodos suspended the option of buying or selling depository receipts through the internal trading system facilitated by Triodos. This means that the liquidity had almost completely disappeared from the depository receipts. On 6 October 2020, Triodos reopened the option of trading in depository receipts with the bank, albeit with restrictions regarding the size and frequency of transactions. On 5 January 2021, Triodos suspended this trading option again. After several short and restricted trade openings, it was announced on 21 December 2021<sup>1</sup> that the existing trading option would be terminated with immediate effect.

Triodos has announced that it will set up a semi-open trading system (Multilateral Trading Facility – 'MTF') to enable future tradability in depository receipts. Triodos believes it will take 12 to 18 months from December 2021 to prepare for this, which means that even in the most generous scenario, depository receipt holders will not have been able to dispose of the funds entrusted to Triodos for almost two years.

EI-VEB doubts the certainty of the ultimate implementation of the MTF, given the conditions ('questions') set by Triodos. In addition to market conditions and the question whether Triodos is internally 'ready' for implementation, the decisive issue is whether there is sufficient interest in the market (i.e. whether there are enough interested parties in purchasing Depository Receipts).

The latter issue, sufficient interest in Depository Receipts, seems highly questionable. It was precisely because of a persistent imbalance between buyers and sellers of Depository Receipts that the internal trading system was discontinued. The interest of buyers will therefore only be aroused if the price at which Depository Receipts are traded were (much) lower than the net asset value, which is undesirable for the current Depository Receipt holders.

According to Triodos, the (now discontinued) trading system in which pricing was based on intrinsic value worked well for a long time, but no longer. The underlying causes for this dysfunction that Triodos mentions are not convincing and, in any case, have never been substantiated.

Triodos, for example, talks about the influence of the corona pandemic as a driver of the imbalance between supply and demand in Depository Receipts. However, the bank did not wait for the end of the pandemic to see if the imbalance would reduce as a result. In fact, the

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<sup>1</sup> <https://www.triodos.nl/persberichten/2021/211221-triodos-bank-streeft-naar-notering-op-multilateral-trading-facility>

bank never made a connection between the end of the pandemic and the functioning of the internal trading system.

The bank stated in September 2021 that it is 'no longer likely that the current depository receipt trading system will be able to structurally balance at all times the selling pressure created by life events of depository receipt holders or for other reasons with sufficient demand for depository receipts at net asset value'. The bank has never been able to explain why these 'life events' are suddenly having an increasing effect on the trade in depository receipts.

By discontinuing its buyback programme and continuing to sell and offer its Depository Receipts to customers during the brief resumption of this programme in the autumn of 2021, Triodos violated aspects of conduct relating to the obligation to manage and maintain integrity.<sup>2</sup>

It is impossible to see how the sale and offer of new Depository Receipts during the short period of resumption of the buyback programme can be qualified as a proper duty of care to the customers whom Triodos actively approached with advertising e-mails to buy Depository Receipts at a discount. It must have been clear to Triodos that there was and could no longer be a sustainable, balanced restart of its buyback programme.

The fact that Triodos itself had serious doubts about this at the time of the opening in October 2021 is evidenced by the ceiling of EUR 5,000 on the redemption of its Depository Receipts. It is hard to see how Triodos could have carefully represented the interests of its customers by offering them new Depository Receipts. Although customers were enticed by a discount of EUR 2 on the net asset value of EUR 84 and exemption from the usual transaction costs, this promotional offer shows that Triodos actually no longer had any confidence that this buyback programme had any chance of a sustainable restart.

The canvassing of new buyers of Depository Receipts thus has all the appearance of artificially creating demand for Depository Receipts in order to keep the buyback programme going for some time, even though Triodos knew or should have known that a sustained resumption of this buyback programme was not realistic. The funding base, cost structure and business model prevented any kind of sustainable resumption of the buyback programme. The buyers of Depository Receipts during this brief resumption period can therefore only be regarded as victims; they bought Depository Receipts from a party, Triodos, that knew or ought to have known that these buyers would never again be eligible to sell back these Depository Receipts.

