

Submission by email to MIFID@finance.gov.ie

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

21 September 2016

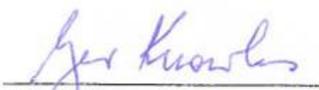
Re: Public Consultation on national discretions in the Markets in Financial Instruments Directive (“MiFID 2”) incorporating elements of the Insurance Distribution Directive.

Dear Sir or Madam,

Davy welcomes the opportunity to comment on the above consultation. Appendix 1 sets out our response to the specific questions raised by the Department of Finance.

We trust that this submission provides some valuable input to this consultation process. We are happy to discuss the content of this submission in more detail with you if you consider that this would be beneficial.

Yours sincerely,



Ger Knowles
Head of Regulation & Compliance

Appendix 1: Response to specific questions asked in the Consultation Paper

Optional Exemptions:

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.

We can understand why the Minister may be mindful to exercise this discretion particularly for smaller firms however we believe it is a legitimate expectation from a consumer perspective that irrespective of the financial services provider with whom he/she interacts, (e.g. insurance firm, Bank, investment firm or IIA firm) he/she should be confident that the firm is obliged to comply with the same regulatory standards. The introduction of MiFID II provides an opportune time to reform and unify regulatory standards to the highest European level. Consequently rather than exercise this discretion, our view is the Minister should include within the transposing Irish statutory instrument, an application section which would specify for those persons outlined in Article 3(1) (a)-(c) the relevant articles of the Directive which would apply.

The principle of proportionality should be operated from a prudential perspective taking into account the nature, size, scale and complexity of the firm. However we believe it is essential from a conduct perspective that all firms, in particular those whose business model is the provision of investment advice to consumers, should comply with the same uniform regulatory arrangements. There is no good reason why regulatory standards should differ at all in this regard.

We question the continued application of certain Irish legislation and codes including the Investment Intermediaries Act which was enacted in 1995 and is now over 20 years old. With regards to the Consumer Protection Code we disagree with the necessity of constantly maintaining two regulatory standards particularly with the continuous quantum of regulation and guidance driven at a consolidated European level. The current approach leads to a natural lag and variations between domestic rules and European standards resulting in a differing treatment of consumers. For example, consumers who purchase the same CPC product receive differing treatment dependent on their service level. This anomaly should be addressed.

The Department has identified a number of variations between MiFID and domestic rules. We would strongly agree that in relation to these variations the regulatory requirements should be identical. In addition to the preliminary gaps identified by the Minister, we note below by way of example other variations which would be corrected if the concept of MiFID II was uniformly applied to all firms:

- **Product Governance** is a key focus area in the revision of MiFID II with the objective to enhance protection for consumers. We fully support this initiative and have a strong view that all product manufacturers and distributors should be caught within its remit.
- **Suitability** obligations as noted under the European Securities and Markets Authority (ESMA) guidance are of a higher standard than the Consumer Protection Code, as they place an obligation on firms to update client information on an on-going basis, where there is an ongoing business relationship. On the other hand, the CPC suitability test is a point in time test at the time of availing of the services. We believe that this ongoing obligation strengthens the responsibilities and requirements of the financial services provider.

In conclusion, decisions by the Minister should be driven by a longer term view on what is best from a consumer perspective rather than continuing to allow different sectors to follow different regulatory regimes.

1 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.

As noted in our response to Question 1.A we do not agree that the persons described under Article 3 (1) (a)-(c) should be exempt from MiFID II. Similar to the approach adopted under the Minimum Competency Code there should be one uniform conduct standard which applies to all regulated firms when providing investment services to consumers.

1 c) The Minister welcomes all views in regard to whether to exercise the discretions provided for in Article 3 (1) (d)-(e).

No comment.

Investor Compensation Scheme

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

Consumer Protection remains a priority for the firm we have always maintained both professional indemnity insurance in addition to being a participant in the Investor Compensation Scheme. We agree with the Minister's proposed approach to maintain the status quo. However we would strongly request the Minister to consider having a mechanism in place in order to collate investment firm levies and apply a credit to investment firms, who in addition to paying into the Investor Compensation Scheme are also required to pay into the Bank and Investment Firm Resolution Fund.

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?

Yes we would strongly agree there should be a level playing field in relation to the distribution of, and advice on equivalent retail investment products.

3 b) If not, can you please explain why level playing field rules should not be followed?

No comment.

3 c) 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).

Option 1 would be our preferred approach as it would give the NCA discretionary powers and authority to begin the process of harmonising differing standards and correcting the variations in existence in the marketplace.

Client Order Handling Rules

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

The firm is in agreement with the Ministers view to adopt the same approach as MiFID I.

Third Country Firms and Branches

5 a) 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.

The firm would favour the approach that third country firms seeking to provide investment services and activities to retail and elective professional clients do so from local branches.

5 b) Do you agree 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.

The firm would agree with the Minister that a third country credit institution wishing to provide investment services in/from Ireland via a branch would be subject to the MiFID II regulations. Third country firms and branches should also be subject to holding specific professional indemnity insurance cover and payment of Central Bank levies, ICCL and BRRD levies.

Higher fees applying to Cancelled Orders

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?

While the consultation focus is on the area of High Frequency Trading, our view would be that the cancellation of orders is a necessity in a functioning market as it allows all clients including consumers the mechanism both online and by telephone to amend prices, increase or decrease order volumes or to remove market orders completely in response to changing market conditions. The imposition of an order cancellation fee therefore only acts as an additional barrier to entry for consumers and may in fact dissuade these consumers from engaging in investment activity completely.

Designation of National Competent Authorities

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?

Yes.

Sanctions

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

No comment.

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

No comment.

Other

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.

In the absence of being supplied with a complete list of Member State discretions we are unable to fully respond. We would welcome publication of the complete list of discretions and the opportunity to further comment in relation to these.