

# Ireland as a Location for MiFID Investment Firms

## BRIEFING

Ireland is home to a significant number of investment firms authorised under the regulatory framework set out in the Markets in Financial Instruments Directive (“**MiFID**”)<sup>1</sup>.

There are a number of advantages to being authorised in Ireland as a MiFID firm including:

- a firm established in Ireland can passport its products and services throughout the European Economic Area (“**EEA**”), either on a branch or a cross-border services basis;
- Ireland is a highly tax efficient location, due to a combination of a 12.5% corporate tax rate and an exceptionally extensive and comprehensive set of double tax agreements; and
- Ireland has a sophisticated financial services ecosystem with a deep pool of staff, managers, professional advisers, regulators and service providers including not only native English speakers but a sizeable international population (roughly 17%).

### Regulatory Framework

Currently, MiFID firms are regulated under the European Communities (Markets in Financial Instruments) Regulations 2007, which transpose MiFID into Irish law, without any significant additional national measures. The existing framework will be replaced by a new regulatory regime once the MiFID II Directive<sup>2</sup> and the Markets in Financial Instruments Regulation<sup>3</sup>

(“**MiFIR**”) (collectively, “**MiFID II**”) apply in January 2018. The Central Bank of Ireland (“**CBI**”) is responsible for the authorisation, prudential regulation and supervision of MiFID firms authorised in Ireland.

### Passporting and Third Country Firms

One of the main advantages of the MiFID legislation is that it enables an investment firm to carry on business covered by its

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<sup>1</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, (OJ L 145, 30.4.2004, p. 1).

<sup>2</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (Text with EEA relevance) (OJ L 173, 12.6.2014, p. 349).

<sup>3</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

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authorisation throughout the EEA without seeking further authorisation in another member state.

An investment firm authorised in a third country (“**Third Country Firm**”) cannot passport under MiFID, but may benefit from a “safe harbour” which means that it does not need to become authorised in Ireland to offer MiFID investment services. In order to avail of safe harbour, the firm’s head or registered office must be in a non-EEA member state, it must not have a branch in Ireland and it must provide investment services exclusively to corporate entities.

MiFID II contains more detailed requirements regarding Third Country Firms, which largely depend on whether the relevant client is: a) a retail client or an opted-up professional client (eg a retail client who has requested to be considered a professional client), or b) a *per se* professional client or eligible counterparty. In certain cases, a Third Country Firm may also provide investment services and activities on the exclusive initiative of the client.

### **Retail Clients and Opted-up**

**Professional Clients:** MiFID II allows each member state to require a Third Country Firm seeking to offer investment services or activities to retail clients and opted-up professional clients to establish a branch authorised in the relevant member state (“**a Third Country Branch**”), once certain conditions are fulfilled. It is not yet clear whether Ireland intends to impose such a requirement: it may instead choose to apply national rules to such firms.

A Third Country Firm will not be able to passport to retail and opted-up professional clients in other EEA member states from a Third Country Branch. To provide services to such clients, it would either need to establish a Third Country Branch in each member state in which it wishes to provide investment services or activities (where the member state’s regime provides for this possibility) or comply with the relevant national rules, as the case may be.

**Per Se Professional Clients and Eligible Counterparties:** MiFID II allows a Third Country Firm to provide services to eligible counterparties and *per se* professional clients on a cross-border basis once a number of conditions are fulfilled. Among other things, the Third Country Firm must be subject to equivalent prudential and business conduct requirements as those set out under EU law. Where a Third Country Firm has established a branch for retail clients and opted-up professional clients, it can use that branch to passport to eligible counterparties and *per se* professional clients throughout the EEA, subject again to meeting equivalence requirements.

### **The Authorisation Process**

An entity wishing to become authorised as a MiFID Firm must submit an application for authorisation to the CBI. The authorisation process is divided into two different levels, based on the investment services proposed, the level of risk and the complexity that the investment firm’s business model would yield. Once the CBI receives a complete application it will reach a decision on a Level 1 authorisation process, which is used for smaller firms with non-complex investment strategies, within 60 working days and on a Level 2 authorisation process within 120 working days. The CBI has published a Guidance Note for Authorisation under MiFID, which is available [here](#).

An entity, including a Third Country Firm, that intends to acquire an existing Irish investment firm will have to notify the CBI by completing an Acquiring Transaction Notification Form (available [here](#)). The approval process takes approximately sixty days, although this period may be interrupted if additional information or clarification is sought from the applicant.

### **Key Considerations**

An entity that wishes to obtain a MiFID authorisation under Irish law must fulfil a number of requirements. For existing groups with substantial operations outside Ireland, an important requirement will

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be the CBI's emphasis on ensuring that the applicant's "heart and mind" will be located in Ireland. This essentially means that the CBI will need to be satisfied that the applicant will be properly run in Ireland and that the CBI will be able to supervise it effectively. Among other things, the CBI will expect to see present in Ireland:

- a senior management team with strength and depth overseen and directed by a strong board; and
- organisation structure and reporting lines which ensure there is appropriate separation and oversight of all activities.

There is no requirement for any specific individual to be resident in Ireland. However, ideally, the personnel who are to fulfil the applicant's core functions should operate out of Ireland.

An Irish authorised branch may outsource/ delegate some of its activities to entities in other jurisdictions, subject to compliance with the MiFID Regulations. Overall responsibility for ensuring compliance with legislative requirements must stay in Ireland.

### **The MiFID II Authorisation Process**

There are a number of differences between the MiFID authorisation process and that applicable under MiFID II. In particular, the authorisation process will no longer be divided into two different levels. On 29 March 2017 the CBI launched its draft Guidance Note for Authorisation as an Investment Firm under MiFID II as well as a draft MiFID II Application Form in order to assist potential applicants in their preparations for the MiFID II authorisation requirements. The MiFID II drafts follow the formats prescribed in EU technical standards, reflecting the CBI's commitment to supervisory convergence and the application of common authorisation procedures across the EU.

The finalised forms will be available on the CBI's website, once the MiFID II Directive has been transposed into Irish law. For the moment, applicants are expected to continue to use the CBI's MiFID Guidance Note and Application Form until the CBI advises otherwise."

### **How Can McCann FitzGerald Help?**

McCann FitzGerald is one of Ireland's premier law firms and advises on the full range of financial activities undertaken in Ireland. We have substantial experience in successfully guiding applicants through the MiFID application process and in helping them comply with their legal obligations, once established. If you are considering setting up a MiFID firm in Ireland, please contact us for further information as to how we can help.

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*Further information is available from:*

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*Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.*

This document is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed.

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