

2017

**Addendum to the
Consumer
Protection Code
2012**



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CONSUMER PROTECTION CODE 2012

Amendments to the Consumer Protection Code arising from the transposition of Directive 2014/65/EU into Irish law

Introduction

The Minister for Finance has decided to exercise the national discretion under Article 3 of Directive 2014/65/EU (MiFID II). This will allow certain firms to continue to be regulated under the Investment Intermediaries Act 1995 rather than the European Union (Markets in Financial Instruments) Regulations 2017 (the MiFID Regulations 2017), provided they are subject to certain requirements that are analogous to requirements imposed on investment firms regulated under the MiFID Regulations 2017. Firms authorised under the Investment Intermediaries Act 1995 that avail of the exemption from MiFID II, as set out under Regulation 4(3) of the MiFID Regulations 2017, will be subject to additional requirements arising from the MiFID Regulations 2017.

In June 2016, the Department of Finance consulted on the national discretion under Article 3 of MiFID II as part of its public consultation on MiFID II national discretions. The Department of Finance published its Feedback Statement to its public consultation on 14 July 2017. The Feedback Statement sets out the additional requirements to be imposed on firms availing of the Article 3 exemption. The Central Bank is now amending the Consumer Protection Code 2012 (the 2012 Code) to reflect these changes. In addition, the Code is being amended to update the reference to the European Communities (Markets in Financial Instruments) Regulations 2007.

The following parts of the 2012 Code are now amended:

- Chapter 4 – Provision of information
- Chapter 9 – Advertising
- Chapter 12 – Definitions.

In addition, a new Chapter 14 is inserted.

This Addendum is effective from 3 January 2018, the date of application of the MiFID Regulations 2017.

LEGAL BASIS

Pursuant to Section 117 of the Central Bank Act 1989, the 2012 Code is hereby amended as set out below.

Amendments to the 2012 Code:

Chapter 4 – Provision of Information

Amendment to provision 4.16

Provision 4.16 is amended by adding the words ‘, other than a **regulated entity** referred to in provision 4.16A,’ after the word ‘intermediary’ and before the words ‘in its legal name’.

The following new provision 4.16A is inserted after provision 4.16:

“4.16A A **regulated entity** providing **MiFID Article 3 services** may only use the term ‘independent’ in its legal name, trading name or any other description of the firm where:

- a) the principal **regulated activities** of the **regulated entity** are provided on the basis of a **fair analysis of the market**; and
- b) the factors to be taken into consideration by the **regulated entity** in conducting its **fair analysis of the market** includes the criteria set out in Article 53(1)(d) of Commission Delegated Regulation (EU) 2017/565.”

Amendment to provision 4.17

Provision 4.17 is amended by adding the words ‘, other than a **regulated entity** referred to in provision 4.17A,’ after the word ‘intermediary’ and before ‘:’.

The following new provision 4.17A is inserted after provision 4.17:

“4.17A The term ‘independent’ may only be used by a **regulated entity** providing **MiFID Article 3 services** in any trading name or other description of a **regulated activity** where the **regulated entity**:

- a) provides the **regulated activity** on the basis of a **fair analysis of the market**; and

- b) the factors to be taken into consideration by the **regulated entity** in conducting its **fair analysis of the market** includes the criteria set out in Article 53(1)(d) of Commission Delegated Regulation (EU) 2017/565.

Where the **regulated entity** does not provide all of its **regulated activities** in an independent capacity, it must explain the different nature of its services in a way that seeks to inform the **consumer**. It must ensure that there is no ambiguity about the range of services that it provides in an independent capacity.”

Provision 4.54 of the Code is disapplied for a regulated entity providing MiFID Article 3 services.

Chapter 9 - Advertising

Amendment to provision 9.35

Provision 9.35 is amended by adding the words ‘, other than a **regulated entity** referred to in provision 9.35A,’ after the words ‘Where a **regulated entity**’ and before the words ‘gives information’.

The following new provision 9.35A is inserted after provision 9.35:

“9.35A Where a **regulated entity** providing **MiFID Article 3 services** gives information about the past performance of the **advertised product or service** or of the **regulated entity**, this information must:

- a) be based on a product similar to that being advertised;
- b) not be selected so as to exaggerate the success or disguise the lack of success of the **advertised product or service**;
- c) state the source of the information;
- d) be based on actual performance;
- e) state clearly the period chosen, which must cover the preceding five years, or the whole period for which the **advertised product or service** has been provided, where less than five years;
- f) include the most recent period;

- g) indicate, where they arise, details of transaction costs, interest and taxation that have been taken into account;
- h) disclose the effect of commissions, fees or other charges, where the indication is based on gross performance; and
- i) state, where applicable, the basis upon which performance is quoted.”

Amendment to provision 9.38

Provision 9.38 is amended by adding the words ‘,other than a **regulated entity** referred to in provision 9.38A,’ after the words ‘Where a **regulated entity**’ and before the words ‘gives information’.

