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Interactive Brokers Ireland Limited Response to the Consultation Paper on the Consumer Protection Code ("CPC" or the "Code")

We refer to the Consultation Paper dated 7 March 2024, concerning the proposed amendments to the Consumer Protection Code. We would like to take the opportunity to provide the following responses to the questions posed.

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Introduction

By way of background, Interactive Brokers Ireland Limited ("**IBIE**") is a MiFID investment firm, regulated by the Central Bank of Ireland. IBIE is part of the Interactive Brokers Group ("**IBKR**").

IBKR provides non-advised, online brokerage services to individual and institutional clients. IBKR is an automated global electronic broker and specialises in routing orders, along with the execution and processing of trades in stocks, options, futures, foreign exchange instruments, bonds, mutual funds, and exchange traded funds on more than 135 electronic exchanges and market centres around the world.

IBIE is authorised to provide the MiFID services of receipt and transmission of orders, execution of orders on behalf of clients and dealing on own account, as well as additional ancillary MiFID services. IBIE provides services to both retail and professional MiFID clients in Ireland and across the EEA on a freedom of services basis.

We understand from the Consultation that regulated financial services providers ("**RFSPs**") offering MiFID services ("**MiFID firms**") are not in scope of the two new Central Bank regulations:

(i) **Standards for Business** set out in the Central Bank Reform Act 2010 (Section 17A) Regulations (the "**Standards for Business Regulations**"); and

(ii) **General Requirements** set out in the Central Bank (Supervision and Enforcement Act) 2013 (Section 48 (Consumer Protection) Regulations.

As such, we understand the proposed amendments to apply to RFSPs when offering MiFID Services as follows:

a) MiFID firms must "consider and apply" the Central Bank's '**Guidance on Securing Customers Interests'** ("**GSCI"**) when providing MiFID services to customers who are consumers "in the State" ("**Irish Consumers**").
b) The Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2023 will be amended to apply new obligations on MiFID firms when conducting unregulated activities.

We welcome that the CBI is not proposing to apply the two new Regulations to MiFID Firms.

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For the reasons outlined below in Section A, we do not believe it appropriate to require MiFID firms to consider and apply the GSCI.

We understand that MiFID firms are not in scope of the Guidance on Protecting Customers in Vulnerable Circumstances' ("**GPCVC**") and, as set out in Section B, we agree that it would not be appropriate to require MiFID firms to comply with the GPCVC, for reasons similar to those outlined in respect of the GSCI.

Questions and responses

This response addresses the following questions:

- **Do you have any comments on the Securing Customers' Interests Standard for Business, Supporting Standards for Business or the draft Guidance on Securing Customers' Interests set out in Annex 5?**
- **What are your views on the proposed amendments to the Consumer Protection Code in relation to consumers in vulnerable circumstances? Do you have any comments on the draft Guidance on Protecting Consumers in Vulnerable Circumstances?**

A. Application of the GSCI to MiFID Firms

We understand that the CBI is proposing that MiFID Firms be required to consider and apply the GSCI when providing investment services to customers who are a) consumers and b) in Ireland.

This marks a significant extension as compared to the existing CPC, which specifically excludes from its scope MiFID services.

As a general principle, we agree that, like all RFSPs, a MiFID firm must pursue its commercial interests in a manner that is cognizant of the interests of its customers. However, in our view this requirement is already ensured under the existing regulatory framework applicable to MiFID firms, including the European Union (Markets in Financial Instruments) Regulations 2017, the Markets in Financial Regulation 600/2014 ("**MiFIR**"), the related Commission Delegated and Implementing Regulations and the guidance and Q&A issued by ESMA.

We are against requiring MiFID firms to consider and apply the GSCI for the following reasons:

1. It will add to the extensive range of regulation to which MiFID firms are already subject, hindering the EU and CBI goals of having a streamlined, efficient regulatory environment that avoids duplication;

2. It is unclear what risk considerations are driving the proposal to subject MiFID firms to additional requirements, which will impose additional costs on MiFID firms without offering any clear benefits to consumers;
3. In so far as the GSCI gold plates existing EU requirements, it will undermine supervisory convergence and the effectiveness of the single market, hinder cross border trade, disadvantage firms authorised in Ireland and create opportunities for regulatory arbitrage; and
4. It may impede consumers from accessing well-regulated and cost-effective products, undermining the overall goal of increasing investor participation in EU capital markets.

To the extent that the GSCI does apply to MiFID firms, we do not understand what is meant by the requirement to "consider and apply" the GSCI, and suggest that MiFID firms be instead required to either "consider" the GSCI or implement the requirements set out in the GSCI on a "comply or explain" basis.

