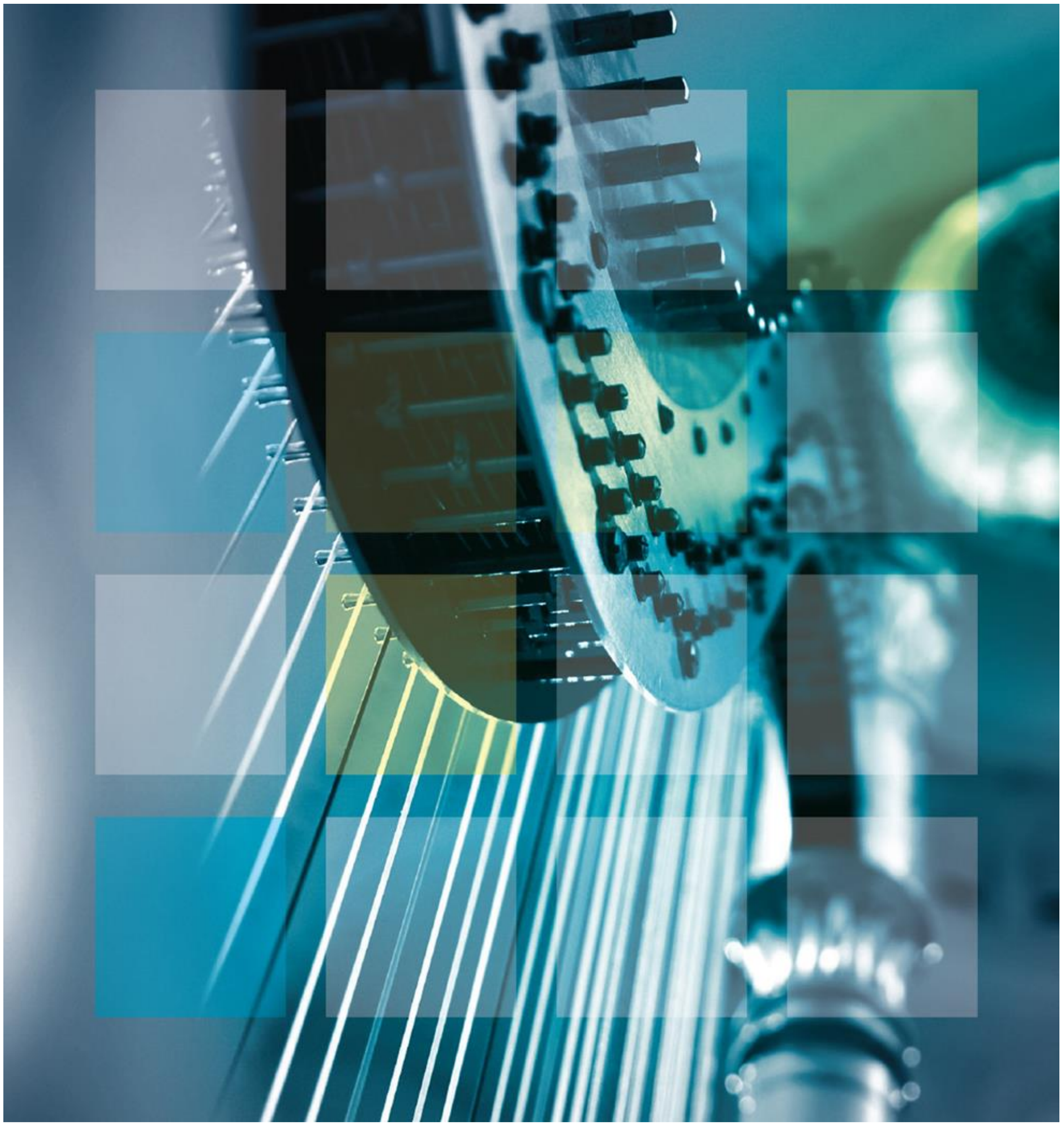

Public Consultation on national discretions in the Markets in Financial Instruments Directive (“MiFID 2”) incorporating elements of the Insurance Distribution Directive (“IDD”)

The Consultation Process

The Minister for Finance, Mr. Michael Noonan, T.D., invites interested parties to make submissions in relation to national discretions contained in the Markets in Financial Instruments Directive (hereafter referred to as "MiFID 2") and certain discretions contained in the Insurance Distribution Directive (hereafter referred to as "IDD").

