



**FSBA**

Financial Services  
Bar Association

## **Central Bank of Ireland**

### **Consumer Protection Code Review 2023**

#### **Submission of the Financial Services Bar Association**

**31 March 2023**

#### **Executive summary**

- 1.1. The Central Bank of Ireland (“**CBI**”) Discussion Paper of October 2022 invites submissions in relation to two broad themes, three more focused themes and 25 questions.
- 1.2. The Financial Services Bar Association (“**FSBA**”) welcomes the opportunity to respond to this consultation.
- 1.3. The Consumer Protection Code (“**CPC**”) contains the core conduct of business rule book for regulated financial services in Ireland involving consumers and is an important part of the legal and regulatory framework. While the CPC has been an important focus for consumer protection supervisory and enforcement activity of the CBI, doubts as to the precise standing and status of the CPC have made it less useful in the context of horizontal enforcement by affected consumers under section 44 of the Central Bank (Supervision and Enforcement) Act 2013 (“**CBSE 2013**”).
- 1.4. The FSBA responds to this consultation principally by engaging with the 25 specific questions posed by the CBI which are relevant to the objects of the FSBA but also comments on some overarching issues.
- 1.5. The FSBA particularly welcomes the proposed simplification of the legal status and standing of the CPC.

#### **Legal status and standing of the CPC**

- 1.6. The principal issue in relation to the CPC which is relevant to FBSA members acting for and advising both consumers and regulated financial service providers (“**firms**”) is that of the legal status and standing of the CPC.
- 1.7. As Clarke J observed in the Supreme Court in *Irish Life and Permanent plc v Dunne* [2016] 1 IR 92, the Oireachtas has empowered the CBI to make binding codes but has not specified whether the courts were to have any particular role in applying the provisions of such a code.
- 1.8. The issue is somewhat broader. Section 44 CBSE introduced a new method of



FSBA

Financial Services  
Bar Association

horizontal enforcement of the legal and regulatory framework by conferring a right of action on customers affected by a failure by a firm to comply with any obligation under financial services legislation and who have suffered loss or damage as a result. The FSBA is not aware of any reported decision which conclusively holds that the CPC is actionable under section 44. The FSBA considers that the absence of reported decisions in this regard may reflect a number of different factors and influences, such as the fact that many consumers prefer making use of the Financial Services and Pensions Ombudsman service rather than initiating legal action. However, the FSBA considers that doubt on the part of practitioners as to whether or not provisions of the CPC constitute “*any obligation under financial services legislation*” is also a contributing factor.

- 1.9. There are certain other features of the legal status and standing of the CPC which merit some comment. For example, the effect of section 34G of the Central Bank Act 1997 (“**CBA 1997**”) is effectively to incorporate the CPC into Part V CBA 1997 so that a breach of the CPC by a credit servicing firm may constitute an offence pursuant to section 34G(3) CBA 1997. In circumstances where there is no obligation on the CBI to lay before the Oireachtas codes of practice issued by the CBI pursuant to section 117 of the Central Bank Act 1989, it is doubtful whether an infringement of the CPC could properly constitute an offence. This is a matter for the Oireachtas rather than the CBI, but it is mentioned here for completeness.
- 1.10. The FSBA welcomes the CBI statement that it intends to update the CPC in due course “*by setting out both new and existing requirements in regulations dealing with cross-sectoral conduct of business rules.*”
- 1.11. Given the reference to cross-sectoral conduct of business rules, the FSBA infers that the CBI intends to update the CPC by making regulations pursuant to section 17A (2) CBRA 2010 as inserted by the Central Bank (Individual Accountability Framework) Act 2023.
- 1.12. The FSBA considers that regulations issued under section 48 CBSE 2013 or equally such as may be issued under Section 17A(2) CBRA 2010 are actionable pursuant to Section 44 CBSE.
- 1.13. The FSBA comments that issuing the CPC in the form of regulations under Section 17A(2) CBRA 2010 will add additional utility for consumers and additional transparency and predictability for regulated firms.
- 1.14. However, the FSBA observes that careful consideration may be required before making regulations under Section 17A(2) CBRA 2010 because of a tension between some of the content, in particular the General Principles, and the generally applicable legal position.
- 1.15. The FSBA believes it to be desirable that the regulations which comprise the reissued CPC differentiate between principles and provisions that are enforceable by private litigation under Section 44 CBSE 2013 and those that are not.

