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Ireland Exercises National Discretions under IFR/IFD

Introduction

On 24 May 2021, the Department of Finance published its feedback statement (**Feedback Statement**) concerning the outcome of is public consultation on the exercise of national discretions under the Investment Firms Directive (EU) 2019/2034 (**IFD**). A copy of the Feedback Statement can be accessed here.

The IFD and the Investment Firms Regulation (EU/2019/2033) (**IFR**) 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**). The IFD is required to be transposed into Irish law by 26 June 2021. The IFR will take effect in Ireland from the same date.

National discretions

As set out in an earlier Dillon Eustace briefing paper (which can be accessed here) the Department of Finance published a public consultation paper on 6 May 2020 on the exercise of national discretions contained in the IFD (**Consultation Paper**). The Consultation Paper related to the small number of provisions within the IFD which allow Member States to exercise a national discretion.

The Consultation Paper sought input on whether and in what manner those national discretions should be exercised. The Feedback Statement confirms the decisions of the Department of Finance in relation to each of the discretions. These decisions will now be reflected in the Irish legislation implementing the IFD.

Role of the Central Bank of Ireland

The Feedback Statement confirms that the Minister for Finance will designate the Central Bank of Ireland as the national competent authority for the purposes of the IFD/IFR.

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Variable remuneration discretions

A number of discretions were consulted on relating to the variable remuneration requirements set out in Article 32 of the IFD, in particular relating to elements of the pay-out process, namely the payment of variable remuneration in instruments and the deferral of payment of variable remuneration. The Feedback Statement confirms the approach to be adopted in Ireland in respect of each of these potential national discretions as follows:

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

Article 32(3) allows a Member State or a national competent authority the discretion to place restrictions on the types and designs of instruments or to prohibit the use of certain instruments for the purposes of variable remuneration. The Feedback Statement indicates that the Minister for Finance will not exercise this discretion and the provisions of the IFD will apply in Ireland without amendment as regards the types and designs of instruments in which variable remuneration may be paid.

(ii) Balance sheet threshold for exemption

Article 32(5) and (6) of IFD provides that the requirements for the pay out of variable remuneration in instruments and the deferral of payment of variable remuneration will not apply to firms with at least €100 million of on and off-balance sheet assets. A Member State is given the discretion to either; (i) increase the threshold exemption to a maximum of €300 million provided certain criteria set out in Article 32(5) relating to the size of the firm and its business are fulfilled; or (ii) decrease this threshold to below €100 million if certain criteria are met (Article 32(6)).

The Feedback Statement indicates that for Ireland this discretion will be exercised and the balance sheet threshold for exemption will be set at €300 million provided that those certain criteria set out in Article 32(5) are fulfilled. The Feedback Statement also indicates that a discretion is being provided to the Central Bank to lower this threshold if 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.

(iii) Individual exemption

Article 32(4) of the IFD provides that an individual (i.e. staff member) whose annual variable remuneration is less than the €50,000 threshold and does not represent more than 25% of that individual's total annual remuneration is entitled to an exemption from the requirements regarding the pay out of variable remuneration in instruments and the deferral of payment of variable remuneration.

Article 32(7) of the IFD grants a discretion to a Member State to decide not to grant this exemption because of: (a) national specificities in terms of remuneration practices; or (b) the nature of the responsibilities and job profile of those staff member. The Feedback Statement indicates that the Minister for Finance will not exercise this discretion.

Discretions to be exercised by the Central Bank under the IFD and IFR

IFD and IFR separately provide for a number of other discretions to be exercised by national competent authorities of member states. On 14 January 2021, the Central Bank published the paper 'Consultation on Competent Authority Discretions in the Investment Firms Directive and the Investment Firms Regulation' (**CP135**) whereby it consulted on the various discretions afforded to the Central bank under the IFD and the IFR. A Dillon Eustace briefing paper on this topic can be accessed here.

The Central Bank has not yet published a feedback statement in response to CP135 indicating how it will exercise these discretions.

Queries

If you have any queries about the information contained in this article, please contact Keith Waine or Karen Jennings or your usual Dillon Eustace contact.

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