Subject: EMA response to the CBI Consultation Paper 158 on the review of the Consumer Protection Code

Date: 9 June 2024

Overarching comments:

The EMA continue to welcome the revision of the Consumer Protection Code and reiterate that the Code should reflect technological advances in the context of engagement and communications with consumers. We acknowledge and support the CBI's objective of aligning the CPC with the OECD High Level Principles on Financial Consumer Protection.

EMA members generally welcome the update and modernisation of the CPC to better reflect the landscape and needs of consumers and firms.

We support in particular the CBI's objective to create a regulatory context in which the potential benefits of innovation for consumers, businesses and society can be realised, and for a payments ecosystem which fosters innovation and inclusion.

We welcome the altered approach in CPC CP158, signalling a shift away from the idea that innovation is in itself 'risky', and we welcome the recognition inherent in the consultation paper that innovative financial service approaches do not automatically lead to greater consumer risk.

When developing the changes to the Code and consumer protection framework, we again would welcome an approach that is proportionate, and takes into account the nature, scale and complexity of business types. The importance of ensuring a level-playing field with other EU Member States cannot be underestimated. Continued fostering of engagement by the CBI with innovative financial service providers and representatives will increase the ability for innovative financial services provision to work in customers interests, and improve choice.

EMA members generally observe that several phrases and terms within the Consultation Paper and supporting documents that could be open to interpretation, and we seek clarity below on some of these examples.

EMA members also seek clarity on the geographic scope of the Code and new consumer protection framework, and whether it is intended to apply to consumers basd outside of Ireland that are served by Irish-authorised firms. Furthermore, members have some concern on the precedence or otherwise of the new Code legislative framework in relation to existing and future national, EU and international legal requirements. In general, EU requirements take precedence.

We reiterate that any and all further reviews to the Code, and these Guidance documents, should be evidence-based and result from known or witnessed shortfalls/concerns, rather than perceived risks that have not led to any actual consumer harm to date.

Consultation Paper Responses

• 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?

- We welcome the emphasis on proportionality and on customer autonomy that is set out in the documents supporting the revised CPC. We also welcome the CBI's intention to improve understanding of the substance and particularly of the limits of the existing best interests obligation, which ultimately aims for firms to deliver good customer outcomes.
- We welcome the efforts made to illustrate what this means in practical terms, by way of case study examples. We note however that the examples provided in the Guidance as posing "significant customer detriment" do not include any innovative financial service provider or service.
- In section 2.2 'Securing Customers' Interests During Business Model Change and Innovation' we support the suggestion "*that there is appropriate alignment between innovative developments and the interests of a firm's customers*" and further also agree that "*challenges such as a lack of access to services for some consumers, the appropriate use of data including personal data, and the nature of the decision-making process for more financially significant and complex products*" do not bring additional risk by default.
- We note under 2.4 Customer Behaviours, Habits, Preferences and Biases the statement that "Digitalisation is expanding the availability of financial data facilitating customer profiling and increasing the risk that firms can seek to inappropriately exploit consumer behaviours, habits, preferences or biases" but that the example provided in traditional approaches was in insurance. We again highlight the fact that digitalisation cannot, of itself, be deemed to be riskier or anti-consumers best interests, as is seen with the insurance example in the Guidance.
- The use of the term "issues," predominantly in section 2.5 of the Guidance, is not explained, and members would be grateful for clarification of this term, particularly in contrast with the term "errors", which also appears throughout the text.
- In section 2.5.2 of the draft Guidance, it states "*mediation may be an effective tool to reach a mutually acceptable resolution of an issue*". Could the CBI clarify specifically what "mediation" refers to here? Is this a reference to the Financial Services and Pensions Ombudsman mediation process, or another tool/process?
- We acknowledge the need for the Guidance to be read in conjunction with the CBI's Guide to Consumer Protection Risk Assessment (CPRA Guidance).
- The EMA does not support the proposition to extend the definition of small business from firms with an annual turnover of €3 million to €5 million. We believe this is overly burdensome and not in the spirit of the initial desire to protect individual customers and 'small' businesses as consumers in Ireland. While acknowledging the incorporation of the SME Regulations into the Consumer Protection framework, we do not agree that the €5 million threshold for incorporated entities is the fair approach. It does not benefit the real 'consumer' in this jurisdiction. We go into further detail on this below.

