

Question 1: Optional Exemptions

- 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.**

Yes, although the (a) to (c) discretions are of very limited relevance to energy.

- 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.**

N/A

- 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.**

In the normal course of business, in order to reduce price risk in its operations in the Irish and GB energy markets, ESB enters into forward price contracts relating to the purchases and sale of gas, coal, carbon and electricity. ESB's counterparties for the majority of these contracts are UK regulated and domiciled entities. This requirement to transact in financial markets to hedge energy commodity price risk is likely to increase for all market participants due to I-SEM, and greater physical interconnection between the Irish and the GB energy markets.

In the context of Brexit, we would be concerned that the regulatory environment for energy commodity price instruments between the UK and the EU would diverge over time. In that context there is a risk that UK regulated entities might opt out of transacting with EU regulated entities if the additional regulatory burden (including compliance with MiFID 2) of transacting with an EU regulated entity made it uneconomic for them to do so. Accordingly ESB would be concerned about the implications for Irish energy undertakings if Ireland failed to exercise any discretions under Articles 3(1)(d) and 3(1)(e) but other member states with energy interconnection with the UK (including France and the Netherlands) did avail of national discretions under these Articles, in order to keep electricity, carbon and gas hedging transactions out of the scope of MiFID 2. Failure by the Minister to exercise the discretion, if there was a material risk of other EU states exercising their discretion, could put Irish entities at a relative disadvantage to competing firms in the UK or in certain other EU states in obtaining the necessary counterparties to hedge and reduce energy commodity price risk. Accordingly we would urge caution in finalising a decision not to exercise the discretion for as long as it is open to the Minister to do so. If no other member state exercises the discretion, we see little benefit to Ireland doing so on its own.

Question 2: Optional Exemptions and Investor Compensation Scheme

- A. Do you agree with the proposed approach? If not can you provide justifications?**

N/A.

Question 3: Investor Protection, including Conflict of Interest

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?

N/A

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

N/A

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).

N/A

Question 4: Client Order Handling Rules

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

N/A

Question 5: Third Country Firms and Branches

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.

While there is uncertainty relating to the terms of Brexit at this juncture, it is difficult to envisage a scenario where a UK investment firm or operator would not come within the MiFID II harmonised regime for TCFs.

B. Do you agree with 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.

In the context of I-SEM the application of MiFID II to third country firms could potentially make the selection of financial institutions for certain settlement functions broader. See also our response under Question 1(c)

Question 6: Higher Fees Applying to Cancelled Orders

- A. 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?**

This may be relevant in the context of I-SEM design if a market making obligation is brought forward. Any tiered fee structure would make it more expensive for firms obligated to provide liquidity as they would need to cancel and reprice orders continuously through windows. However, even if the Minister is minded to exercise his discretion, the design of iSEM and rules relating thereto are a matter for the SEM Committee and will be subject to consultation with market participants.

We believe that this if this discretion is exercised it should only apply for HFT or where a threshold/ratio is reached.

Question 7: Designation of National Competent Authorities

- A. 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**

No issues. Central Bank is the appropriate body for MiFID II.

Question 8: Sanctions

- A. Do you agree with the Ministers views as outlined above?**

We have no objection to the proposal outlined. We note the proposal is to align with existing legislation.

- B. Do you agree with the Ministers views as outlined above?**

No comment

Question 9: Other

- A. 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.**

We may comment on any further consultations the Central Bank may conduct on issues such as position limits, authorisation of OTFs, reporting etc. once the level 2 rules are finalised.