The consultation period **will run to 5pm, Wednesday 21 September 2016**. Any submissions received after this deadline will not be considered.

How to Respond

The preferred means of response is by email to: MIFID@finance.gov.ie.

Alternatively, you may respond by post to:

MiFID 2- Public Consultation
Financial Services Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

Please include contact details if you are responding by post. When responding, please indicate whether you are a professional adviser, representative body, corporate body or member of the public.

Freedom of Information

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that responses to the consultation may be published on the Department's website.

Disclaimer

The policy or legal analysis in this document is intended as a means of better informing interested parties on relevant considerations or information relating to MiFID and its transposition. Nothing in this document constitutes legal advice or any other form of advice, nor should it be construed as such.

What happens next?

The views expressed in this consultation process will be considered by the Minister and his officials in the context of the transposition of MiFID 2 into Irish law and, to

the extent required, the transposition of IDD into Irish law and any changes that may be required to other domestic legislation.

Introduction

MiFID 2, which is accompanied by a Regulation ("MiFIR"), was adopted as a legislative proposal in October 2011, came into force in July 2014, and was subsequently amended in 2016. It is scheduled to be transposed by July 2017 and to enter into application in January 2018.

MiFID 2 will be very substantially supplemented by way of delegated acts ("level 2 measures"): there are around 100 "empowerments" in MiFID 2 (where policy makers have delegated powers to the European Commission and/or the European Securities and Markets Authority (ESMA) to draft delegated acts, regulatory technical standards and implementing technical standards).

MiFID 2 significantly develops upon MiFID 1 in several areas, in particular in relation to market structure and investor protection. In line with the overall approach following the financial crises, MiFID 2 contains fewer substantive national discretions.

Objectives of MiFID 2

The objectives of the legislation include:

- To establish safer and more transparent capital markets
- To strengthen investor protection
- To deliver on the G20 commitment to tackle less regulated and more opaque parts of the financial system (mainly in instruments trading OTC)
- To contribute to establishing a single rulebook for EU financial markets
- To strengthen supervision and enforcement

Key elements of MiFID 2

1. MiFID 2 introduces a **market structure framework** which seeks to ensure that trading, wherever appropriate, takes place on regulated platforms. To this end, it subjects shares and non-equity instruments to a trading obligation. It also introduces a new multilateral trading venue, the Organised Trading Facility (OTF), for non-equity instruments to trade on organised multilateral trading platforms.

2. MiFID 2 increases **equity market transparency** and for the first time establishes a principle of transparency for non-equity instruments such as bonds and derivatives.

3. To meet the G20 commitments, MiFID 2 provides for **strengthened supervisory powers** and a harmonised position-limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse.

4. A new framework will improve conditions for **competition in the trading and clearing of financial instruments**. This is essential for the integration of efficient and safe EU capital markets.

5. MiFID 2 will introduce trading **controls for algorithmic trading activities** which have dramatically increased the speed of trading and can cause systemic risks. These safeguards include the requirement for all algorithmic traders to be properly regulated and to provide liquidity when pursuing a market-making strategy.

6. **Stronger investor protection** is achieved by introducing better organisational requirements, such as client asset protection or product governance, which also strengthen the role of management bodies. Independent advice is clearly distinguished from non-independent advice and limitations are imposed on the receipt of commissions (inducements).

7. A harmonised regime for granting access to EU markets for **firms from third countries** is based on an equivalence assessment of third-country jurisdictions by the Commission. The regime applies only to the cross-border provision of investment services and activities provided to professional and eligible counterparties.

Interaction between MiFID 2 and the IDD

The IDD was adopted in January 2016 and is scheduled to enter into application in February 2018. IDD regulates the way insurance products are sold. It lays down the information that should be given to consumers before they sign an insurance contract, it imposes certain conduct of business and transparency rules on distributors, it clarifies procedures and rules for cross-border business and it contains rules for the supervision and sanctioning of insurance distributors in case they breach the provisions of the Directive. The rules apply to the sale of all insurance products. However, more prescriptive rules apply to those distributors that sell insurance products that have an investment element, such as unit-linked life insurance contracts, as these products potentially represent increased risk to

consumers. This consultation, insofar as it relates to IDD, only concerns investment based insurance products.

As persons regulated under MiFID 2 and IDD can sell functionally equivalent or substitutable investment products, there are sound reasons for examining certain national discretions in IDD in conjunction with the MiFID transposition process. Specifically, MiFID and IDD contain similar national discretions which enable Member States, should they so choose, to establish stricter investor protection rules pertaining to the distribution of or advice provided on *investment* products. The relevant MiFID national discretion is contained in article 24(12) while articles 22(3) and 29(3) contains the equivalent IDD discretions. This is further discussed in section 3.