- We welcome the reference to proportionality, and that "consumer protection requirements should be proportionate in terms of achieving the outcome sought without being unduly burdensome or costly." Any proportional approach has to be based on information likely to have been known by the firm at the time of its interaction with the customer.
- We would welcome further engagement by the CBI with the fintech sector around the expectation that firms "ensure that certain cohorts of consumers, including those with poor digital literacy, do not become excluded through poor design." (guidance 13)
- We would also propose that the expectation that "Firms should give consideration to the suitability of alternative service provision for existing customers who may be excluded by digital delivery" does not rest with every financial service firm in every sector, as indeed consumers can choose non-digital financial service offerings with alternative traditional financial service providers. Example 1 on pg 13 of the Guidance states that "Securing customers' interest requires all firms to consider customer impacts when taking decisions to move to digital delivery." (guidance 13) We assume this is less applicable for firms who are digital-only.
- In the financial technology sector in general, due to continued advancements and the ever-changing nature of service provision, we consider that the use of hyperlinks to terms, information and other documents that can be updated frequently, should be permitted. This approach forms a key element of standard operations within the growing fintech sector. It would be operationally unrealistic and unmanageable to impose static information requirements on such customers.
- Further, it is important to balance the need to ensure consumers receive pertinent and timely information with avoiding a reduction or stifling of the advances in the financial tech space, resulting in reduced competition and options for consumers and SMEs, which is contrary to the intent of the updated CPC.

Do you have any comments on our expectation that firms offering MiFID services and firms offering crowdfunding services should consider and apply the Guidance on Securing Customers' Interests?

No answer.

• Do you have any comments on the proposed Code enhancements with regard to digitalisation?

- We note the value of digitalisation being recognised for firms and customers, and the opportunity for further benefits for all stakeholders.
- We support the premise that digitalisation will support, and not replace, traditional in-person financial service provision, adding to choice and availability regardless of consumer needs, and therefore being in consumers' best interests.
- Section 2.2 of the consultation paper clarifies that durable medium "includes providing and storing information through digital means". We consider the definition of durable medium, should be updated to accommodate modern forms of communication (e.g. via

platform/portal access, email, push notifications), and offer optionality for consumers who may wish to receive written notification in a variety of ways.

- EMA members query the value of slowing down digital transactions. Where a firm demonstrates that all criteria have been met i.e. that the customer has been effectively informed and there are no adverse customer outcomes in executing the decision, then considering speed as a risk factor in isolation is a regressive step in a digital world. Whilst we do acknowledge the CBI's concern that "haste" in decision making can lead to misunderstandings (and potentially poor outcomes), we believe that the focus should be on simplifying the process so that customers can better understand the required key information to inform their decision making. The EMA and members continue to remain available to support in these endeavours.
- Firms would also query the apparent blanket requirement that they shall give step-by-step guidance to consumers on how to use and navigate the digital platform (Reg 40(1) of the Conduct of Business Regs). The proposal is that this requirement should be output driven, ie. that the platform is easy to use, understandable and easy to navigate through. It should be for the firm to decide whether such guidance is needed/helpful to achieve this end.
- Some members would ask that the Conduct of Business Regulation definition of Bundling on page 27 refers to the bundling of two or more distinct products specifically with the addition of 'that are financial in nature' or regulated products. This would be consistent and align with how contingent selling is described in Regulation 92(1) of the same Conduct of Business Regulations.
- Furthermore, it would be helpful to have additional guidance as to the CBI's expectations in relation to structure and content of key customer information and consumer terms. It is important that the jurisdiction of Ireland remains comparable to these expectations across the EU/UK.
- Members suggest that any revisions to the Code on firms' obligations with regards to Material Changes to their Services should be equivalent with general CBI requirements of firms regarding notifying the Regulator in advance of material business changes and obtaining approval from the Regulator before making any such changes. (Considering whether the CBI may have defined what a "material change to services" would look like?)

What are your views on the proposed requirements on banks where they are changing or ceasing branch services?
No answer.

• Do you have any comments on the 'informing effectively' proposals?

- The EMA would only comment that whilst firms can make every effort to ensure that their communications are clear and not misleading, it may be more difficult to "'*ensure*" practical understanding' by the customer".

• Are there any specific challenges regarding implementation of the new Informing Effectively Standard for Business?
No answer.

Do you have any comments on the proposed enhanced disclosure requirements for mortgages?
No answer.

Do you have any comments on the proposed enhancements, or any further suggestions on the CCMA?
No answer.

• Are there other actions that firms could take to ensure that customers understand the status of unregulated products and services and the potential impact for consumers?