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<sup>2</sup> Art. 3:17 paragraph 2 b Wft (Dutch Financial Supervision Act). These rules relate to integrity, which is understood to mean the prevention of: 1° conflicts of interest; 2° the commission of criminal offences or other breaches of the law by the financial company or its employees, which may damage confidence in the financial company or in the financial markets; 3° relations with clients which may damage confidence in the financial company or in the financial markets; and 4° other actions by the financial company or its employees which contravene socially accepted standards in such a way as to cause serious damage to confidence in the financial company or in the financial markets.

The fact that there is an execution-only relationship with the customer does not mean that Triodos is not bound by the principle that it must treat its customers with integrity and care. Nor does it relieve Triodos of its obligation to put its customers' interests first.

Actively offering and advertising the purchase of Depository Receipts to its customers, while Triodos knew or should have known that the buyback programme could only be temporarily restarted, is at least in breach of the code of conduct that requires that the (appearance of) entanglement of Triodos' own interests with those of its customers be avoided.

Triodos knew or should reasonably have known, and from the use of bait and switch (Action Conditions) it also expected, that the buyback programme could never be restarted for a longer period of time. Moreover, it knew that listing on an MTF - which it ultimately appears to have chosen - would result in a serious loss for its depository receipt holders. As a result, Triodos was no longer in a position to offer the sale of its own Depository Receipts to its customers as products that did not carry a great risk.

Triodos was also no longer in a position to describe these Depository Receipts as a suitable product for its customers.<sup>3</sup> Its customers were exposed to irresponsible risks by the uncertain restart of the buyback programme.

As regards the duty of care of a bank such as Triodos and the status of an execution-only relationship between Triodos and its customers, the following framework is relevant.

According to established case law, the bank, as a professional investment institution considered to be eminently expert, has a (special) duty of care that is also intended to protect its customers from the dangers of their own carelessness or lack of insight. The extent of this duty of care depends on the concrete circumstances of the case, which may also take into account the applicable public law regulations.

This duty of care must, dependent on the nature and complexity of the financial instrument, inter alia conduct an adequate investigation into the financial possibilities, the expertise and goals of the customer, to be able to ascertain whether, and if so, to what extent and in what manner it must inform the customer about the operation and characteristics of a proposed transaction or applied construction and warn him of the (special) risks that are associated therewith, as well as of the fact that a transaction proposed by him or applied (investment) strategy may not be in line with his financial possibilities or goals, his risk appetite or his expertise.<sup>4</sup>

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Pursuant to Art. 4:24 of the Wft, Triodos was required to carry out a suitability test; depository receipts for shares are not mentioned in the list of non-complex products in Article 4:24 paragraph 5 of the Wft. To be able to offer these depository receipts for shares that are not traded on a stock exchange, Triodos was required to carry out a suitability test on its clients.

<sup>4</sup> HR 3 February 2012, ECLI:NL:HR:2012:BU4914, r. o. 3.4. Referring to HR 26 June 1998, ECLI:NL:HR:1998 ZC2686; HR

A duty to warn may exist in circumstances where a particular risk or the danger it creates is not apparent without (explicit) warning, for instance because of the complexity of the legal relationship, and the investment firm should understand this.

## (2) Mismanagement in the business sphere

'Social return' is central to Triodos' mission. Impact in this area, the bank has regularly emphasised, can only be achieved if it is considered in conjunction with the bank's financial performance in terms of risk and return.

Based on recent results, there are good reasons to doubt that Triodos' prudential policy is correct. This is an unsustainable financing model, which means that Triodos' objects cannot (any longer) be achieved.

A closer look at some of the financial targets communicated by Triodos in recent years shows that it has not been managed as effectively as might be expected of a professional, supervised bank. Time and again, the depository receipt holders have stressed the importance of these objectives and confirmed their feasibility.

