



Banking & Payments  
Federation **Ireland**

BPFI Response to the Department of Finance  
Consultation Paper on National Discretions in the  
Markets in Financial Instruments Directive (MiFID 2)

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BPFI

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## Introduction

Banking & Payments Federation Ireland (BPFI) is the voice of banking and payments in Ireland. Representing over 70 domestic and international members institutions, we mobilise the sector's collective resources and insights to deliver value and benefit to members, enabling them to build competitive sustainable businesses which support customers, the economy and society.

We welcome the opportunity to comment on the Department of Finance Consultation Paper on national discretions in the Markets in Financial Instruments Directive (MiFID 2) and we have consulted with our members on the questions set out in the consultation paper. The Directive is an important piece of legislation which introduces a more harmonised and effective level of investor protection in Europe.

We would welcome the opportunity to review and provide observations on the draft legislation once available.

## 1. Optional discretions

*Text of the National Discretion:* Article 3(1) “Member States may choose not to apply this Directive to any persons for which they are the home Member State provided that the activities of those persons are authorised and regulated at national level and those persons: (a) are not allowed to hold client funds or client securities and which for that reason are not allowed at any time to place themselves in debit with their clients; (b) are not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and/or the provision of investment advice in relation to such financial instruments; and (c) in the course of providing that service, are allowed to transmit orders only to: (i) investment firms authorised in accordance with this Directive; (ii) credit institutions authorised in accordance with Directive 2013/36/EU; (iii) branches of investment firms or of credit institutions authorised in a third country and which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those laid down in this Directive, in Regulation (EU) No 575/2013 or in Directive 2013/36/EU; (iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings; or (v) investment companies with fixed capital, as defined in Article 17(7) of Directive 2012/30/EU of the European Parliament and of the Council ( 1 ) the securities of which are listed or dealt in on a regulated market in a Member State; or (d) provide investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where those clients are exclusively local electricity undertakings as defined in Article 2(35) of Directive 2009/72/EC and/or natural gas undertakings as defined in Article 2(1) ....’

**Question 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.

### Response

There should be a cautious approach taken towards this aspect of the legislation. Unintended consequences may be created if compliance costs for small intermediaries become so large it results in intermediary firms becoming uneconomical. If only the largest firms survive then this could have negative implications for the small investor as large firms may not be as interested in doing business with this type of investor resulting in the small investor having no place to go for investments. There should be appropriate levels of Regulation depending on the nature and complexity of the business a firm operates.

**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.

## Response

A comparison will need to be carried out on the MiFID requirements and intermediaries' regulatory requirements in order to respond to this question.

We would also need to undertake a detailed review of the requirements to determine if these are covered in domestic legislation.

**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.

## Response

This question is directed at emissions and commodity trading companies. We are not in a position to comment comprehensively on this as we are not aware of the regulatory regime that commodities and emissions allowances etc. fall under. However we would encourage the Minister to be mindful of unintended consequences where for example an airline carrier who may want to hedge their fuel exposure were to be caught by MiFID II and if the compliance burden of this Regulation is too costly it will result in the airline carrier potentially choosing not to hedge their activity which is not the desired outcome. It should also be noted that this activity is caught by EMIR.

## 2. Optional Exemptions and Investor Compensation Scheme

*Text of the National Discretion: Article 3(2) Optional Exemptions:* “Member States shall require persons exempt from this Directive pursuant to paragraph 1 of this Article to be covered by an investor-compensation scheme recognised in accordance with Directive 97/9/EC. Member States may allow investment firms not to be covered by such a scheme provided they hold professional indemnity insurance where, taking into account the size, risk profile and legal nature of the persons exempt in accordance with paragraph 1 of this Article, equivalent protection to their clients is ensured” *Comment:* In the interests of investor protection the Minister is strongly minded to maintain the status quo, namely to maintain the requirement that all investment firms, regardless of any exemption enjoyed by virtue of Article 3 (1), should be covered by the investor compensation scheme.

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

### Response

We agree with the proposed approach.

The investor protection scheme was set up to allow private investors to claim for compensation without the need for expensive legal action. This rationale is still valid.

