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MiFID II: DOF Feedback Statement Third Country Firm Safe Harbour

Amongst the various responses and Ministerial decisions referenced in the Department of Finance's Feedback Statement on its public consultation on MiFID II national discretions, one with quite significant impact relates to the approach to third country firms engaged in the provision of wholesale investment services (services to *per se* professional clients and eligible counterparties).

Currently, third country firms providing services to non-natural persons in Ireland from outside the EU can benefit from what is generally referred to as a "*safe-harbour*" provision found in Regulation 8 of the 2007 MiFID Regulations, whereby they are not deemed to be "operating in the State" and therefore do not require a MiFID authorisation. This is important not only for the third country firms but also for a wide range of Irish based recipients of investment services from such third country firms, including Irish insurance companies, banks, investment funds, corporates, asset managers, universities and many other bodies.

The Minister has decided to substantially maintain the current national regime for third country firms but to limit it to the provision of wholesale investment services. In other words, the safe-harbour that is currently provided under Regulation 8 of the 2007 MiFID Regulations will generally remain but will be adjusted to take account of the new MiFID II regime.

Under MiFID II third country firms can provide services to a full range of clients who are based within the Union, provided they do so by establishing a branch within the Union.

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MIFIR, however, allows third country firms to provide services to professional clients and to eligible counterparties only, without having to set up a branch once the third country firm is registered with ESMA. However, in order to be registered with ESMA the particular jurisdiction where the third country firm is located has to be the subject of a positive equivalence assessment by the European Commission which may be several years off.

MIFIR goes on to provide that, in the absence of such assessment having been carried out, it is possible for a third country firm to provide services to professional clients and eligible counterparties based in a Member State to the extent that the national law of that Member State allows. The Minister proposes to reflect that in the revised legislative framework.

The safe-harbour will not however be available to:

(i) third country firms whose home country is on the FATF list of non-cooperative jurisdictions and which is not subject to authorisation and supervision in respect of investment services provided to wholesale clients in Ireland, or

(ii) third country firms whose home country is not a signatory to the IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information.

This is a welcome development which will ensure that Irish based *per se* professional clients and eligible counterparties can continue to receive investment services from firms that are based outside the Union. An appropriate adjustment will need to be made to the current safe-harbour, not only in terms of to whom it actually applies, but also to ensure that the conceptual basis of the MiFID II and MIFIR regime (the location of the client rather than concept of "operating in the State") is addressed.

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