The following new provision 9.38A is inserted after provision 9.38:

“9.38A Where a **regulated entity** providing **MiFID Article 3 services** gives information in an **advertisement** about the simulated performance of the **advertised product or service**, this information must:

- a) be based on a simulated performance that is relevant to the performance of the advertised product or service;
- b) not be selected so as to exaggerate the success or disguise the lack of success of the **advertised product or service**;
- c) state the source;
- d) indicate whether, and to what extent, transaction costs, interest and taxation have been taken into account;
- e) for simulated past performance, be based on the actual past performance of one or more investment products which are the same as or substantially the same as the **advertised product or service**. The past performance used for this purpose must comply with the conditions set out at provision 9.35A.”

Chapter 12 – Definitions

A new definition is added to Chapter 12 after '**Member State**' and before '**MiFID service**':

'**MiFID Article 3 services**' means the services specified in Regulation 4(3) of the MiFID Regulations 2017, transposing Article 3(1)(b) and Article 3(1)(c) of Directive 2014/65/EU.

The definition of "**fair analysis of the market**" in Chapter 12 is amended to add 'or **investment products**' after 'contracts' and 'or **investment product**' after 'contract'.

The definition of "**MiFID service**" in Chapter 12 is deleted and replaced with the following:

"**MiFID service**' means any service or activity set out in Schedule 1 of the MiFID II Regulations 2017, but not including any service or activity of a person to whom such Regulations do not apply by virtue of Regulation 4(3) of such Regulations."

CHAPTER 14

The following new Chapter is inserted in the Consumer Protection Code 2012 after Chapter 13:

"CHAPTER 14

CLARIFICATION OF SCOPE

The provisions of this Chapter only apply to a **regulated entity** when providing **MiFID Article 3 services**.

ADDITIONAL REQUIREMENTS ARISING FROM THE TRANSPOSITION OF DIRECTIVE 2014/65/EU INTO IRISH LAW

Recording of telephone conversations or electronic communications

14.1 A **regulated entity** shall comply with either:

- a) Regulation 23(5) – (12) of the MiFID Regulations 2017 and Article 76(1)(b), 76(8) and 76(10) of Commission Delegated Regulation (EU) 2017/565; or
- b) Where telephone conversations or electronic communications relating to the provision of client order services that relate to offering, arranging or providing an **investment product** are not recorded, the **regulated entity** must promptly follow up the telephone conversation with a written communication to the client which confirms the key details of the telephone conversation. This written confirmation, at a minimum, shall include the order details and the details of any recommendation in connection with that order. The **regulated entity** shall provide the client with an opportunity to disagree with the content of the written communication or to otherwise stop the order being executed within a specified time-frame.

Conflicts of interest requirements

14.2 A **regulated entity** shall ensure that disclosure to **consumers** shall include a specific description of the conflicts of interest that arise in offering, recommending, arranging or providing an **investment product**. The description shall explain the risks to the client that arise as a result of the conflicts of interest and the steps undertaken to mitigate these risks, in sufficient detail to enable that client to take an informed decision with respect to the investment business service in the context of which the conflicts of interest arise.

14.3 A **regulated entity** shall assess and periodically review, on an at least annual basis, its conflicts of interest policy and shall take all appropriate measures to address any deficiencies.

Target market and information on products

14.4 Where a **regulated entity** offers, recommends, arranges or provides an **investment product**, it shall have in place adequate arrangements:

- a) to obtain all appropriate information on the **investment product** and the **investment product** approval process, including the identified target market of the **investment product**, and
- b) to understand the characteristics and identified target market of each **investment product**.

Independent Advice

14.5 A **regulated entity** shall comply with Regulation 32(13)(b) of the MiFID Regulations 2017, subject to Regulation 32(15) of those Regulations.

14.6 A **regulated entity** shall comply with Article 52(1) and Article 52(3) of Commission Delegated Regulation (EU) 2017/565.

14.7 A **regulated entity** offering investment advice on both an independent basis and on a non-independent basis shall not allow a natural person to provide both independent and non-independent advice.

Information relating to execution of orders

14.8 A **regulated entity** shall ensure that Article 59 of Commission Delegated Regulation (EU) 2017/565 is complied with.

Information on costs and associated charges

14.9 A **regulated entity** shall comply with Regulation 32(4)(d) and Regulation 32(7) to (9) of the MiFID Regulations 2017 and Article 50(2), (5), (8), (9), second paragraph and (10) of Commission Delegated Regulation (EU) 2017/565.

Periodic suitability assessments

14.10 A **regulated entity** shall comply with:

- a) Regulation 32(5)(c) of the MiFID Regulations 2017,
- b) Article 54(12), third paragraph of Commission Delegated Regulation (EU) 2017/565, and
- c) Article 54(13) of Commission Delegated Regulation (EU) 2017/565.

Remuneration

14.11 A **regulated entity** shall comply with Article 27(4) of Commission Delegated Regulation (EU) 2017/565.”

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