EI-VEB points first of all to the cost-income ratio, an important measure of efficiency. At least since 2016, 79 to 80 per cent of Triodos' income has been spent on costs. This is considerably higher than the bank's target of keeping the ratio below 70 per cent. Triodos explained its low efficiency partly by the costs of (implementing) legislation and regulations.

As early as 2017, it was reported that achieving the target of 70 per cent (or less) would therefore take some time. However, a fall to 75 per cent would be achieved quickly, it was claimed at the General Meeting on 19 May 2017, for example. To date, however, this has not been the case, although Triodos has repeatedly alerted depository receipt holders to the importance of this ratio.

Triodos' low efficiency over the years has also had an impact on its low return on equity in recent years. In the years 2017 to 2020, the bank set a target for return on equity of 3 to 5 per cent. Triodos achieved a return at the bottom of that range in those years, only to fall below it in 2020.

Triodos qualifies its own return target as 'fair', which should be viewed in the previously mentioned threefold mission ('creating impact by consciously using money for social change'), return and risk. In its own words, the bank puts the mission first; only then does it look at risk and return. The bank apparently considers a lower-than-market return in balance given its mission ('social impact') and risk profile.

It is therefore reasonable for (potential) depository receipt holders to anticipate a low risk profile for the said investment in line with the lower returns realised, certainly given the high

capital buffers maintained by Triodos. The reality is that the depository receipt holders have been sold a very risky investment with low returns. Triodos' mandatory warnings in the legal small print of official documentation including prospectuses do not change this.

At the same time, the bank knew or should have known that missing targets and/or barely meeting - from a market point of view - uncompetitive targets has implications for the valuation of the company at the time when free pricing of the depository receipts were to be applied. Banks that operate a lot more efficiently and profitably than Triodos are traded on the stock exchange considerably below their intrinsic value. At Triodos, an extra large difference must be taken into account because of the restrictions in trading and the chosen governance that gives depository receipt holders very limited control.

Triodos should therefore have known for some time that the Depository Receipts would quote well below their intrinsic value in a less bank-controlled trading environment. Triodos did not see this as an obstacle to continue using the internal trading system for years, in no way warning depository receipt holders of its finality.

### (3) Failure of the board to provide information properly

As explained in detail above as well as in our letter of 17 March 2022, EI-VEB doubts Triodos' reading of the moment when the realisation dawned on the executive and supervisory directors that the internal trading system was no longer tenable. Triodos has previously indicated that this will be concluded by the end of 2021 following research earlier in the year.

At the Annual General Meeting of 21 May 2021, Triodos kept many options open with regard to the trade in Depository Receipts and stated that it was looking for a solution to further grow the capital base. The interests of depository receipt holders would be expressly taken into account in this. The expected significant decrease in the value of Depository Receipts will be the outcome of this. This outcome is not only bitter, it was also foreseeable for some time, based on knowledge of Triodos' business realities and market conditions.

Therefore, EI-VEB is of the opinion that Triodos did not disclose and share its internal assessment of the trading system with depository receipt holders in a timely manner. It also remains unclear how the decision-making process that led to the discontinuation of the internal trading system took place, how the decision was made in favour of the MTF and whether the interests of depository receipt holders were taken into account as much as Triodos had previously indicated.

EI-VEB reiterates its call on Triodos to provide insight into the discussion and decision-making concerning (the termination of) the internal trading system and the consideration of alternatives in meetings of the Executive Board and Supervisory Board.

EI-VEB reserves all rights to extend its objections. VEB explicitly states that it is submitting these objections to you now in the context of Book 2 Article 349 of the Dutch Civil Code.



### **3. VEB is willing to talk, but full transparency is necessary**

In its letter of 25 March 2022, Triodos states that it is prepared to meet with VEB. VEB gladly accepts Triodos' invitation to a meeting, but on condition that this meeting must take place within 14 days of the date of this letter.

EI-VEB would like to receive your substantive response to this letter as soon as possible.

Kind regards

European Investors-VEB

Gerben Everts Managing Director