

7th June 2024

Irish MiFID Industry Association Response to the Central Bank of Ireland’s Consultation Paper on the Consumer Protection Code (CP-158)

Introduction

The Irish MiFID Industry Association (“IMIA”) was set up in 2018 to provide central representation to the Central Bank of Ireland and other regulatory bodies on behalf of its members; promote good industry practices on regulatory requirements; host educational events on MiFID regulations and other regulatory issues impacting MiFID firms and to promote networking and peer interaction.

The IMIA broadly welcomes the proposals to omit Firms providing MiFID Services (hereafter referred to as “Firms”) from the Business Standards and General Requirements. However, there are a number of enhancements required to ensure that the new Consumer Protection Code (CPC) is fit for purpose and does not continue to perpetuate the currently uneven playing field which applies to the distribution of MiFID products and Life Insurance wrapped products (IBIPs).

Reliance on Intermediaries/Investment Intermediary Act (“IIA”) Firms

At present, MiFID Firms cannot place reliance on an IIA Firm to assess suitability or appropriateness on behalf of a client. In practice, this means that the underlying client may receive multiple statements of suitability and regulatory correspondence relating to a single investment account (from the MiFID Firm and IIA Firm) causing duplication of operational efforts and confusion to the client.

We understand that Ireland was the only country in Europe that took the “Article Three” exemption when MiFID II came into effect, therefore this anomaly does not exist elsewhere in Europe. A preferable approach assumes the suitability/appropriateness testing (third-party assessment) undertaken by an IIA firm should be sufficient for a MiFID Firm to rely on, rather than having to undertake an additional assessment. The results of this third-party assessment could be provided to the MiFID Firm for record-keeping and due diligence purposes. This can be maintained along with all other client documentation held on the client’s file.

IIA firms are regulated by the Central Bank of Ireland (“the Central Bank”) and subject to the provisions of the Minimum Competency Code. The IMIA also notes that many Insurance Based Investment Products (“IBIPs”) have a highly complex structure, in many cases much more complex than MiFID retail products. The IMIA is of the view that where MiFID Firms could rely on third-party assessments (described above) this could result in a wider range of potentially

more cost-effective products offered to retail clients, thereby increasing consumer choice and competition.

Dual-regulation with Pension Authority

It is noted that the Pensions Authority is the regulator of pension products in Ireland and not the Central Bank. MiFID Firms may, however, be authorised to offer investment services in respect of Personal Retirement Savings Accounts (“PRSAs”). We suggest that the role of the two regulatory authorities may be poorly understood by Consumers.

We believe the CPC should encompass all retail investment channels, including pension products thereby providing clarity to consumers, industry practitioners and regulated entities and preventing regulatory divergence. For example, it is currently not possible for MiFID Firms to provide ‘independent’ investment advice in respect of PRSAs. This is due to remuneration rules with PRSAs that don’t recognise independent investment advice provisions under MiFID II.

Complaints Handling

The IMIA considers that the Complaints handling provisions in the CPC provide strong support for consumers. The IMIA would be supportive of these provisions applying to MiFID Retail clients.

Securing Customer Interest

Under MiFID, execution-only is a non-advisory service whereby retail investors instruct firms to transact in financial instruments without any suitability assessments taking place.

Appropriateness assessments are only undertaken with respect to complex products. Execution-only clients of a firm must acknowledge that they understand they will not receive any advice and will not be subject to the requirement to undertake suitability and appropriateness assessments (in the case of non-complex products).

It is important to bear in mind that even when a client is in an advisory relationship with firms, the consumer can choose to ignore the advice and proceed with a trade or strategy that may not be in their best interests. In these circumstances, the firm must clearly inform the client that they are trading against the advice of the firm. In relation to complex instruments, execution-only clients must be provided with a warning which states the investment has been deemed inappropriate.

Guidance on “Best Interests” should include qualifying language relating to the business relationship between the firm and the investor. Under an execution-only mandate, firms are limited in acting on behalf of the customer’s best interest as the customer has agreed not to receive advice.

