

Department of Finance Consultation paper on the Investment Firms Directive

Ireland's Department of Finance has issued a Public Consultation (the Consultation) on the exercise of national discretions available under the Investment Firms Directive (IFD).

The majority of the IFD's provisions are required to be transposed by Ireland on a fully harmonised basis so that they apply from 26 June 2021. However, the IFD gives Member States some discretions as to how to apply certain provisions and exemptions. Those Irish investment firms, who will be subject to the IFD's remuneration requirements, will be interested in the discretions outlined in the Consultation which relate to staff remuneration explained below.

Background

Article 32(1), IFD sets out the requirements for investment firms in relation to variable remuneration. In particular, Article 32(1)(j) relates to the requirement for pay out of variable remuneration in instruments and Article 32(1)(l) relates to deferral of payment of variable remuneration.

Article 32(3) allows a Member State or the National Competent Authority (which in Ireland is likely to be the Central Bank of Ireland) a discretion to place restrictions on the types and design of instruments or to prohibit the use of certain instruments for the purposes of variable remuneration.

Article 32(4) **exempts** investment firms and individuals from Article 32(1)(j)&(l) where respectively:

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

Article 32(5) allows Member States the discretion to **increase** the €100m on and off-

balance sheet assets threshold set out in Article 32(4)(a) to a maximum of €300m provided the following criteria are met:

- a. the investment firm is not, in the Member State in which it is established, one of the three largest investment firms in terms of total value of assets
- b. the investment firm is not subject to obligations or is subject to simplified obligations in relation to recovery and resolution planning in accordance with Article 4 of Directive 2014/59/EU
- c. the size of the investment firm's on and off-balance sheet trading-book business is equal to or less than €150m
- d. the size of the investment firm's on and off-balance sheet derivative business is equal to or less than €100m
- e. the threshold does not exceed €300m and
- f. it is appropriate to increase the threshold, taking into account the nature and scope of the investment firm's activities, its internal organisation, and, where applicable, the characteristics of the group to which it belongs.

Use of the above discretion would likely result in fewer investment firms having to apply 'payment in instruments' and deferral requirements to the variable pay of their relevant staff.

Alternatively, Article 32(6) allows Member States the discretion to **lower** the €100m on and off-balance sheet assets threshold set out in Article 32(4)(a). Use of this discretion would likely have the opposite effect of increasing the number of investment firms who would have to apply 'payment in instruments' and deferral requirements to the variable pay of their relevant staff.

Finally, Member States may also decide **not** to apply the exemption provided in Article 32(4) (b) for relevant investment firm staff entitled to annual variable remuneration below the €50000 and one quarter of total annual remuneration thresholds because of:

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

Applying the above discretion would likely increase the number of investment firm relevant staff subject to payment in instrument and deferral requirements.

The Consultation invites responses on the following by 5pm on 6 July 2020 on the following questions:

1. **Should Ireland exercise the discretion to raise the threshold up to a maximum of €300m or reduce the threshold? If so, how much should the threshold be increased/reduced by?**
2. **Should Ireland restrict or prohibit the use of certain types or designs of instruments for the purposes of variable remuneration?**
3. **Should the restriction or prohibition on 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?**
4. **Should Ireland exercise the discretion to prevent staff relying on the exemption set out in Article 32(4)(b)? If so, the basis to be used to justify not allowing use of the exemption should be clearly set out including the relevant national specificities and staff job profiles.**

For more information in relation to this topic please contact Patrick Brandt, Partner, Keavy Ryan, Partner, Michael Doyle, Partner, Sinéad Prunty, Knowledge Lawyer or a member of the A&L Goodbody Litigation and Dispute Resolution team.

Our team



Keavy Ryan
Partner, Corporate and M&A
and Incentives
+353 1 649 2366
kryan@algoodbody.com



Patrick Brandt
Partner, Financial Regulation
+353 1 649 2337
pbrandt@algoodbody.com



Michael Doyle
Partner, Employment, Pensions
& Incentives
+353 1 649 2729
mvdoyle@algoodbody.com



Sinead Prunty
Knowledge Lawyer,
Financial Regulation
+353 1 649 2054
sprunty@algoodbody.com

Disclaimer: A&L Goodbody 2020. The contents of this document are limited to general information and not detailed analysis of law or legal advice and are not intended to address specific legal queries arising in any particular set of circumstances.