## Versions of the CPC



**FSBA**

Financial Services  
Bar Association

- 1.16. The FSBA notes that the CBI hosts various versions of the CPC and addenda on the CBI website. This material includes a document which is described as an “*Unofficial Consolidation of the Consumer Protection Code 2012 (Revised 1 January 2015).*”
- 1.17. The FSBA notes that pursuant to section 117(1) CBA 1989, the CBI has the power to “*draw up, amend or revoke*” one or more codes of practice.
- 1.18. Insofar as the CBI has issued addenda which amend the CPC, the FSBA comments that the CBI had the power simply to issue a code of practice as amended by whatever material was contained in an addendum. Given that the CBI alone has the power to draw up, amend or revoke codes of practice, the purpose of issuing an unofficial consolidation is unclear. The position differs, for example, from the case of a statutory body which prepares a consolidation of legislation (which can only be made by the Oireachtas) and, with the exception of the Law Reform Commission can only do so unofficially. It may be that this aspect of the CPC will have less relevance if the CPC is reissued as regulations under Section 17A(2) CBRA 2010.
- 1.19. The FSBA notes that legacy codes and requirements may be relevant to legal or enforcement action although no longer in force. It would be desirable therefore that legacy versions of the CPC (and indeed all non-statutory or sub-statutory codes or requirements which have ever been issued by the CBI) would be made available in a consolidated, comprehensive and systematic way on the CBI website with the possibility of ‘time travel’ so as to select the regulatory framework in force at specific times (as is the case with the Handbook of rules and guidance maintained by the Financial Conduct Authority in the United Kingdom (<https://www.handbook.fca.org.uk>), or the Règlement Général published by the Autorité des Marchés Financiers in France (<https://www.amf-france.org/fr/eli/fr/aai/amf/rg/archives>)).

### **Languages**

- 1.20. The FSBA notes that the CPC was not mentioned in the Central Bank of Ireland Language Scheme 2019 – 2022. Whether or not it has been prescribed as such, the FSBA considers that the CPC is a document of major public importance and that simultaneous publication in Irish and English would be desirable.
- 1.21. The FSBA observes that financial services legislation is now routinely issued in the Irish language by the European Parliament and the Council (e.g. Rialachán (AE) Uimh. 1286/2014 ó Pharlaimint na hEorpa agus ón gComhairle an 26 Samhain 2014 maidir le doiciméid um fhaisnéis bhunriachtanach do tháirgí infheistíochta miondíola pacáistithe agus táirgí infheistíochta atá árachas-bhunaithe (PRIIPanna)).

### **Broad Theme A – Availability and Choice**

***What are your views on availability and choice of financial services and products for consumers?***



FSBA

Financial Services  
Bar Association

1.22. No comment

***How important are new providers and new delivery channels to serving consumers' financial needs?***

1.23. No comment

***In implementing its consumer protection mandate, how should the Central Bank reflect the importance of competition in its regulatory approach?***

1.24. No comment

***Broad Theme B – Firms Acting in Consumers' Best Interests***

***Do you agree that the Central Bank should develop guidance on what it means for a firm to act in the best interests of its customers?***

1.25. Yes.

***Does the suggested outline of 'customer best interest' guidance capture the essence of the obligation to act in customers' best interests? What other guidance would you suggest?***

1.26. The CPC can give rise to enforcement action including under Part IIIC of the Central Bank Act 1942 and, if reissued as regulations under Section 17A(2) CBRA 2010 that will remain the case.

1.27. The SBA notes that the CBI may make regulations prescribing business standards pursuant to Section 17A(2) CBRA 2010 for the purpose of ensuring that in the conduct of its affairs a firm acts in the best interests of customers and of the integrity of the market.