IMIA member firms have differing views depending on their business models. Many firms conduct their business through IIA firms or have a dual MiFID/IIA license. Therefore, they understand that they will be in scope for applying the “Best Interest” Guidance.

Other Member Firms that provide services directly to Clients believe that they should be out of scope for the Best Interest Guidance as there are similar protections offered under MiFID II.

Purchasing Unregulated Products

The IMIA has no objection to the proposals to apply additional disclosure requirements when Firms are conducting unregulated activities.

It would be helpful if the Central Bank could provide further clarity on how firms are expected to *“demonstrate that they can effectively bridge the gap between the knowledge and expertise of their target market, and the complexity and sophistication of a product”*.

Clarity is also sought with respect to the scope of the provisions relating to unregulated products. The IMIA considers the requirements to be most relevant at the marketing, advice and sales stages. Applying the full requirements, particularly in terms of marketing requirements, throughout the life cycle of a product is challenging to Firms and presents complexities for consumers. An area of concern for IMIA members is the amount of material to be provided to clients. As noted in the response to the Retail Investment Strategy, members have noted from clients that there is already a significant volume of material that clients have to receive. Where a client has both unregulated and regulated products within their portfolio, the information required also increases. For example, a client with both regulated and unregulated products cannot receive a unified statement of their investments.

The Association would welcome an approach which would permit both regulated and unregulated products to appear on the same post-sale documentation provided the unregulated products were clearly identified and the protections foregone clearly communicated on that document. While cognisant of the requirements, the IMIA notes that the provision of separate statements/documentation, where applicable, provides both an additional cost to firms and increases the volume of information for clients, which can be cumbersome to the customer journey.

Independent Advice

In addition to the Consumer Protection Code, the Central Bank may wish to examine the Minimum Competency Requirements, to allow for differentiation between types of advisors, so consumers can understand better whether they are being advised by a QFA, Certified Financial Planner or Independent advisor.

Customers in Vulnerable Circumstances

The IMIA agrees in principle with the guidance on customers in vulnerable circumstances but has concerns relating to the practical implementation. The CPC includes a requirement that all firms must ensure that the information provided by the customer, is recorded and maintained by the firm, with the **consent** of the customer. This information contains the details relating to the vulnerability. Further clarity is required on the nature of the consent and whether it is explicit or implied. Legal advice sought by firms details that explicit consent needs to be obtained in order to record and maintain any special category data, such as health needs/special requirements. The IMIA would welcome clear guidance on the course of action to be taken should the customer not consent to the firm recording the information which could result in the client being deemed vulnerable or potentially vulnerable.

Firms which provide advice are required by the CPC to obtain (and implicitly retain) all relevant information leading to the advice being given. Most Data Protection Privacy Statements will state the information will be recorded and shared internally (and with others where relevant).

Financial Abuse

Further clarity from the Central Bank regarding the response to potential financial abuse situations would be welcome. In situations where customers request a legitimate transaction, the Firms are obliged to follow instructions.

Similar to the Vulnerable Customer concerns, there may be instances where a third party makes the Firm aware of a scenario such as gambling, romance fraud, coercive control, or other types of coercion. However, the customer may deny this or even be unaware of the situation. Guidance would be welcomed on the next steps in this situation as firms have a duty of care to clients, however, they cannot interfere with the customer's autonomy. It would be helpful if the Central Bank could provide further guidance on *"reasonable systems and controls... to mitigate the risk of financial abuse"*.

Record Keeping by Firms

The CPC proposes that where a consumer does not become a formal client of the firm, that a firm will be required to retain these records for no more than 12 months - reduced from six years under the existing Code.

Under the formal complaints process with the Financial Services and Pensions Ombudsman (FSPO), both the consumer and the firm will be required to provide documentation to support the investigative process. Currently, timeframes to resolve consumer complaints take many years for the FSPO to resolve, therefore shortening the record retention period will be

disadvantageous to both consumers and firms as records will not be available to support and investigate complaints arising.

What are your views on the proposal for a 12-month implementation period? Should some proposals be implemented sooner?

The IMIA have no issue with the 12-month implementation period.