General Approach

MiFID 1, which came into force in 2007, was transposed into Irish law as S.I. 60 of 2007[1]. MiFID 2 builds upon the framework established under MiFID 1. As such it contains a number of provisions and national discretions which have already been transposed into Irish law. For instance, articles 28, 29, 30 & 88 of MiFID 2 contain a number of discretions, which were previously included in the transposing Regulations of MiFID 1.

The Minister, in the interest of continuity and in the absence of any concerns brought to his attention, is minded to retain such provisions in the MiFID 2 transposing regulations. However, the Minister is open to considering views from stakeholders in this regard.

It is intended that the transposing text will mirror as closely as possible the wording of MiFID 2. To the extent possible, it is also intended that the structure of the MiFID 1 regulations be retained to facilitate a smooth transition between the MiFID 1 and MiFID 2 regulations.

Finally, the Department acknowledges that there have been complicating factors which has created uncertainty for market participants and also impacted on the timing of this public consultation, namely the delay in the European Commission adopting and publishing the MiFID level 2 measures (which are still in draft form) and the amendments to MiFID that were agreed by the EU co-legislators in 2016, including the delays to the entry into application date and the transposition deadline by a year.

[1] As amended by S.I. No 663 of 2007 and S.I No 773 of 2007

National Discretions

Optional Exemptions

1) Text of the National Discretion: Article 3(1)

*"Member States **may choose not to apply this Directive** to any persons for which they are the home Member State provided that the activities of those persons are authorised and regulated at national level and those persons:*

(a) are not allowed to hold client funds or client securities and which for that reason are not allowed at any time to place themselves in debit with their clients;

(b) are not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and/or the provision of investment advice in relation to such financial instruments; and

(c) in the course of providing that service, are allowed to transmit orders only to:

> *(i) investment firms authorised in accordance with this Directive;*
> *(ii) credit institutions authorised in accordance with Directive 2013/36/EU;*
> *(iii) branches of investment firms or of credit institutions authorised in a third country and which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those laid down in this Directive, in Regulation (EU) No 575/2013 or in Directive 2013/36/EU;*
> *(iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings; or*
> *(v) investment companies with fixed capital, as defined in Article 17(7) of Directive 2012/30/EU of the European Parliament and of the Council (1) the securities of which are listed or dealt in on a regulated market in a Member State; or*

(d) provide investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where those clients are exclusively local electricity undertakings as defined in Article 2(35) of Directive 2009/72/EC and/or natural gas undertakings as defined in Article 2(1) of Directive 2009/73/EC, and provided that those clients jointly hold 100 % of the capital or of the voting rights of those persons, exercise joint control and are exempt under point (j) of Article 2(1) of this Directive if they carry out those investment services themselves; or

(e) provide investment services exclusively in emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where those clients are exclusively operators as defined in point (f) of Article 3 of Directive 2003/87/EC, and provided that those clients jointly hold 100 % of the capital or voting rights of those persons, exercise joint control and are exempt under point (j) of Article 2(1) of this Directive if they carry out those investment services themselves."

Comment:

Comparison with MiFID 1 rules

MiFID 2 Article 3(1) is similar to MiFID 1 Article 3(1), which was transposed as Regulation 5 of S.I. 60 of 2007. In the transposition of MiFID 1, the decision was taken to exercise the discretion provided and accordingly persons detailed in points 3 (1) (a) (b) and (c) were exempt from the scope of the transposing regulations. MiFID 2 retains this discretion however with the added proviso that such persons would be subject to requirements which are "*at least analogous*" to the MiFID 2 requirements concerning conditions and procedures for authorisations, supervision, conduct of business rules and organisational requirements.

MiFID 2 contains *additional* optional exemptions in relation to certain investment services in commodities, emission allowances and derivatives (points (d) & (e)). Member States are provided with the option of exempting persons whose activities are exclusively covered by 3(1)(d) and/or (e). These services can be described as follows:

Article 3(1)(d) provides a specific exemption for entities providing hedging transactions for clients that are local electricity undertakings and/or natural gas undertakings, provided these entities are, broadly speaking, owned or controlled by such gas and electricity undertakings and that such gas and electricity undertakings would be exempt under Article 2(1)(j) if they carried out the investment services themselves.

