

Date: 29 March 2023

Central Bank of Ireland  
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**Re: Consumer Protection Code Review Discussion Paper**

Dear Sirs,

I write to you in connection with the above and while the Discussion Paper has quite a wide range of areas for consideration I only wish to comment on Theme 3 - Unregulated Activities.

Over the years I have encountered this area from two perspectives:

1. Through clients who have occasionally asked me for a view before investing into what I then opined to be either unregulated financial products and or unregulated investments, and
2. Providing expert opinion on legal cases being brought by plaintiffs who invested in such unregulated products and or investments and who suffered financial loss.

As a result of these interactions, I have had sight of documentation that many potential or actual investors received as part of the marketing and or sales process for such products or funds. In many cases where losses were incurred, sometimes totally, it would appear that such losses arose a result of careless advice of the adviser.

In this document I will only address the area of “careless advice” rather than fraudulent activities which also pervades in the sphere of unregulated investments. That being said, some of my commentary may have application in dealing with such fraudulent activities. My broad definition of “careless advice” is intended to reflect the lack of due diligence by advisers including failing to read whatever marketing material was used to promote some unregulated products or investments. In some cases such products often contained warnings that should have been investigated further before any client recommendation was made. Where such warnings were present it appears that they may not have been imparted to the client as part of what I would feel should have been a reasonable advice process.

In responding to this discussion paper I would feel that the following areas should be given further consideration, if not possible action:

1. Education of financial advisers on the issues around regulated and unregulated financial products and funds,
2. Education of the general public on the issues around regulated and unregulated financial products and funds,
3. Penalties for unregulated parties promoting unregulated products & funds.
4. How promotional material for unregulated products and funds are allowed to be described, and
5. How suitability letters advising on using all financial products, regulated and unregulated, might be amended to draw investors’ attention to the risks of using unregulated products and funds.

## **1. Education of financial advisers on the issues around regulated and unregulated financial products and funds**

Considering that all regulated financial advisers are required to show competence by way of either professional training and or experience as well as maintaining CPD standards, this area might seem like an odd starting point to introduce into a document such as this. Nonetheless, in my experience of reviewing client files that were presented to me prior to legal action by potential plaintiffs it appeared that many of the advisers concerned did not seem to be aware that some products and or funds being recommended were, in fact, unregulated.

In many cases it seems that they were also unaware of the consequences that might be experienced by the client investors in the event that something negative might occur including total wipe-out of the investment.

Furthermore, many of these advisers were unaware that such advice was not covered by either their Professional Indemnity Insurance or the ICCL.

I would feel that there is scope for the financial educational bodies, such as the LIA, The Institute of Bankers, the Insurance Institute of Ireland and the various accountancy bodies to introduce such educational material into their separate curriculum for their courses as well as ongoing CPD. The range of such material should cover, as a minimum:

- a) Distinction between regulated and unregulated products.
- b) Distinction between a regulated and unregulated investment fund or vehicle. This should include when monies might be applied to crypto assets, private loan notes and the securitisation or adequacy of any personal guarantees by the promoters.
- c) The different rules required of a regulated entity in promoting and or advising on regulated and unregulated products and investments.
- d) How a regulated product might stumble into actually being promoted or open to being applied to investments that are unregulated.
- e) Professional Indemnity & ICCL Issues.

## **2. Education of the general public on the issues around regulated and unregulated financial products and funds**

In my experience most members of the public invest monies through advisers on the basis of their own personal assessment of how trustworthy the adviser, whether regulated or not, is perceived to be in the eyes of that individual investor. This trust may be further reinforced when they observe that the advisory firm is regulated by the Central Bank of Ireland, the “halo effect” that is referred to in the CPC Discussion Paper.

Without wishing to put an undue burden on the CBI it may be useful going forward if there was a nationwide educational program directly promoted by the CBI on the whole area of regulated and unregulated products and investments. The past success of the CBI public campaign of the “I don’t know what a tracker mortgage is” comes to mind and is still quite often referred to by both advisers and members of the public. Perhaps something in a similar vein might be considered going forward.

