



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

Sent via email to MIFID@finance.gov.ie

21 September 2016

Dear Sirs

We welcome the opportunity to contribute to the Department of Finance's Public Consultation on national discretions in the Markets in Financial Instruments Directive¹ ("MiFID 2") incorporating elements of the Insurance Distribution Directive dated June 2016 (the "**Consultation**").

The Irish Debt Securities Association ("**IDSA**") is an industry organisation established to promote and develop Ireland as the premier European location for activities to support the global structured finance, debt securities and the specialist securities industries. IDSA promotes a responsible, sustainable and effective environment within which debt securities and other specialist securities can be used to facilitate transactions, to create investment products and to raise capital funding. IDSA aims to achieve its mission by representing all industry participants, promoting high standards of professional conduct among industry service providers and leading the industry activity to develop and provide a world-leading environment for structured finance transactions and for the issuance of debt securities and other specialist securities. The membership of IDSA includes the corporate administrators, trustees, audit firms, legal advisors, listing agents, and other parties involved in the structuring and management of Special Purpose Vehicles ("**SPVs**") in the industry in Ireland.

General approach

We welcome the statements in the Consultation regarding the Minister's overall intended approach to transposition, both regarding the intention that the transposing text will mirror as closely as possible the wording of MiFID 2 and, to the extent possible, the structure of the Irish MiFID 1 regulations² be retained to facilitate a smooth transition between the two regimes (noting that some minor changes to the ordering of sections in the Current Irish Regulations when implementing MiFID 2 would improve the structure of the Current Irish Regulations (for example, the provisions on best execution/order handling are mixed between Regulations 96 – 97 and Regulations 106 – 108)).

Providing a stable business and regulatory environment in Ireland is an important aspect in encouraging international finance and debt securities to consider Ireland as a jurisdiction of choice

¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Directive 2002/92/EC and Directive 2011/61/EU

² European Communities (Markets in Financial Instruments) Regulations 2007 (nos. 1 to 3) (as amended) (the "**Current Irish Regulations**")

and in maintaining Ireland's leading position internationally in this industry together with the government's commitment to such strategic objectives.³ In this regard, it is of significant importance that the Minister retains, to the extent possible, the current statutory position in respect of the provision of investment services into the jurisdiction on a cross-border basis, which provides for and supports the significant debt security and structured finance industry in Ireland.

With that in mind, and recognising the objectives, requirements of and the Member State discretions contained in MiFID 2, coupled with the Current Irish Regulations and the Investment Intermediaries Act, 1995 (as amended) (the "IAA"), we respond below to Consultation questions relevant to the sector:

Third Country Firms and Branches

Q5a) optional branch requirement in respect of services to retail or elective professional clients

We note that the Minister is considering the policy options in relation to this national discretion and it is our view that imposing the branch requirement, in respect of both retail and elective professional clients, would not be appropriate when the balance of expected investor protection from branch establishment is considered against the cost and other issues required by a third country firm ("TCF") to establish and maintain the branch (as well as the impact on the local regulatory resources that will be required to authorise and supervise such branches).

We understand that the United Kingdom will not exercise this discretion for either retail or elective professional clients, and we share HM Treasury's position in its 2015 public consultation (applying it in the Irish context) that the current regime maintains the investor protection, market integrity and financial stability objectives, while ensuring that Ireland can continue to encourage business internationally from TCFs.⁴

In respect of elective professional clients in particular, investor protection concerns are by definition less relevant than with respect to retail clients. Further, MiFID client categorisation in certain sectors can be somewhat problematic for investment firms, in particular for certain "true" corporates and finance industry SPVs which may be sophisticated clients in the ordinary sense, but do not automatically fall within MiFID 2 definition of "per se" professional (wholesale) clients.⁵ For certainty of treatment and business purposes, such sophisticated clients can in practice opt to be treated as elective professional clients (if eligible to so elect). However, if a branch establishment requirement is imposed for elective professional clients, the ability of TCFs to provide services to such sophisticated clients may be in doubt or at least will be subject to uncertainty and potentially contrasting views from advisors as to whether a client is in fact a per se professional client (where the provision of services will not require a branch) or is an elective professional client only (where a branch would be required, if the Minister makes this election).