Article 3(1)(e) provides a similar exemption for entities providing hedging transactions for clients that are operators within the EU Emissions Trading System Directive.[2]

[2] Article 3(f) of that Directive provides the following definition: 'operator' means any person who operates or controls an installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated

Article 3(2) and 'analogous requirements'

Persons currently exempt under MiFID 1 article 3(1)(a)-(c) are subject to domestic regulation, *primarily retail investment intermediaries authorised under the Investment Intermediaries Act 1995*. In addition they are subject to the Handbook of Prudential Requirements for Investment Intermediaries, the Central Bank's Consumer Protection Code, the Minimum Competency Code and the Central Bank's fitness and probity standards.

In order to retain the current exemption for persons described in MiFID 2 article 3(1)(a)-(c), the State needs to ensure that there are rules that are 'at least analogous' to the requirements specified in article 3(2). This means that any persons exempted under article 3(1) would still be subject to certain authorisation, supervision, conduct of business and organisational requirements *analogous* to those under outlined in MiFID 2.

The Department has undertaken a legal analysis (taking on board technical advice received from the Central Bank) on how the existing regime for retail investment intermediaries compares to the list of 'analogous requirements' specified in article 3(2).

The Department acknowledges that retail investment intermediaries are already subject to an authorisation regime tailored to their activities and a substantial set of rules. Our assessment is that the rules applicable to them, to a large extent, are indeed analogous to the article 3(2) requirements.

However, we consider that there are, in all probability, gaps which, in the event that the discretion was exercised, would need to be filled. Examples of analogous requirements that must be applied and are under consideration include:

- **Article 9,** which sets out requirements relating to the role and responsibility of the management body.

- **Article 24,** in particular as it refers to **independent** investment advice: whereas MiFID clearly bans independent advisors from **accepting and retaining** remuneration provided by third parties in relation to the provision of service to clients (with the exception of minor non-monetary benefits where a quality enhancement test is satisfied), the Consumer Protection Code, via provisions 4.16 and 4.17, allows intermediaries to use the term 'independent' and accept remuneration provided by third parties so long as

they allow the consumer the option to pay in full for its services by means of a fee.

- **Article 16(7),** which requires records to include the recording of specified telephone conversations or electronic communications. This differs from the Consumer Protection Code where a written record of the telephone call is required (provision 11.1 and the associated definition of "record").

- **Article 29,** which sets out the obligation of investment firms when appointing tied agents.

Question 1:

A. The Minister is minded to exercise the discretions provided for in Article 3 (1) (a)-(c). Do you agree with this approach? If not, please outline your reasons.

B. If persons described under Article 3 (1) (a)-(c) are exempted from MiFID, what provisions of MiFID, in your opinion, have **no** corresponding domestic rules/requirements which are at least analogous, in accordance with the list set out in article 3(2)? Please specify the amended domestic rules that would be required.

C. The Minister welcomes all views in regard to whether to exercise the discretions provided for in Article 3 (1) (d)-(e). In particular, the Minister is interested in the views of any entities that consider they may be in a position to benefit from the exercise of the discretion. If such entities exist in Ireland, they are requested to identify the regulatory regime that they are subject to and to what extent that meets the analogous requirements specified in article 3(2). In the absence of compelling reasons provided in response to this consultation, the Minister is strongly minded not to exercise the discretion.

Optional Exemptions and Investor Compensation Scheme

2) Text of the National Discretion: Article 3(2) Optional Exemptions:

"Member States shall require persons exempt from this Directive pursuant to paragraph 1 of this Article to be covered by an investor-compensation scheme recognised in accordance with Directive 97/9/EC. ***Member States may allow investment firms not to be covered by such a scheme provided they hold professional indemnity insurance*** *where, taking into account the size, risk profile and legal nature of the persons exempt in accordance with paragraph 1 of this Article, equivalent protection to their clients is ensured"*

Comment:

In the interests of investor protection the Minister is strongly minded to maintain the status quo, namely to maintain the requirement that *all* investment firms, regardless of any exemption enjoyed by virtue of Article 3 (1), should be covered by the investor compensation scheme.

Question 2:

Do you agree with the proposed approach? If not can you provide justifications?

Investor Protection, including Conflict of Interest

3) Text of the National Discretion: Article 24 (12)

"Member States may, in exceptional cases, ***impose additional requirements on investment firms in respect of the matters covered by this Article****. Such requirements must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State".*

IDD (in respect of insurance based ***investment*** *products)*
22(3) Member States **may limit or prohibit** the acceptance or receipt of fees, commissions or other monetary or non-monetary benefits paid or provided to insurance distributors by any third party, or a person acting on behalf of a third party, in relation to the **distribution** of insurance products.

