



## May 2020

### Public consultation on the exercise of national discretions in the Investment Firms Directive

On 6 May 2020, the Department of Finance published a public consultation paper on the exercise of national discretions contained in the Investment Firms Directive (EU) 2019/2034 (“**Consultation Paper**”).

Please note that Dillon Eustace has previously published two articles on the new proposed regulatory framework for investment firms in January and December of last year (access [here](#) and [here](#)). The new framework comprises the Investment Firms Directive (EU) 2019/2034 (“**IFD**”) and the Investment Firm Regulation (EU) 2019/2033 (“**IFR**”). In time, the IFD and IFR will be supplemented by way of delegated acts, regulatory technical standards and implementing technical standards.

The IFR and the IFD will, for most existing investment firms, replace the existing prudential requirements for investment firms set out in the Capital Requirements Regulation (575/2013) (“**CRR**”) and Directive 2013/36/EU (“**CRD IV**”), and will also amend the Markets in Financial Instruments Directive (2014/65/EU) (“**MiFID II**”) and the Markets in Financial Instruments Regulation (600/2014) (“**MiFIR**”).

Under the new proposed regulatory regime, certain systemically relevant investment firms which engage in “bank-like” activities and services will be reclassified as “credit institutions” (Class 1) and will be fully subject to the prudential requirements laid down in CRR and CRD IV. Other similar investment firms, but with smaller assets sheets (Class 1 minus) may be subject to the same prudential requirements as Class 1 firms.

For further information on any of the issues discussed in this article please contact:



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All other investment firms which are not considered systemic (Classes 2 and 3) will be subject to a new tailored regime with bespoke and lighter prudential requirements.

The objective of the new proposed framework is to provide for capital, liquidity and other prudential requirements for investment firms in the European Union which reflect the business models of those firms and proportionately capture the risks posed and faced by these firms.

### **National Discretions**

Although most of the IFD will be transposed in Ireland on a fully harmonised basis (and the IFR applies directly without requiring any local transposition), there are a small number of provisions within the IFD which allow Member States exercise a national discretion. The Consultation Paper seeks the public's input on whether and in what manner those national discretions might be exercised.

The national discretions being consulted on are listed on pages 10 – 12 of the Consultation Paper and relate to the designation of Ireland's National Competent Authority for IFD and aspects of the remuneration regime for Class 2 investment firms (Class 3 firms will be subject solely to the current MiFID II remuneration framework).

### **Should the Central Bank be Ireland's single NCA for IFD?**

The first discretion being consulted on relates to Article 4(1) of the IFD which provides that a Member State must designate one or more competent authorities to carry out the functions and duties provided for in the IFD and in IFR. The Consultation Paper asks if stakeholders agree with the designation being allocated to the Central Bank of Ireland ("**Central Bank**").

### **Variable Remuneration discretions**

The second and third discretions being consulted on relate to the variable remuneration requirements set out in Article 32 of the IFD, in particular those relating to elements of the pay-out process, namely the payment of variable remuneration in instruments and the deferral of payment of variable remuneration.

#### **(i) *Balance Sheet Threshold for Exemption***

Under Article 32(4) of IFD, the requirements for pay out of variable remuneration in instruments and the deferral of payment of variable remuneration will not apply to:

- (a) an investment firm that has on and off-balance sheet assets equal to or less than €100 million;
- (b) an individual who receives less than €50,000 annual variable remuneration and this does not represent more than one fourth of the individual's total annual remuneration.

A Member State is given the discretion to increase the figure in para (a), below which the requirements would not apply, to a maximum of €300 million provided certain criteria set out in Article 32(5) are fulfilled. A Member State is also given the discretion to lower the threshold.

The Consultation Paper asks whether Ireland should use these discretions in order to raise the threshold up to a maximum of €300 million or to reduce it, and asks what the threshold should be raised to or reduced to.

**(ii) €50,000 Threshold for Exemption**

A Member State can decide that staff members who are entitled to annual variable remuneration of less than the €50,000 threshold will not be entitled to the exemption because of:

- (a) national specificities in terms of remuneration practices; or,
- (b) the nature of the responsibilities and job profile of those staff members.

The Consultation Paper asks whether Ireland should exercise the discretion to prevent staff relying on the exemption set out in Article 32(4)(b) and if so, should the basis be clearly set out including the relevant national specificities and staff job profiles.

**(iii) Types and designs of instruments in which variable remuneration may be paid**

Article 32(3) allows a Member State or the Competent Authority, the discretion to place restrictions on the types and designs of instruments or prohibit the use of certain instruments for the purposes of variable remuneration.

The Consultation Paper asks whether Ireland should restrict or prohibit the use of certain types or designs of instruments for the purpose of variable remuneration.

It also asks whether the restriction or prohibition of certain types or designs of instruments for the purposes of variable remuneration should be addressed by way of transposing regulations or whether the power should be provided to the proposed designated body set out, the Central Bank.

**Consultation Period**

Interested stakeholders have until the close of business on **6 July 2020** to submit any feedback in relation to the Consultation Paper. The Department of Finance has indicated that the comments received will be taken into consideration when transposing into Irish law the IFD national discretions.

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The IFD and IFR were adopted as legislative proposals on 05 December 2019 and entered into force on 25 December 2019. They are scheduled to be transposed into Irish law by 26 June 2021.

If you have any queries about the information contained in this article, please contact Andrew Bates or Enda McGeever or your usual Dillon Eustace contact.

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