While crypto assets are most likely seen as the main area of focus when it comes to unregulated investments, private loan notes which might be unsecured are also areas that many personal investment monies have been applied towards. As such the full range of unregulated products and

funds, as known at this point in time, could not only be elaborated on but also warnings issued that such products may not be covered by an advisers' professional indemnity insurance or the ICCL. The fact that such a warning might be publicly declared would have the effect of members of the public seeking information from advisers as to what financial products or funds are actually covered under the adviser's professional indemnity insurance and or ICCL.

In the discussion paper issued by the CBI, it was stated that the "Central Bank is concerned that consumers are not always aware that they are dealing with an unregulated firm" As part of the public educational program in conjunction with advisers amending their suitability letters (see my comments below in answering the Discussion Paper's questions on this theme) in a relevant manner to include their regulatory number, the general public should be encouraged to cross check such regulatory numbers on the CBI registers.

In the Discussion Paper the CBI noted that "Disclosures can be limited in their effectiveness, and we know that consumers frequently do not read, or appreciate the significance of, disclosures". This is a very valid point and perhaps a more graphic approach to drawing attention to regulated or unregulated issues might be needed. I have made a suggestion further down in this document in this regard which deals with suitability statements and marketing material.

### **3. Penalties for unregulated parties promoting regulated & unregulated products or funds**

The CBI is quite correct in being concerned about how some unregulated products and services are marketed to consumers, with evidence of misleading advertisements, particularly on social media, where influencers are being paid to advertise products such as crypto assets to consumers.

As far as I am aware no punitive legislation is in situ in Ireland for unregulated parties who may be involved in the promotion of any financial product or funds, regulated or unregulated. Perhaps legislation needs to be introduced to deter such parties going forward along the lines of the USD1.26m fine issued by the US Securities and Exchange Commission to Kim Kardashian after she promoted a crypto asset on Instagram.

### **4. How promotional material for unregulated products and funds are allowed to be described**

Because the CBI has, hitherto, not involved itself in policing the unregulated investment arena on the basis that the CBI brief is to only oversee regulate entities and regulated products it needs to consider the broader issues of promotion of unregulated products and investments to a wider extent than just the issues raised through social media.

This CBI's brief should be broadened to include the oversight of printed and graphical material and where breaches of a pre-determined nature are observed then punitive action should be taken. I have suggested below how such descriptions might be used in promotional material.

**5. How suitability letters advising on using ALL financial products, regulated and unregulated, might be amended to draw investors' attention to the risks of using unregulated products and funds.**

The main reason why members of the public “gloss over” prescribed regulatory warnings is that they are seen as regulatory “bump” despite the best intentions of both regulators and regulated entities. This is quite possibly due to the fact that there is a lack of printed colour in any such warnings resulting in the warnings themselves blending with the other typed matter in any correspondence.

I believe that the time has come for a colour coded (red or green) “traffic light” system to be applied to be used in describing not only the product and investment funds but also whether the adviser is regulated or unregulated in the product or fund being promoted or advised on. In addition, a statement of whether the product and or fund is covered by professional indemnity insurance or the ICCL should be similarly colour coded.

**Answering the CBI Discussion Paper Questions: Theme 3 – Unregulated Activities**

All of the above commentary has been intended to be used by the author in providing context to answering the three questions under this section of my reply.

*Q.11 The Code requires regulated firms to provide a statement indicating that they are ‘regulated by the Central Bank’. Do you think this is useful for consumers?*

This should be broadened to include not only the regulated entity number but also a direct web link to the CBI’s register listing for that entity. This would allow the member of the public to investigate the regulatory status of the regulated entity more easily.









I would also suggest that the regulatory description be better expressed in more user friendly language rather than just the legalistic descriptions that are currently used in the registers as follows:

Entity Type	Description
<a href="#">Insurance, Reinsurance or Ancillary Insurance Intermediary</a>	Registered as an insurance, reinsurance or ancillary insurance intermediary under the European Union (Insurance Distribution) Regulations, 2018.
<a href="#">Investment Business Firm</a>	Authorised as an Investment Business Firm under Section 10 of the Investment Intermediaries Act, 1995 (as amended).
<a href="#">Investment Product Intermediary</a>	Service Providers holding appointments from IIA product producers, including intermediaries that may issue appointments, appearing in the register maintained under Section 31 of the Investment Intermediaries Act, 1995 (as amended)
<a href="#">Mortgage Credit Intermediaries/Mortgage Intermediaries</a>	Mortgage Credit Intermediaries/Mortgage Intermediaries authorised pursuant to Section 31(10) of the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 and Section 151A (1) of the Consumer Credit Act 1995.