29(3) Member States ***may impose stricter requirements*** *on distributors in respect of the matters covered by this Article. In particular, Member States may* ***additionally prohibit or further restrict*** *the offer or acceptance of fees, commissions or non-monetary benefits from third parties in relation to the provision of insurance* ***advice****.*

Stricter requirements may include requiring any such fees, commissions or non-monetary benefits to be returned to the clients or offset against fees paid by the client.

Comment:
Article 24(12) MiFID 2 provides that Member States may in exceptional circumstances impose additional requirements on investment firms in relation to matters covered by Article 24. This includes rules in relation to remuneration arrangements connected to the provision of investment advice and portfolio management.

Article 22(3) and 29(3), IDD, provides similar discretions, as outlined above. However, notwithstanding the desirability of delivering consistent protection for investors and ensuring a level playing field between similar products, the MiFID 2 and IDD rules diverge in some important respects, as follows:

- unlike MiFID, there is no ban in IDD for independent advisers to receive inducements.

- unlike MiFID, in IDD there is no requirement for independent advisers to assess a sufficiently large number of products available on the market which are sufficiently diversified with regard to their type and product providers and which are not limited to products issued or provided by entities having close links with the intermediary. This choice is left at the discretion of Member States.

- unlike MiFID, in IDD there is no 'service quality enhancement test' which is a pre-condition for investment firms fulfilling conflict of interest requirements in relation to fees, commissions and non-monetary benefits. The IDD requirement merely refers to the condition that the payment of inducements does not have a 'detrimental impact on the quality of the relevant service to the customer'. This is similar to the Central Bank's Consumer Protection Code (conflicts of interest provisions).

The first issue to address, then, is whether a consistent legislative approach should be adopted in respect of key rules pertaining to the sale to retail investors of functionally equivalent investment products.[3] To fully address this issue, consideration would need to be given to the rules applicable to retail investment intermediaries authorised under the Investment Intermediaries Act 1995 insofar as they distribute retail investment products or provide investment advice on same. In this regard it is noted that the 'analogous requirements' in article 3(2) includes article 23 (conflicts of interest) and most of article 24 (general principles and information to clients). Effectively, policy makers were cognisant of the need to ensure that clients received minimum harmonised levels of protection even in cases where investment services providers were scoped out of MiFID

[3] More generally, the concern for level playing field rules is seen in MiFID 2 in relation to new rules applicable to investment firms or credit institutions that sell or advise clients in relation to structured deposits, which are distinct from financial instruments within the meaning of Annex 1, Section C.

Question 3 a & b

A. In light of:
- the new MiFID and IDD rules,
- their divergence in key respects (as outlined above),
- the national discretions provided therein (as outlined above), and
- the need for appropriate levels of protection for consumers of investment products, whoever they may deal with,

do you consider that there should be level playing field rules in relation to the distribution of, and advice on, functionally equivalent retail investment products?

B. If not, can you please explain why level playing field rules should not be followed?

In Member States where there have been significant changes to the national rules concerning the sale of investment products (i.e. not directly related to MiFID 2 and IDD), financial regulators, motivated by a desire to improve consumer protection standards, have played a very significant role in undertaking thorough examinations of the issues arising. For example, this approach has been adopted in the Netherlands and also the UK through its Retail Distribution Review.

Thus, the building of an evidential base would help inform the policy decision on whether to exercise the aforementioned national discretions, if so which ones, how and when.

The Minister considers that this is an area that warrants further examination and considers that the presumptive National Competent Authority (NCA), the Central Bank, is best placed to provide the necessary evidence gathering and assessment to inform the policy choices.

The Central Bank's 2016 Consumer Protection Outlook Report sets out the priority themes that the Central Bank will be focusing on during 2016. The Central Bank has stated that its first step will be to publish a Discussion Paper on the risks and benefits to consumers of commission payments to intermediaries in order to seek input from interested parties and ascertain next steps to ensure consumers' best interests are being protected in this area.

Set out below are two possible approaches, the first of which leaves it at the discretion of the NCA as to whether and to what extent it examines this area or subsequently makes or recommends rule changes; the second requires the NCA to

prepare a detailed assessment for the Minister who is then in a better position to determine whether to exercise the Member State discretions, and if so how, also having regard to level playing field rules for the retail investment sector more generally.

