An Roinn Airgeadais
Department of Finance

Investment Firms Directive (EU) 2019/2034

Public Consultation Feedback Statement on the Exercise of National Discretions

May 2021

Financial Services Division
Department of Finance
www.gov.ie/finance

Investment Firms Directive/Regulation Public Consultation Overview

The Investment Firms Directive (IFD) and Investment Firms Directive (IFR) were adopted as legislative proposals in December 2017 and came into force in January 2020 with final transposition into Irish law required to take place by 26 June 2021. IFD/IFR puts in place a new prudential framework for Investment Firms (herein known as 'Firms') that fall within the remit of the Markets in Financial Instruments Directive (MiFID II).

The IFD framework introduces a bespoke prudential framework for Firms that are currently subject to CRD prudential rules while bringing the largest systemic investment Firms under the same regime as Banks. IFD seeks to ensure that Firms manage customer risk and market risk to a higher standard. The new framework will allow for a more tailored suite of regulations for different Firms depending on their classification/type. A general trend is that larger Firms or those that are considered as having a high market impact are subject to regulation that is more intensive. The degree of regulation is dependent on individual Firm's activity, risk profile and structure, which in turn dictates their categorisation under new prudential 'classes'.

Each Member State has four national discretions under which they can undertake policy decisions. The Department of Finance conducted a **public consultation** on the exercise of the national discretions, which was open from 6th May – 6th July 2020. One submission to the public consultation was received (See Annex 1)

National Discretions Summary for IFD/IFR

1. Article 4(1) - The Minister has the discretion to designate a body as a single **National Competent Authority** (NCA) for IFD/IFR.

2. Article 32(3) - Member States or the NCA have the discretion to place additional restrictions on the types and designs of instruments, or additional prohibitions on the use of certain instruments, for the purposes of **variable remuneration**.

3. Article 32(5) & (6) - Member States or the NCA have the discretion to exempt certain Firms from the restrictions on **variable remuneration**.
    - The current threshold, after which the restrictions come into effect, is for Firms with at least €100 million of on and off-balance sheet assets

- However, this threshold can be increased to up to €300 million if certain criteria are met (Article 32 (5)).
- Similarly, this this threshold can be lowered below €100 million if certain criteria are met (Article 32 (6)).

4. Article 32(7) - Member States or the NCA may decide that an individual (i.e. staff member) in a Firm, entitled to **variable remuneration** below a certain threshold, shall not be entitled to the exemption because of specificities in terms of remuneration practices or because of the nature of the responsibilities and job profile of those staff members.
    - The threshold below which a staff member is exempt from the variable remuneration restrictions is where an individual receives less than €50,000 variable remuneration and this does not represent more than 25% of their annual remuneration.

National Discretions Being Exercised in IFD/IFR

1. Article 4(1):
    - The Minister for Finance will designate the Central Bank of Ireland as the NCA for IFD/IFR

2. Article 32(3):
    - The Minister for Finance will not exercise this discretion. The default provisions of the Directive will not be amended.

3. Article 32(5) & (6):
    - The Minister for Finance will set of the default threshold to €300 million.
    - The Minister also designates that where the Central Bank of Ireland is satisfied that it is appropriate, taking into account the nature and scope of an investment Firm's activities, the internal organisation of the investment Firm, and, where applicable, the characteristics of the group to which the investment Firm belongs, the Bank may specify a lower threshold than €300 million for a Firm with regards to the discretion afforded under Article 32(5) & (6).

4. Article 32(7):
    - The Minister for Finance will not exercise this discretion. The default provisions of the Directive will not be amended.

ANNEX 1 – Public Consultation Submissions Received

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06 July 2020

IFD Public Consultation
Funds, Insurance, Markets & Pensions Division
Department of Finance
Government Buildings
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RE: Public Consultation on the exercise of national discretions in Directive (EU) 2019/2034 May 2020

Dear Sir/Madam,

Public Consultation Questions

1. **Do you agree with the designation of the Central Bank of Ireland as the single National Competent Authority for IFD?**

   Yes, given the Central Bank's existing role and experience it is the natural choice for designation as the single National Competent Authority for IFD.

2. **Should Ireland exercise the discretion to raise the threshold up to a maximum of €300 million /reduce the threshold? If so, how much should the threshold be increased /reduced by?**

   No Comment

3. **Should Ireland restrict or prohibit the use of certain types or designs of instruments for the purposes of variable remuneration?**

   We do not believe that Ireland should impose further restriction on the types or designs of instruments for the purposes of variable remuneration. The types of instruments listed in point (j) of Article 32(1) are already tightly constrained by the requirements of (i) – (iv) of that paragraph. Further restrictions are likely to lead to increased requests by Investment Firms for approval by way of derogation under Point (k) of Article 32 (1) where the Investment Firm does not issue any of the instruments referred to in point (j) and therefore requires a specific derogation. The requirement to apply for such a derogation would needlessly increase uncertainty and expense for Investment Firms. We can think of no reasons why Ireland would want to further restrict the types or designs of instruments for the purposes of variable remuneration given the already limited nature of the permitted instruments under point (j).

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4. **Should the restriction or prohibition of certain types or designs of instruments for the purposes of variable remuneration be addressed by way of transposing regulations or should the Minister for Finance delegate this discretionary power to the National Competent Authority?**

   As above, we do not believe that Ireland should impose further restriction on the types or designs of instruments for the purposes of variable remuneration. However, were Ireland to decide to impose such restrictions, we believe that they should be addressed by way of transposing regulations in order to ensure that Investment Firms have certainty at an early stage as to the instrument types which have been restricted.

5. **Should Ireland exercise the discretion to prevent staff relying on the exemption set out in Article 32(4)(b)? If so, the basis should be clearly set out including the relevant national specificities and staff job profiles.**

   We do not believe that Ireland should exercise the discretion to prevent staff relying on the exemption set out in Article 32(4)(b). The level of variable remuneration and the ratio of that variable remuneration to fixed remuneration mandated for the exemption mean that such a member of staff is unlikely to be (i) a member of senior management or a risk taker or (i) incentivised by the variable remuneration, comprising less than one quarter of their fixed remuneration, to act in a manner which poses any material risk to the prudential supervision of the investment firm, in particular in relation to its solvency and its financial soundness.

We note further that the implementation of the IFD/IFRR provisions on remuneration by the UK and the Netherlands have been delayed until 2021 to avoid the application of these provisions during a remuneration cycle. We believe that such a delay would also be warranted in the Irish context to avoid the difficulties that will be caused by a change to the applicable remuneration rules midway through a remuneration cycle.

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