1. Streamlining Regulation

As outlined above, MiFID firms are already subject to a robust regulatory framework at both EU and domestic level. They are also subject to other more general requirements which appear to overlap with the GSCI, including both those set out in existing legislation, such as the Consumer Contracts Act 2022 and those which will start to apply over the coming months / years, such as the European Union (Accessibility Requirements of Products and Services) Regulations 2023, and Directive 2023/2673 which sets out new rules applicable to the distance marketing of financial services contracts. Moreover, the EU Commission's Retail Investment Strategy proposes making extensive changes to the existing regulatory framework, some of which will impact the same issues covered in the GSCI.

At his recent address to the IAIM, the CBI's Governor referred to the need to think about regulation in terms of "streamlining, looking for efficiencies, avoiding duplication and improving simplicity". Adding the GSCI to the existing range of requirements applicable to MiFID firms appears at odds with this in so far as the requirements set out in the GSCI are either duplicative or additional to existing MiFID requirements.

2. Interaction with MiFID

The GSCI sets out Guidance in several areas, which are already the subject of comprehensive requirements under the MiFID regulatory framework, including requirements around governance, product governance and appropriateness. It is unclear what risk considerations are driving the proposal to require MiFID firms to consider and apply the GSCI and, in particular, why the CBI considers the existing MiFID protections to be inadequate.

Moreover, as mentioned, the MiFID regulatory framework is currently the subject of a comprehensive review at the EU level in the context of the EU Commission's Retail Investment Strategy, which includes proposals on strengthening the MiFID investor protection provisions. It is premature to require MiFID firms to take additional consumer protection measures in advance of the new rules being adopted at EU level. It is also unclear why the CBI considers the proposed changes insufficient to remedy any apparent inadequacies the CBI has identified in the MiFID framework.

Applying the GCSI will impose additional costs on MiFID firms, without conferring any obvious benefit to consumers, who are already protected under the MiFID framework. For example, MiFID Firms will have to:

a) Carry out a gap analysis between the GSCI and the MiFID Requirements and make any necessary amendments following on from that analysis. This is likely to be particularly challenging given that it is unclear why or, in some cases, how the GSCI adds to the MiFID requirements.
b) Collect information on client firms' turnover to determine whether or not the firm was a consumer for the purpose of the GSCI. This is likely to change from year to year and would require additional, annual data collection on the part of MiFID firms, for little obvious benefit to its customers.

The next section sets a number of specific examples of the difficult interaction between the GSCI and MiFID.

3. The Effectiveness of the Single Market

As the CBI is aware, the purpose of the MiFID regulatory regime is to provide a single, harmonised set of rules for investment firms to allow them to operate across the EEA. Requiring MiFID firms to consider and apply the GSCI would effectively subject MiFID firms in Ireland to additional requirements in key areas, at least when dealing with Irish consumers. Moreover, such a requirement appears to directly contradict both the CBI's and ESMA's goal of an EU regulatory framework that drives consistency of outcomes across the EEA. In its recently published Position Paper on "Building more effective and attractive capital markets in the EU", ESMA observes that "*Variations in supervisory practices and interpretations of regulations can create regulatory arbitrage, hinder efficient cross-border operations, and undermine the effectiveness of the single market*." In our view, requiring MiFID Firms to consider and apply the GSCI constitutes a prime example of such a variation in supervisory practices / regulatory interpretation.

We have set out below some specific examples of how requiring MiFID firms to apply the GSCI undermines supervisory convergence, hinders cross border trade and could create opportunities

for regulatory arbitrage, regarding a) client categorisation, b) product intervention measures c) execution only sales, d) delivery channels and e) information requirements.

a) Client Categorisation:

As set out in the Standards for Business, the Standard of securing customers' interests applies to an RFSP only in the conduct of its affairs with customers in the State who are "consumers", namely natural persons or incorporated entities with a turnover of up to €5 million. We understand the GSCI to have the same scope.

In contrast, the investor protection rules applicable under MiFID apply to both retail and professional clients, irrespective of where in the EEA those clients are located. As the CBI is aware, under MiFID rules, Clients can opt-up to professional client status. Moreover, in its Retail Investment Strategy, the Commission is proposing to adjust the opt-up criteria, which it regards as disproportionate in relation to more sophisticated and experienced clients, who do not necessarily need the same level of protection. Specifically, the Commission is proposing to make it easier for retail clients to opt up to professional client status by reducing the wealth criterion and inserting a fourth criterion allowing firms to consider relevant education and training that a client has received. While the Commission / ESMA have previously considered introducing an additional category of MiFID Clients, they have both rejected this approach, most recently in the context of the above-mentioned Retail Investment Strategy.