## 3. Investor Protection, including Conflict of Interest

*Text of the National Discretion: Article 24 (12)* “Member States may, in exceptional cases, impose additional requirements on investment firms in respect of the matters covered by this Article. Such requirements must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State”.

### Question 3a and b

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?

## Response

We agree that there should be a level playing field in relation to the distribution of, and advice on, functionally equivalent retail investment products. Obligations in Ireland should not be more onerous than in other Member States.

Unlike non-life investment products, insurance-based investment products have two components – investment and protection against biometric risks.

For example, the life insurance part of an insurance-based investment product may offer a number of benefits:

- Protection of surviving dependants
- Income protection
- Succession planning
- Long-term care
- Consistent saving

Therefore, investment products that are subject to MiFID II and insurance based investment products that are subject to IDD are not always “functionally equivalent”. We would suggest that the distinction between the two types of product requires more detailed consideration ideally under the detailed assessment proposed in Option 2 below.

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

As per above, level playing field rules should be followed.

**Question 3c:** 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).

## Response

We think that option 2 would best address the interest of retail investors. A better informed decision could be made with the aid of a detailed assessment by the NCA.

We agree with the suggested criteria for the study set out in the consultation paper.

## 4. Client Order Handling Rules

Text of the National discretion: Article 28 (2) “2. Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market or traded on a trading venue which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. Member States may decide that investment firms comply with that obligation by transmitting the client limit order to a trading venue. Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article 4 of Regulation (EU) No 600/2014”.

**Question 4:** Do you agree with the Minister’s proposal to continue to exercise this discretion?

## Response

We agree that the same approach as pursued under MiFID 1 is appropriate.

## 5. Third Country Firms and Branches

5a) Text of the National discretion: Article 39 (1), optional branch requirement in respect of services retail or elective professional clients “1. A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State.”

**Question 5a** - 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.

### Response

This requires further discussion and we would welcome the opportunity to engage further with the Department of Finance. There are important policy issues to be discussed in this area and we would welcome the opportunity to meet to discuss these.

5b) Text of the National discretion: Article 46(4) MiFIR, Third Country Firms and National Regimes Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 47(1) or where such decision is no longer in effect.

**Question 5b** - 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.

### Response

We would welcome the opportunity to discuss this issue further with the Department of Finance. Our initial thoughts are that all branches whether they are third country or EU branches should be subject to the same MiFID II requirements within Member States. This will need further discussion when more is known on Brexit.



## 6. Higher Fees Applying to Cancelled Orders

*6) Text of the National discretion: Article 48 (9) “Member States may allow a regulated market to impose a higher fee for placing an order that is subsequently cancelled than an order which is executed and to impose a higher fee on participants placing a high ratio of cancelled orders to executed orders and on those operating a high-frequency algorithmic trading technique in order to reflect the additional burden on system capacity”.*

**Question 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?

### Response

We agree with this proposal.

## 7. Designation of National Competent Authorities

Text of the National discretion: Article 67 (1) “Each Member State shall designate the competent authorities which are to carry out each of the duties provided for under the different provisions of Regulation (EU) No 600/2014 and of this Directive.”

**Question 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?

### Response

BPFI agree that the Central Bank of Ireland should be designated as the National Competent Authority for MiFID and the transposing regulations.

## 8. Sanctions 8A) Text of the National Discretion

8a - Article 70(1) “Without prejudice to the supervisory powers including investigatory powers and powers to impose remedies of competent authorities in accordance with Article 69 and the right for Member States to provide for and impose criminal sanctions, Member States shall lay down rules on and ensure that their competent authorities may impose administrative sanctions and measures applicable to all infringements of this Directive or of Regulation (EU) No 600/2014

**Question 8A:** Do you agree with the Minister’s views as outlined above?

### Response

We agree with the Minister’s views on the above issue.

**Question 8b:** Do you agree with the Minister’s views as outlined above?

### Response

We agree with the Minister’s views as outlined above.

## 9. Other

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.

### Response

There is no additional Member State discretion related to the transposition that we wish to outline.

## Follow up

Banking & Payments Federation Ireland is available to elaborate and discuss any of these points if wished.