1.28. The 'best interests' in the CPC and as proposed to be re-issued in regulations evokes a fiduciary or quasi-fiduciary relationship. As Baker J summarised the test for a fiduciary relationship in ***Best v Ghose*** [2018] IEHC 376: "*the essential material characteristic of a fiduciary relationship arises where a person has both the power to act on behalf of another or to act in a way that impacts on the interests of another, and responsibility to do so in the interests of that other person.*"

1.29. The rule of law requires that standards of conduct which are enforceable and which can give to significant penalties must be knowable.

1.30. The FSBA comments that insofar as the CBI equates a firm's obligation to act in the best interest of its customers and potential customers with a "*strong self-evident imperative to do the right thing*" that language connotes a subjective, aspirational state of affairs. That is a standard which admits more so of after-the-fact judgment and criticism (with the benefit of hindsight) rather than a standard of conduct which is knowable by firms, directors or managers seeking to ascertain legal and regulatory



duties at the relevant times.

- 1.31. Any useful guidance on the proposed “*best interests*” obligation should explore the potential tension between the legitimate interests of a firm and the interests of a customer and seek to illustrate the balancing exercise which is described in the Discussion Paper.
- 1.32. The FSBA considers that the formulation of a “best interests” test with reference to the legitimate expectations of customers is over-elaborate. Legitimate expectations is an established legal concept with quite a different meaning than is intended here. The FSBA comments that seeking to identify or determine a customer’s legitimate expectations by reference to what an ordinary customer in the relevant market would have expected assuming that the firm “*had the customer’s best interests at heart*” appears over-complex and perhaps paternalistic.
- 1.33. The FSBA comments that any guidance in this area should seek to engage with the tension between the generally applicable legal position i.e. that banks do not generally stand in a fiduciary capacity vis-à-vis their customers and the obligation to act in best interests pursuant to the CPC or a reissued CPC.
- 1.34. In relation to the perceived risk of seeking to specify more precisely the meaning of *best interests*, the FSBA does not consider that clearly framed and predictable statutory requirements should be described as legalistic or as a legalistic conception. The FSBA considers that legalism connotes excessive adherence to the details of law and is inapt to describe transparent and clear statutory requirements.
- 1.35. The FSBA comments that the considerations which are listed on page 32 of the Discussion Paper are generally appropriate but may not add much clarity to the applicable standard.
- 1.36. In relation to the reference to “*a high level of contractual clarity*” the FSBA comments that it is important to separate the proper objective interpretation of contracts from issues of the subjective understanding on the part of customers. There are existing established standards of contractual clarity which have been developed and clarified by multiple decisions of the Court of Justice of the European Union in the context of the Unfair Contract Terms Directive. Consistency and predictability would suggest reference to these concepts and this body of material rather than developing a standalone concept of contractual clarity. It is also important that a requirement for a high level of contractual clarity not be applied with the benefit of hindsight so as effectively to require warnings to be given in relation to contractual terms which are not expressly required by the CPC.
- 1.37. Insofar as the CBI comments on how an ordinary time-constrained consumer would reasonably have understood particular information, it is important to observe that certain financial products or services are reasonably complex and quite unavoidably involve detailed legal documentation. The meaning of those documents is a matter for objective interpretation according to established legal principles and the expectation or subjective understanding of customers is of limited relevance. In the area of unfair contract terms, the FSBA notes that the CJEU has applied the concept of a hypothetical average consumer.
- 1.38. In relation to what is often called *read-across*, there is merit in requiring firms to



FSBA

Financial Services  
Bar Association

undertake a beneficial impact assessment so that relevant issues are addressed for all customers in a similar position. However, the FSBA does not consider that this approach is necessarily inherent in a principle of looking to customers' best interests or is best elucidated by discussion in that context. This proposition as to *read-across* requires clear legal basis and clearly defined scope and application. Not all issues or outcomes give rise to principles which can usefully be applied across broader customer populations.

- 1.39. The FSBA considers that a formula which requires due regard to the interests of customers and that customers be treated fairly may be preferable to an express requirement to act in the best interests of customers. The FSBA see merit in the new consumer duty introduced in the UK and the focus on good outcomes for retail customers.