Option 1: Not exercise the discretion but delegate the discretionary powers to the NCA

In this option the minimum requirements set out in MiFID and IDD would be transposed into national law but the approach taken in Regulation 79(1) of the MiFID 1 Regulations would be adopted. A regulation would expressly provide the NCA with regulation making powers to impose additional requirements, with or without the consent of the Minister and subject to the conditions set out in MiFID 2 article 24(12). This could, in effect, be extended to include all sellers of/advisors on retail investment products (e.g. by replicating the delegation of the discretion for IDD). This option provides maximum flexibility to the NCA in all respects related to the discretion (including timelines) and any underlying examination required to support a decision on whether to exercise it.

Option 2: Request the NCA to conduct a detailed assessment in this area in advance of any decision whether and how to exercise the national discretion(s)

This option seeks to ensure that the Minister is best informed of the relevant considerations in advance of any decision on whether to exercise the Member State discretions in MiFID and/or IDD, and if so whether there are any changes required to other legislation for the purpose of ensuring level playing field rules across the retail investment sector.

Under this option the NCA would, at the request of the Minister, assess whether the interests of retail investors are best served by exercising the national discretion or discretions, with the overall objective of ensuring the rules best support high quality financial advice, also having due regard to accessibility and affordability considerations.

Such an assessment could have regard to:

a) the development of EU legislation in this area and the factors that gave rise to recent legislative changes,

b) the experience of Member States that have made changes in national law in this area, including where such changes went beyond the requirements of EU law, and what learning can be applied in an Irish context,
c) whether current remuneration arrangements best address barriers which discourage retail investors from seeking advice,
d) the desirability of level playing field rules in respect of financial advice pertaining to functionally equivalent retail investment products, and for the different types of financial advisor,
e) the delineation between financial advice and guidance,
f) wider trends in relation to non-advisory sales to retail investors,
g) the opportunities and challenges presented by new and emerging technologies to provide cost effective, efficient and user friendly advice or guidance services, and
h) any other issues the Bank considers relevant.

For key terms like ‘retail investor’, ‘remuneration arrangements’, ‘financial advice’ and ‘retail investment products’ the intention would be that the assessment is sufficiently broad as to cover the entire retail investment sector (utilising existing definitions in MiFID, IDD, the Investment Intermediaries Act 1995 etc.).

Question 3c:

Which option, if any, do you think best addresses the interests of retail investors and why? If your preference is for option 2 can you please specify whether you agree with the suggested criteria ((a) to (h) as outlined above).

Client Order Handling Rules

4) Text of the National discretion: Article 28 (2)

“2. Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market or traded on a trading venue which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. ***Member States may decide that investment firms comply with that obligation by transmitting the client limit order to a trading venue.*** *Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article 4 of Regulation (EU) No 600/2014”.*

Comment:

In MiFID 1, investment firms were obliged to facilitate the earliest possible execution of a client order by making public that client limit order in an easily accessible manner and in addition investment firms are considered to have complied with this obligation if they transmitted the client limit order to a trading venue. Article 70 of Commission Delegated DRAFT Regulation C(2016) 2398 final, in the circumstances described in article 28(2) above, clarifies that a client limit order shall be considered to be made available to the public when the investment firm has submitted the order for execution to a regulated market or Multi-lateral Trading Facility (MTF) or the order has been published by a data reporting services provider and can be easily executed as soon as market conditions allow.

In the absence of any strong reasons brought to his attention, the Minister will follow the same approach as MiFID 1. For information, the relevant Regulation in this regard are Regulations 108 of S.I. 60 of 2007 as amended.

Question 4:

Do you agree with the Minister’s proposal to continue to exercise this discretion?

Third Country Firms and Branches

5a) Text of the National discretion: Article 39 (1), optional branch requirement in respect of services retail or elective professional clients

*"1. A Member State **may require** that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory **establish a branch** in that Member State."*

Comment:

The third country regime in MiFID 2 (incl. MiFIR) represents a significant departure from MiFID 1. MiFID 1 provided that each Member State could introduce its own third country regime, subject to the general principles of the EU Treaties and provided that national provisions did not result in treatment more favourable than that given to EU firms. Third-country firms that have established a branch in a Member State do not currently benefit from the 'European passport' to provide investment services throughout the EU. To date, the creation of a subsidiary (i.e. a separate legal entity in a Member State) duly authorised under the MiFID regime is the means through which to passport services in the Union.

