

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

This submission outlines the views of Brokers Ireland in relation to relevant proposals contained in the Public Consultation on national discretions in the Markets in Financial Instruments Directive (“MiFID 2”) incorporating elements of the Insurance Distribution Directive (“IDD”)

Brokers Ireland is a co-operative structure between the Irish Brokers Association (IBA) and the Professional Insurance Brokers Association (PIBA) who together represent over 90% of full time professional brokers in the Irish market.

The proposals will have a significant impact on a large proportion of our members who are authorised under the Investment Intermediaries Act 1995 (as amended) (IIA) and provide some or all of products outlined below.

Shares in a company that is listed on a stock exchange, bonds that are listed on a stock exchange, prize bonds
Relevant collective investment scheme instruments
Tracker bonds (other than those offered by an insurance undertaking)
Insurance policies (<i>also covered under the IMR/IDD</i>)
Personal Retirement Savings Accounts (within the meaning of the Pensions Act, 1990) (<i>also covered under the IMR/IDD</i>)

We agree with the continuation of the national discretion under article 3 of the MIFID directive as per the current regime whereby Investment Intermediaries authorised under the Investment Intermediaries Act 1995 (as amended) (IIA) are exempted from MIFID (where they provide advice on and receive and transmit orders for listed shares and bonds and collective investment funds) subject to some conditions including: “are not allowed to hold clients’ funds or securities and therefore are not allowed at any time to place themselves in debit with their clients.”

Whilst Brokers Ireland understand that Ireland must implement the requirements of the MIFID II directive, it is important to emphasise that the nature of the products which fall under the IIA (Article 3(1)) discretion differ greatly from pure MIFID products and that the nature of these products are more aligned with products which fall under the Insurance Distribution Directive (IDD).

Brokers Ireland would have concerns in relation to the imposition of a regulatory regime which would be disproportionate to the nature and scale of intermediaries and the products they provide who fall under this exemption. A “mifidisation” of their regulatory requirements could lead to many intermediaries ceasing to provide these products which would lead to a decline in the availability of these investment products in the market which is not in the best interests of choice, competition and ultimately consumers.

Please find below responses to relevant questions posed in the consultation to our members.

Text of the National Discretion: Article 3(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.

Brokers Ireland agree with the continuation of the national discretion as outlined in Article 3.(1)of the MIFID directive as per the current regime, whereby Investment Intermediaries authorised under the Investment Intermediaries Act 1995 (as amended) IIA are exempted from MIFID subject to conditions listed in a –c.

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.

Brokers Ireland believes that intermediaries authorised under the IIA are already subject to stringent regulatory oversight. These requirements consist of a comprehensive authorisation process and ongoing regulatory requirements such as annual online returns which requires submission of data on the firm in respect of general information, financial information, ownership information and conduct of business. Annual accounts are required to be audited and are available to the Central Bank on request. An annual Fitness & Probity return is also required in relation to all individuals who hold a pre-approved controlled function role. Intermediaries are subject to the requirements of the Consumer Protection Code and Minimum Competency Code and the handbook of prudential requirements for investment intermediaries. The Central Bank is also active in its supervision of firms through themed inspections and also onsite inspections.

Addressing the gaps which are identified in the consultation paper

Article 9 - Requirements relating to the role and responsibility of the management body.

The IMR (IDD) & IIA intermediary application form is a very detailed process and requires applicants to submit a Business Plan and Programme of Operations outlining the activities of the firm, the management structure and detailing the role and responsibilities of individuals within the firm. All individuals who are to hold a significant role/function in the firm are deemed a pre-approved controlled function and will be required to submit an individual questionnaire and supplementary information to evidence that they meet the Fitness & Probity Standards/Minimum Competency Code as appropriate.

For IIA firms, where there is to be a change in shareholding an application has to be made for approval of this acquiring transaction. If there is to be a change in directorship/PCF role this has to be approved by the Central Bank following submission of an Individual Questionnaire.

Firms are subject to ongoing regulatory requirements such as annual online returns which require submission of data on the firm in respect of general information, financial information, ownership information and conduct of business.

Brokers Ireland feels that the current authorisation and supervisory regime meets the requirements as set down by Article 9 whilst being appropriate to the nature of the products sold under this exemption.