Application of the GSCI to MiFID firms would effectively create additional categories of MiFID clients in direct contradiction to the EU's approach to client categorisation. Specifically, the usual MiFID protections would apply to a firm's retail / opted-up professional clients who are not consumers, whereas the additional requirements set out in the GSCI would apply to retail / opted up professional clients who are consumers. Moreover, application of the GSCI to MiFID firms would appear to negate the ability of clients to choose different levels of protection under MiFID as MiFID firms would be required to treat all natural persons as consumers, even when categorised as a professional client under MiFID.

While we understand the intention is to confine the scope of the GSCI to Irish resident consumers, it is not clear to us how this works in practice for firms like IBIE which have clients from outside Ireland. Specifically, MiFID firms are required to treat customers honestly, fairly, and professionally in accordance with the best interests of its clients, under Regulation 31 of the MiFID Regulations. This includes ensuring all clients are afforded "the same level of protection", so it is unclear whether Irish firms would be expected to provide one level of protection to their Irish clients and a different level based on EU protections to the others. Moreover, it is not clear to us how the definition of a "consumer" should apply outside of Ireland in the case of corporate

entities. Specifically, the appropriate turnover for determining whether a corporate entity is a consumer is likely to vary depending on the economic environment in which it operates. For some, €5 million may be too high, and for others too low.

b) Product Intervention Measures

The GSCI requires firms to implement similar controls and restrictions to those imposed by the CBI on CFDs, on products with features or aspects that are similar to CFDs (Paragraph 2.3.7).

The CBI measures on CFDs were adopted pursuant to Article 42 of MiFIR, which permits national competent authorities ("**NCAs**"), including the CBI, to prohibit or restrict the marketing, sale or distribution of certain financial instruments, or a type of financial activity or practice in or from the relevant Member State. Commission Delegated Regulation 2017/569 specifies certain criteria and factors to be taken into account by NCAs in determining when there is a significant investor protection concern.

Requiring MiFID firms to implement similar controls and restrictions to those applicable under the CBI's product intervention measures on products with features or aspects that are similar to CFDs would effectively undermine the role that MiFIR confers on NCAs and ESMA with respect to such measures. Moreover, it would lead to a circumvention of the criteria and safeguards integral to Article 42.

Moreover, it is unclear, what the Guidance means when it refers to products with "features or aspects that are similar to CFDs" or how MiFID firms are expected to assess this. In this respect, it is noteworthy that while other NCAs have put in place product intervention measures for products other than CFDs, there is a lack of uniformity regarding the products covered.

It is also unclear what is meant by "similar controls and restrictions" to those imposed on CFDs and in particular whether firms are required to put in place some of those controls, or all of those controls, once they have identified a product similar to a CFD. Again, even where other NCAs have introduced product intervention measures for the same/similar financial instruments, the controls and restrictions set out under those measures may differ significantly.

In summary, it is for NCAs and ESMA and not MiFID firms to determine whether product intervention measures are necessary to protect clients, in accordance with the criteria set out in MiFIR. We believe it is unreasonable and inappropriate to use the GSCI to impose a new positive obligation on firms to take measures equivalent to product intervention measures, when MiFIR clearly provides that such measures are within the remit and responsibility of ESMA and the NCAs and should only be adopted when specific criteria are fulfilled.

c) Execution only sales of certain products

The GSCI provides that "*some products are not appropriate for execution only models and should only be sold with advice where it is possible for the firm to determine the suitability of the product for the customer and the level of customer understanding*" (Example 3, p. 18).

MiFID firms are already subject to both appropriateness and product governance requirements, which are each important elements of the MiFID investor protection framework, and which are designed to protect clients from investing in products that are not appropriate for them.

Under the appropriateness requirements, investment firms providing non-advised services are required to request information on the knowledge and experience of clients or potential clients to assess whether the investment service or product envisaged is appropriate, and to issue a warning in case the investment service or product is deemed inappropriate. Clients are free to proceed with the service or product if they so choose.

Under the product governance requirements, investment firms that manufacture products for sale to clients or distribute products to clients must maintain, operate, and review adequate product governance arrangements. As part of these arrangements, such firms must identify, and periodically review, a target market of end clients for each product and a distribution strategy that is consistent with the identified target market. As set out in ESMA's Guidelines on MiFID II Product Governance Requirements, the purpose of identifying a product's target market and distribution strategy is to ensure that "*the product ends up with the type of clients for whose needs, characteristics and objectives it has been designed, instead of with another group of clients for whom the product may not be compatible*".

While we understand that the GSCI does not prohibit execution only firms from providing complex products to consumers, we consider the phrasing in Example 3 to be misleading in this regard. It also fails to take account of the fact that investment firms operating on an execution only basis are still capable of and, in fact, are required to determine the appropriateness of a product for customers as well as their level of understanding, in addition to having regard to the relevant product market.