In order to ensure a more level playing field in the EU for third country firms, MiFID 2 introduces a harmonised third country equivalence regime for the access of third country investment firms to the EU when providing wholesale business (services to per se professional clients and eligible counterparties), 3 years following a European Commission equivalence decision.

In relation to business conducted with retail and elective professional clients, a Member State may continue to operate its existing national regime, if such a regime is in place, provided this does not treat third country firms more favourably than Union firms. In the alternative, a Member State may elect into the new regime under Article 39 MiFID 2.

Article 39 provides that Member States *may* require third country firms seeking to provide investment services and activities to retail and elective professional clients

to do so from *local branches*[4], which are authorised and supervised in accordance with criteria set out in Title 2 Chapter IV of MiFID 2[5].

There are a number of considerations that will inform the decision on whether to exercise this discretion. These include:

- To what extent would investor protection concerns arise if Ireland did not apply a branch requirement?
- How are other Member States approaching this issue and, to the extent known, what factors have influenced any Member State that is proposing **not** to apply a branch requirement?

Question 5a:

The Minister is considering the policy options in relation to this national discretion. Please provide any views you may have on this issue, including supporting rationale for or against imposing a branch requirement.

5b) Text of the National discretion: Article 46(4) MiFIR, Third Country Firms and National Regimes

Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 47(1) or where such decision is no longer in effect.

MiFIR provides for a harmonised regime to emerge in respect of third country firms providing investment services to professional and institutional clients following an equivalence decision by the European Commission in accordance with article 47. However, in the absence of such a decision Member States can continue to operate national regimes in respect of such firms, subject to certain conditions such as equal treatment with EU firms.

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[4] Like MiFID 1, a subsidiary incorporated in the EU will be entitled to serve all categories of clients throughout the EU, including retail clients. As a separate and independent legal entity governed by the laws of a Member State, a subsidiary is not considered as a third-country firm and is therefore not subject to MiFID 2 market access provisions.

[5] For all client types, MiFID 2 does not restrict the performance of investment services and activities to EU clients by third country firms on a cross-border basis where this is at the client's "own exclusive initiative".

Regulation 5(1)(r) of the current MiFID Regulations (S.I. 60 of 2007) specifies that the regulations do not apply to *"branches of non-EEA firms established in the State"*. However, article 47(1) of the Capital Requirements Directive (CRD) and Article 46(3) of MiFIR provide that the national regulations treat third country firms and EU firms equally.

This means, in the case of third country firms seeking to establish a branch in Ireland for the purpose of conducting investment services, there will be a requirement that they are subject to the same set of rules as would apply to an EU firm.

The Minister, therefore, is minded to change the approach from the MiFID 1 regulations by clarifying that the MiFID 2 regulations will apply to branches of third country firms (based on the principle of equal treatment with EU firms, so a third country credit institution wishing to provide investment services in/from Ireland via a branch would be subject to the MiFID 2 provisions described in article 1(3) and 1(4)).

Question 5b:

Do you agree with that branches of third country firms should be brought within the scope of the MiFID 2 regulations? If not, please provide reasons why you do not favour this approach.

Higher Fees Applying to Cancelled Orders

6) Text of the National discretion: Article 48 (9)

*"Member States may allow a regulated market to **impose a higher fee** for placing an **order that is subsequently cancelled** than an order which is executed and to impose a higher fee on participants placing a high ratio of cancelled orders to executed orders and on those operating a high-frequency algorithmic trading technique in order to reflect the additional burden on system capacity".*

Comment:

MiFID 2 introduces a new regulatory regime for firms which engage in algorithmic and/or High-Frequency Trading (HFT). Under MiFID 2 HFT firms will be subject to a range of restrictions and controls, which include testing of algorithms by the participants, built in circuit breakers and the introduction of minimum tick sizes across trading venues. In addition to these requirements, Members States have been provided with a discretion in relation to the fees charged by trading venues for cancelled orders. Essentially, the discretion, if exercised, would permit regulated markets to adjust fees (upwards) for cancelled orders.

The discretion in article 48(9) implicitly recognises concerns expressed over high order cancellation rates leading to an increased risk of overloaded systems and increased volatility in particular in relation to the provision of liquidity.

Exercising this discretion and allowing a market operator to charge higher fees for cancelled orders could help reduce market volatility in circumstances where the market operator considers that there is an additional burden on system capacity.