### ***Theme 1 – Innovation and Disruption***

***Do you agree with our proposed approach to enhancing our Innovation Hub?***

- 1.40. Yes

***What more should be done to support innovation while ensuring consumers' best interests are protected?***

- 1.41. No comment.

***How can regulators ensure that neither firms currently in the market, nor new entrants, have unfair advantages which could be a barrier to fair competition?***

- 1.42. No comment.

### ***Theme 2 – Digitalisation***

***Do you agree with our analysis of the benefits, challenges and risks around digitalisation in the area of financial services? What are the key issues for you?***

- 1.43. Yes.

***How do you think the personalisation and individual-targeting of ads can be made compatible with the requirement for firms to act in the best interests of customers?***

- 1.44. The FSBA does not consider that personalisation or individual targeting of advertisements necessarily (or even probably) amounts to the provision of advice or recommendations so as to come within any relevant obligations in terms of suitability or appropriateness.

- 1.45. The FSBA comments generally that some refinement and discussion of the concept of suitability and associated duties and obligations is appropriate in circumstances where





the concept appears to have slightly different meanings across the legal and regulatory framework. For example, section 43 CBSE 2013 deals with “*providing the customer with a financial service which was not suitable for the customer at the time when it was provided*” while the law in relation to suitability of investment services is more complex than that reference might suggest.

### ***Theme 3 – Unregulated Activities***

#### ***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?***

- 1.46. This statement is familiar to consumers and likely has some value on that basis. However, in its own terms it is uninformative.
- 1.47. It could be useful if the standard regulatory statement directed the consumer to material on the CBI website which explains what regulation by the CBI means in practice. This could include a standard statement (varying by firm type) as to what regulation means i.e. that the firm has to effectively obtain permission from the CBI to carry on his business and must meet certain standards. The guidance could explain the customer protection powers of the CBI, the customer right to bring an action for damages under section 44 CBSE 2013 and a brief statement of the role and jurisdiction of the FSPO.
- 1.48. The FSBA notes that the CBI has mentioned many of these aspects of the concept of regulation in the Discussion Paper. The FSBA comments that the merit of a single clear destination describing what flows from regulated status is that it could give concrete force and utility to the well-worn and familiar regulatory status statement.

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

- 1.49. Regulated firms engaging in unregulated activities could be required to:
  - 1.49.1. Use different letterhead for unregulated activities
  - 1.49.2. Use a different portion of the firm website for unregulated activities
  - 1.49.3. Use a standard, prominent boxed-text warning.

#### ***Should there be additional obligations on regulated firms when they undertake unregulated activities?***

- 1.50. The FSBA has noted above some concerns in relation to a concept of acting in the best interests of customers as that concept is proposed to be developed or explained by proposed guidance.
- 1.51. Some firms provide unregulated activities because their clients want those services. At present, the scope and application of the CPC is determined by the activity in which a firm is engaged as well as the regulatory status of the firm. Any proposal to apply the standards applicable to regulated business to unregulated business would require careful consideration.



**FSBA**

Financial Services  
Bar Association

#### ***Theme 4 – Pricing Matters***

##### ***What can firms do to improve transparency of pricing for consumers?***

1.52. No comment.

##### ***In relation to pricing, are there examples of firms using unfair practices to take advantage of customer vulnerabilities?***

1.53. No comment.

#### ***Theme 5 – Informing Effectively***

##### ***How can regulation improve effectiveness of information disclosure to consumers?***

1.54. The FSBA considers that the Key Information Document concept from UCITS IV Directive and the EU PRIIPs Regulation (EU/1286/2014) on Key Information Documents (KIDs) has some potential application in a simplified version.

1.55. The FSBA considers that issues of effective information disclosure to consumers can usefully be addressed in standard disclosures and key information documents which are applicable to different types of regulated business and different products and services.

##### ***How can firms better support consumers' understanding – can technology play a role?***

1.56. The FSBA agrees that technology can play a role in terms of supporting consumers and assisting them to understand standard disclosures and key information documents.