*Q.12 How can the difference between regulated and unregulated activities be made clearer for consumers?*

The current Consumer Protection Code only relates to regulated product advice by regulated entities. I would respectfully suggest that any regulated entity that is recommending any financial product should be obliged to provide a suitability letter, irrespective of whether the product and or investment was regulated or unregulated.

While words would technically express warnings I would suggest that a “Traffic Light” system be built into the client correspondence of not only suitability statements but also marketing brochures. Such a system could be used but without the Amber – Red for unregulated and possibly dangerous, Green for regulated. The following table might be useful in considering amendments to the drafting of the suitability letter where, in particular, unregulated products or unregulated investments are being recommended. If the product is regulated then all graphics should be green. If the product and investment fund or instrument is unregulated then the relevant graphic should be red. A similar or modified table could be used for marketing materials such as brochures or flyers.

<b>Adviser</b>	Is the adviser regulated by the Central Bank of Ireland to provide advice and arrange purchase on this product being recommended	
	Is the adviser regulated by the Central Bank of Ireland to provide advice and arrange purchase on this investment fund or instrument being recommended	
<b>Product</b>	Is the product being recommended regulated by the Central Bank of Ireland	
	Is the product being recommended regulated by any other EU regulatory authority and passported to be sold in Ireland under the Central Bank conduct of Business rules	Green/Red or Not Applicable
<b>Fund/Investment</b>	Is the investment fund or instrument being recommended regulated by the Central Bank of Ireland	
	Is the investment fund or instrument being recommended regulated by any other EU regulatory authority and passported to be sold in Ireland under the Central Bank conduct of Business rules	Green/Red or Not Applicable
<b>Professional Indemnity Insurance</b>	Is advice for the product being recommended insured under the adviser’s professional indemnity insurance?	
	Is the investment fund or instrument being recommended insured under the adviser’s professional indemnity insurance?	
<b>Investor Compensation Company</b>	Is advice for the product being recommended protected under the Central Bank of Ireland’s ICCL Scheme	
	Is advice for the investment fund or instrument being recommended protected under the Central Bank of Ireland’s ICCL Scheme	

Before any adviser would insert a green graphic they would have to confirm from product providers whether the product and or underlying investment is regulated or not. This, in turn, would force all financial product providers to issue statements on their products regarding the regulated or unregulated status.

Although the above table may seem cumbersome the fact that it would have to be imbedded into a suitability letter would mean that any adviser might think twice before deciding to promote unregulated products or investment funds/instruments. At the very least, it forces advisers to truly research the product that they are recommending. While many reading my submission might comment that all regulated advisers should properly research all product and investment offerings the fact that there are a growing number of legal cases involving investors seeking financial redress in respect of losses relating to unregulated products or investments is proof that such research is not being properly carried out before advice is or was been given.

Finally, on this particular issue some might say that introducing colour into client statements is an unnecessary office expense when a black ink printer is used in most offices. The reality is that many regulated entities' offices use colour printers as they have now become cost effective when compared with such technical offerings in the past.

*Q.13 Should there be additional obligations on regulated firms when they undertake unregulated activities?*

While the above table might be useful in informing consumers on unregulated related issues a further annual statement as part of the regulatory return could be used to inform the Central Bank of Ireland as to whether a regulated entity is involved in the promotion of unregulated product and or investments. Where a regulated entity is involved in providing advice on unregulated products/investments a statement from the regulated entity's professional indemnity insurer confirming that such products are insured should be provided to the Central Bank of Ireland. My expectation is that when confronted by the need to obtain such a statement many advisers would realise that their involvement in unregulated products should be reconsidered especially if the insurer would refuse to provide such a statement. If such a statement could not be obtained then the Central Bank of Ireland would need to be provided with reassurance that the regulated entity has sufficient capital set aside to meet the costs of any potential legal action relating to possible future claims related to unregulated products and investments.

Yours faithfully,



**Eamon Porter**  
CERTIFIED FINANCIAL PLANNER™, Grad Dip, ACII, QFA FLIA, SIA, RPA, CUG