Question 6:

This Article was not previously included in MiFID 1. The Minister is minded to exercise this discretion by extending to regulated markets the flexibility to impose higher fees for cancelled orders. Do you agree with this proposal?

Designation of National Competent Authorities

7) Text of the National discretion: Article 67 (1)

*"Each Member State shall **designate** the competent authorities which are to carry out each of the duties provided for under the different provisions of Regulation (EU) No 600/2014 and of this Directive."*

Comment:
Under the current MiFID 1 Regulations, the Central Bank was appointed as the National Competent Authority (NCA) for the purposes of MiFID and has also been designated as NCA for financial services legislation more generally.

Question 7:

The Minister, having regard to the supervisory role exercised by the Central Bank in relation to MiFID I and more generally financial services legislation, and in the absence of any compelling reasons to the contrary, is strongly minded to designate the Central Bank as the single National Competent Authority for MIFID and the transposing Regulations.
Do you agree?

Sanctions

8A) Text of the National Discretion: *Article 70(1)*

*"Without prejudice to the supervisory powers including investigatory powers and powers to impose remedies of competent authorities in accordance with Article 69 and **the right for Member States to provide for and impose criminal sanctions**, Member States shall lay down rules on and ensure that their competent authorities may impose administrative sanctions and measures applicable to all infringements of this Directive or of Regulation (EU) No 600/2014*

Comment:
Technically this is more a clarification of a right rather than a national discretion.

Under section 5 of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 a person guilty of an offence is liable on conviction on indictment to a fine not exceeding €10,000,000 or imprisonment for a term not exceeding 10 years or both.

The offences in question are for specified infringements of the MiFID Regulations (S.I. 60 of 2007), mostly related to obstruction/refusal to cooperate and breach of authorisation conditions.

While not directly required, the Minister is strongly minded to retain these same criminal sanctions for infringements of MiFID 2, extending them to cover equivalent offences by new MiFID 2 categories (e.g. market operators of Organised Trading Facilities, Data Service Providers).

MiFID is the cornerstone of financial markets legislation and the additional deterrent provided by criminal sanctions in respect of serious infringements was considered a helpful supplement to the MiFID 1 regulations. The same argument applies in respect of the MiFID 2 regulations.

Question 8A:

Do you agree with the Minister's views as outlined above?

Article 70(7): *Member States may empower competent authorities to impose types of sanction in addition to those referred to in paragraph 6 or to impose fines exceeding the amounts referred to in points (f), (g) and (h) of paragraph 6.*

The 'at least' maximum administrative fines referred to in 70(7) are:

- in the case of a legal person, €5 million;
- in the case of a natural person, €5 million; and
- twice the amount of the benefit derived from the infringement where that benefit can be determined.

In addition there is power to fine a legal person up to 10% of total annual turnover (this is capped at 10% and therefore not subject to any national discretion).

In respect of legal persons, the Minister notes that €5 million is less than the maximum fine provided for in other EU financial services legislation. In light of this and the potentially serious consequences of MiFID infringements, the Minister considers it appropriate to align the maximum level of administrative fine for a legal person with the maximum level in the Central Bank Supervision and Enforcement Act 2013, namely €10 million (achieved through making MiFID 2 a designated enactment subject to the Central Bank's Administrative Sanctions Procedure).

The Minister is strongly minded not to increase the €5 million maximum fine for natural persons nor to increase the disgorgement amount.

Question 8b:

Do you agree with the Minister's views as outlined above?

Other

MiFID 2 provides many empowerments to the European Commission to make "level 2" rules[6] that are required to fully implement the "level 1" rules. The level 2 rules are of a technical nature and their finalisation has been significantly delayed. The European Commission's website contains the most up to date version of the draft level 2 rules.[7]

On a preliminary analysis of these rules – and we must emphasise that they are still subject to change - we did not identify any substantive national discretions for the Member State.[8]

More generally, if you consider there are any issues arising in relation to the transposition which have not been addressed in the preceding questions, we would encourage you to set out your views under this question.

Question 9:

Are there any other Member State discretions or issues related to the transposition of MiFID 2 that you wish to outline? Please specify the provision of MiFID 2 which is required to be transposed or the area of concern identified.

[6] In the form of Commission Delegated Acts or Implementing Acts

[7] http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm

[8] The level 2 rules, once finalised, will very likely contain some decisions of a technical nature for the National Competent Authority. Any such decisions are outside the scope of this consultation as the Department cannot interfere with the independent decision-making of the presumptive NCA, the Central Bank.