##### ***Does the way in which firms approach disclosure in respect of mortgage products need enhancing? If so, how? - taking account of the wide variety of features of mortgage products, and borrowers' different circumstances and needs.***

1.57. The FSBA notes that no particular issue is identified in this regard in the Discussion Paper. Insofar as the FSBA considers that issues of standard effective information disclosure to consumers could be enhanced, it considers this could equally apply to mortgage products. However, the FSBA does not offer any particular view as to whether firms are approaching disclosure in respect of mortgage products appropriately or whether that system requires enhancement.

1.58. The FSBA would welcome the opportunity to engage with specific proposals on enhanced disclosure in the area of mortgage products.





**FSBA**

Financial Services  
Bar Association

### ***Theme 6 – Vulnerability***

***Given that vulnerability should be considered more as a spectrum of risk than a binary distinction, how should firms' duty to act in their customers' best interests reflect this?***

- 1.59. The FSPA agrees with the CBI and Financial Conduct Authority view that vulnerability is a spectrum of risk.
- 1.60. The FSBA welcomes the draft text of principle 6 as it appears in the footnote on page 55 of the Discussion Paper.
- 1.61. Vulnerability or potential vulnerability should be defined as neutrally as possible.
- 1.62. While vulnerability for the purposes of the CPC is not co-extensive with issues of capacity generally, the FSBA considers that the Assisted Decision Making (Capacity) Act 2015 which is due to commence on 26 April 2023 is an important consideration. This Act sets out a general presumption that a person has capacity which reflects the position at common law and section 3 sets out the functional test to be applied in assessing a person's capacity. The ADMC Act 2015 also creates a number of new arrangements for assisting persons who may lack capacity.
- 1.63. The FSBA agrees that a focus on business processes is required. The FSBA broadly agrees with the discussion of these issues in the Discussion Paper and notes the FCA *Guidance for firms on the fair treatment of vulnerable customers* published 23 February 2021 as a very useful structure.

***What other specific measures might be adopted to protect consumers in vulnerable circumstances while respecting their privacy and autonomy?***

- 1.64. The FSBA considers that the facility to identify a trusted contact person could have considerable merit in this area. The FSBA believes that this could be something that firms could probably introduce themselves without any regulatory basis, however data protection concerns would be very material and providing a uniform and clear regulatory basis would undoubtedly facilitate matters. It would be important that any regulatory treatment of this issue would provide an appropriate structure and template which takes account of data protection and privacy and also issues of mandate. It would also be important that any template document and guidance would be clear on specifically what a trusted contact person can and cannot do in relation to a customer account or customer information.

### 1.65. ***Theme 7 – Financial Literacy***

***What can the responsible authorities do to improve financial education?***

- 1.66. The FSBA sees benefit in short video / visual messaging on core financial education issues such as fraud detection and warning signs.
- 1.67. The FSBA notes that in 2022 MABS published a report on 'Money Attitudes and Behaviors of Young People living in Ireland, Findings of the 'Money Matters' Financial Education Survey' and in November 2022 the National Adult Literacy Agency published a report on the 'Financial literacy in Ireland, challenges and solutions' both of which



FSBA

Financial Services  
Bar Association

contain numerous recommendations. In the CBI's 'Consumer Protection Outlook' published in March 2023, the CBI "*recommend regulated firms consider these findings in their own activities*". The FSBA would see a benefit of also incorporating the recommendations arising from these reports into this process.

***How can consumers be empowered to better protect their own interests when dealing with financial matters?***

- 1.68. Consumers could be encouraged to ask specific questions in a documented way if they have any doubts or questions in relation to financial services or products.
- 1.69. Consumers should be encouraged to seek and obtain their own independent legal advice before entering a contract.

***Theme 8 – Climate Matters***

***How should the financial system best fulfil its role in supporting the transition to a climate neutral economy?***

- 1.70. No comment

***How will climate change impact on availability, choice and pricing for financial products and services?***

- 1.71. The FSBA sees the principal impact in the medium term in respect of insurance for climate-related events.

***Does the impact of climate change require additional specific consumer protections?***

- 1.72. The FSBA does believe that any specific additional protections are required at present.