The consequences of a client being found as eligible only to be treated (or a client later claiming such) as an elective professional client (and thus requiring branch establishment, if the Minister makes this election), rather than a per se professional client, and the uncertainty around same for certain client types/finance industry sectors, may mean TCFs will only provide investment services to those categories of per se professional clients whose meaning and scope is sufficiently free from doubt or dispute in law in all instances.

³ eg, IFS 2020 <http://www.finance.gov.ie/sites/default/files/IFS2020.pdf>

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418281/PU_1750_MiFID_II_26.03.15.pdf

⁵ See Annex II, part 1. For example, the "large undertaking" and "other institutional investor" categories of per se wholesale clients.

In addition, the "reverse-solicitation"/at the client's "exclusive initiative" as a possible solution to the above categorisation uncertainty (where any branch requirement is imposed), are broadly considered to be of narrow application and limited practical application.

Q5b)

We have no objections to the stated intention that branches of TCFs sought to be established in Ireland should be brought within the scope of MiFID 2 in the manner outlined in the Consultation. However, we would like to highlight and emphasise an issue not directly included in the Consultation, but of relevance to the question of TCFs, the industry and Ireland continuing to be a jurisdiction of choice.

With respect to both Q5a and Q5b, as above, we welcome the intended general approach regarding the retention of the framework of the Current Irish Regulations to the extent possible. In this context, our view is that it is appropriate and important to retain the position under Current Irish Regulation 8 ("**Regulation 8**") and Section 9(2) of the IIA, which outlines the scope of the Irish MiFID licencing trigger and the IIA licensing trigger in providing that an investment firm shall not be regarded as operating in Ireland in the circumstances contained therein.

The Consultation notes that MiFIR⁶ provides for a harmonised regime in respect of TCFs providing investment services to eligible counterparties and per se professional clients following an equivalence decision by the European Commission for a given third country (the "**Passport Regime**") and in the absence of such a decision the Member States can continue to operate national regimes in respect of such TCFs, subject to certain conditions. We welcome the Passport Regime, but given it is predicated on a third country being granted equivalence by the European Commission which at best can be a long and involved process, it is important to consider carefully the operation of Ireland's "national regime" as it is this regime which will be the default applicable regime for TCFs, until such time as the European Commission grants (and maintains) equivalence for a given third country.

As mentioned above, and from the perspective of managers, sponsors and arrangers located outside the European Union, the clear certainty of treatment under Regulation 8 is an important aspect in continuing to attract international financing transactions to Ireland. This would be enhanced by the Irish decision not to impose a branch requirement on TCFs, as outlined in the response to Question 5a) above.

In addition, we note the Consultation refers to MiFIR Article 46(3). We do not believe the above position conflicts with this MiFIR provision. Article 46(3) requires the "no more favourable treatment for TCFs" principle is applied only with respect to TCFs which are subject to the Passport Regime (ie, when their country has been granted equivalence, at which point the Passport Regime must be used by those TCFs, subject to the three-year transition period allowed), and Article 46(3) is not of wider application. For the avoidance of doubt and if needed, Regulation 8 (as maintained in the Irish MiFID 2 implementing regulations) may expressly recognise the prevalence of the Passport Regime /MiFIR when it is triggered/made available for applicable TCFs.

Finally, we note the position under Section 9(2) of the IIA should also be maintained in its current form.

⁶ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012

In conclusion can we again record our appreciation for the opportunity to contribute to the Consultation and to note that IDSA and its members would welcome the opportunity to meet with the Department to discuss this letter, its contents and the Consultation in general.

Yours faithfully

For and on behalf of the Irish Debt Securities Association

Gary Palmer

Chief Executive