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.

Brokers Ireland acknowledges the requirements as set by the Mifid II directive. Where restrictions are imposed on the term independent for MIFID products including the products which fall under the IIA exemption, we do not believe that these restrictions should be applied to IDD only intermediaries.

The current provisions as set down by the code, whereby consumers are given the option to pay in full/part by fee or the commission model should continue to apply for IDD only intermediaries.

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”).

The Directive uses the word “order” as a trigger for recording requirements so we would feel that there is no requirement for all conversations to be recorded. Feedback from our European representative body has indicated that at a scrutiny session organised by the ECON Committee in June, a representative from the Commission had advised that the Directive looks at the placing of an order as the triggering element for telephone recording and that the telephone recording rules only applied in cases where advice was followed by an order.

The nature of the products which fall under the IIA discretion differ greatly from pure MIFID products and it would not be a case of the client giving a direct order to purchase a product (e.g. shares). A factfinding process would take place and intermediaries are required to issue a statement of suitability to clients and a completed proposal form to be submitted before the product is put in place. There is a clear paper/audit trail of the advice given.

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

Firstly, this Article would only affect a relatively small amount of IIA intermediaries. Where an investment intermediary wishes to act as a product producer, they must have minimum shareholders’ funds (or in the case of an unincorporated body of persons, a sole trader or partnership, a positive capital account) of €50,000.

The concept of full and unconditional responsibility exists within the IIA.

IIA intermediaries who act as product producers and the appointed intermediaries are required to advise the Central Bank of the appointment and it is recorded on the Central Bank’s register which is publically available.

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.

Brokers Ireland are not aware of entities which would fall within the discretions provided for in Article 3(1) (d)-(e)

Optional Exemptions and Investor Compensation Scheme

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

Brokers Ireland agree with proposal to maintain the status quo, i.e. Intermediaries authorised under the IDD and IIA (non-cash handling firms providing the MIFID exempted products) would contribute to Fund B.

Investor Protection, including Conflict of Interest

3. 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?

It is important here to emphasise the differences between pure MIFID products and IIA exempted/IDD products in terms of nature and complexity and risk to consumers. We would have concerns in relation to any move to standardize requirements between MIFID and IDD products. Clients are advised through the intermediaries terms of business what authorisation they hold and what services and products they provide. Clients are therefore fully informed as to whether they are dealing with a MIFID or IDD/IIA firm.

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

Brokers Ireland would have concerns about the transfer of MIFID requirements across to the IDD during its transposition. It should be recognised that there are three levels of authorisation for investment products, the requirements of the IIA addresses many areas which are not covered by the IDD for distribution of this category of Investment Instrument as defined in the Act. In relation to the area of commissions and conflict of interests, it must be recognised that commission payments fundamentality differ between MIFID and IDD firms. MIFID firms are predominantly remunerated by client fee and commissions earned are an additional payment on top of the fee received. The receipt of this additional commission payment differs from commission payments for the vast percentage of IDD firms where it is the mainstream income of these firms and how the firm is remunerated for their work. Clients are made aware of the remuneration policy of the intermediary via the firms Terms of Business and also the cost of the commission is disclosed to the client via disclosure documents as required by the Life Disclosure Regulations 2001.

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

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)

C. Which option, if any, do you think best addresses the interests of retail investors and why?

Brokers Ireland believes that option 2 best addresses the interests of retail investors. It is that a detailed assessment is undertaken before the introduction of any legislative change which would have significant impact on the industry. We believe that the oversight of the Minister is vital and will act as a revising and as a potential check and balance on the powers of the Central Bank.

If your preference is for option 2 can you please specify whether you agree with the suggested criteria ((a) to (h) as outlined above).

Brokers Ireland agree with the criteria as listed in (a) – (h) but it is important that stakeholder feedback is also taken into account. Proposed changes in legislative and regulatory requirements must be assessed from an industry point of view and must be proportionate to the nature and complexity of the firms involved and the products sold. The importance of competition and availability of advice to consumers is paramount.

Designation of National Competent Authorities

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

Brokers Ireland agrees with the continued designation of the Central Bank as the competent Authority.