It is unclear why the CBI considers the existing appropriateness and product governance requirements insufficient to protection MiFID investors including consumers. To the extent that such deficiencies exist, they should be addressed at EU rather than local level to ensure supervisory convergence and a harmonised pan-European regulatory framework for investment firms.

More generally, the GSCI does not appear to take sufficient account of the importance of financial education. Specifically, a customer may improve their level of understanding of a product through education and whether or not the customer has completed relevant education is something that can be effectively determined by investment firms operating on an execution only basis.

d) Consideration of the Delivery Channel

According to the GSCI, the absence of human interaction and/or advice to support customer-decision making may not be appropriate for certain products and services, and firms should give consideration to the appropriateness of delivery channels as part of the product design process (Paragraph 2.3.12).

The requirement that firms give appropriate consideration to the product delivery channel is already a requirement under the MiFID product governance rules. It is unclear what additional requirements the GSCI is intended to impose in this regard. To the extent that firms must comply with additional product governance requirements when manufacturing or distributing products to consumers in Ireland, this undermines supervisory convergence and the achievement of the single market.

e) Information for consumers

The GSCI also appears to provide for enhanced requirements around information to be provided to customers. As the CBI is aware, MiFID firms are already subject to a number of regulatory requirements around providing information to customers, and, currently, MiFID firms provide clients with information via their websites, in contractual documentation and in regulatory disclosures including PRIIPs Key Information Documents ("**KIDs**"). It is unclear what the GSCI adds to these existing requirements and/or what gaps in information the GSCI is trying to address. To the extent that firms must comply with additional information requirements when providing investment services to consumers in Ireland, it again undermines the achievement of the single market.

4. Impact on Consumers

While we understand that the purpose of the GSCI is to ensure consumers benefit from enhanced protections in our view, the most likely impact of requiring investment firms to apply the GSCI would be a reduction in the range of products being provided to consumers by firms, and in particular firms passporting their services into Ireland.

Specifically, firms established in other EEA Member States may be reluctant to offer services and/or products on the Irish market due to the increased cost, regulatory burden and increased

regulatory risk associated with complying with the GSCI. This in turn could potentially lead to a decrease in the availability of investment products and services available to the Irish market (including ones suitable for everyone), to the ultimate detriment of Irish consumers. This outcome would also undermine the stated domestic and EU objectives of increasing retail participation in capital markets. Moreover, it is not clear to us how the CBI will ensure that the GSCI does apply to firms passporting into Ireland and any difference in enforcement could give rise to an unlevel playing field on the Irish market.

The Meaning of "Consider and Apply"

The CBI is proposing that MiFID firms should be required to "consider and apply" the GSCI in the context of their obligation to 'act honestly, fairly and professionally in accordance with the best interests of its clients' under Regulation 31 of the MiFID Regulations.

It is unclear to us what 'consider and apply' means in practice. Our understanding is that the CBI's expectation is that MiFID firms should consider the GSCI requirements and then decide to apply them in a proportionate manner weighing up: (i) the services actually being provided; and (ii) already existing obligations under MiFID II. As such we consider that a requirement to "consider" or "comply or explain" would be a more suitable one and more accurately reflect the existence of discretion on the part of MiFID firms when applying the GSCI.

If the CBI decides to implement the GSCI on a "consider and apply" basis, we would appreciate if the Guidance could clarify what this means in the context of a proportionately based application of the GSCI.

B. The GPCVC

As set out above, we understand that MiFID firms are not in scope of the GPCVC. We support this approach as we consider that (i) vulnerable customers are already sufficiently protected under the MiFID framework and (ii) application of duplicative or additional requirements in this area is undesirable for the reasons analogous to those set out above in relation to the GSCI.

As a more general comment, we consider proportionately to be of particular importance when determining what can be expected of firms when dealing with consumers in vulnerable circumstances. Specifically, the ability of firms to determine the existence, nature and extent of such circumstances may vary depending on the nature of the firm's product offering and the delivery channels used. Moreover, the nature of a firm's offering is also relevant in determining how the firm should address any vulnerabilities that it has identified. Specifically, the nature and extent of the measures a firm should be expected to take when offering consumers essential financial services, such as basic bank accounts, may be different from those expected of firms

offering other types of financial services. In short, we do not believe that a prescriptive approach regarding the treatment of consumers in vulnerable circumstances is either appropriate or desirable, given the multitude of factors to be taken into consideration when determining how to treat such consumers.

Conclusion

For the reasons outlined above, we do not think that MiFID firms should be subject to the revised code. Please let us know if you require any further information in this regard.