- Regarding Securing Customers' Interests' Supporting Standards for Business and firms distinguishing between their regulated and unregulated activities, the four proposed requirements outlined in the consultation appear reasonable and proportionate in order to achieve this goal.
- However, Section 2.5 of the Consultation Paper appears out of step with the requirements outlined in the CP: "In many circumstances, to avoid this confusion, it will not be possible for a regulated firm to offer unregulated products or services."
- Firms ensuring that the 'halo effect' is effectively avoided should not be punished or restricted from providing unregulated services that provide further consumer choice in Ireland, and therefore this one-line statement is concerning – what will the measures and controls for such Regulator decision-making be? Will these exclusionary cases be transparently shared?
- While members appreciate the distinction required between regulated and unregulated products, it is also a concern that providing too much information in this regard may potentially cause confusion. Further clarity is required by firms as to expectations surrounding this to ensure customers are not "swamped" or overburdened with so much detailed information that it will remain unread and therefore defeat the purpose of easily disseminating information.
- It is noted that in Chapter 73(2) of the Conduct of Business Regulations around disclosure statements, the distinction is being made between regulated activity and activity that is not regulated, to include non-financial services. For consistency, and to align with the aim of the standards of business and supporting standards of business members would suggest, the wording in Chapter 73(2) be reconsidered to suggest instead that content of business stationery, or webpage, or email which states a regulatory line, should not include unregulated activity, as defined in the Code. This would be akin to Chapter 8 of the Conduct of Business Regulations on website information, where the distinction between regulated and. unregulated activity is made as opposed to regulated activity and activity that is not regulated.

• What other initiatives might the Central Bank and other State agencies consider to collectively protect consumers from financial abuse including frauds and scams?

- EMA members propose that a large number of measures are already being taken at national and international level (e.g. review of PSD2), so we consider that nothing further is required for this in the revised CPC.

• Are there any other circumstances that we should consider within the proposed definition of financial abuse?

No answer.

• 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?

- We agree that firms should keep a record of customers' current or continued vulnerable circumstances, subject to the customer's consent, to avoid the customer having to repeat such information at a future engagement with the firm.
- We agree with the approach to vulnerability being "grounded in an expectation of reasonable steps and proportionality."
- EMA members note that whilst the Guidance references the Assisted Decision Making (Capacity Act) 2015. and the upcoming European Accessibility Act in Section 3: Broader Domestic and EU frameworks, it would be helpful if the CBI could provide clarity on how this guidance will interact with other (non-financial) legislation, (noting that PIs and EMI's do not fall within scope of the Decision Making Act). As an example, the need for a dedicated team to be created to look after vulnerable customers per the Assisted Decision-Making Act.
- EMA members are concerned about the non-static nature of the new definition of vulnerability, and the expectations of firms' awareness. This could place a huge and operationally unrealistic burden on relatively junior front-line staff (a service that can often be outsourced). Further, given the personal nature of such information, customers are likely to be hesitant to divulge such information.
- This will also be problematic in the context of targeting information or marketing materials where lack of awareness of vulnerability is at issue.
- Does the CBI anticipate any specific obligations for digital providers with regard to Protecting Consumers in Vulnerable Circumstances? For example, the Code of Practice for Financial Service Providers outlines the required approach to assessing a relevant person's decision-making capacity and how decision support arrangements are implemented. In the case of other jurisdictions, there may be alternative arrangements in place.

• Is the role of the trusted contact person clear? What more could a Trusted Contact Person do?

- The EMA welcomes the introduction of a third-party "trusted contact person' regime. We would also welcome clarity from the CBI regarding how the role of the Trusted Contact Person will function alongside that of Decision Support outlined in the Assisted Decision Making (Capacity Act) 2015. For example, does the CBI envision circumstances where a consumer may appoint a Trusted Contact Person in a manner that contravenes the Decision Support arrangements?
- Members have suggested that there is a lack of clarity around the role of "trusted person". How will this impact current KYC, CDD and other obligations in the financial sector (e.g. current "acting on behalf of" under AML)? What security regime will be put in place around this and verification of authority to act. What will firms be permitted to do without a power of attorney being in force?
- Members suggest that it would also be helpful if the CBI were able to provide guidance on how to ensure the Trusted contact is appropriate. They would also welcome guidance around the handling of resolution or replacement in the event of an unresolvable issue arising with the Trusted Contact Person, or a complaint regarding their activity/conduct, and by/with whom. For example:
    - Would firms be required to obtain a 1-1 and/or a power of attorney to appoint a trusted person?
    - How much access to and decision-making should this Person have over a vulnerable customer's accounts?
    - Is it anticipated that providers will be required to undertake an identity verification process for Trusted Contact Persons?
    - Does this trusted person have to be in jurisdiction?
    - Will this be left to each financial service provider to determine, as with the other questions?
    - How/will the Trusted Contact Person regime operate for customers outside of the jurisdiction of Ireland?
- It may be necessary to provide guidance to both consumers and Trusted Contact Persons on the scope of this anticipated role, such that Trusted Contact Persons and the consumers they are in the position to help are clear on the scope and limitations of this role, and they do not try to assume a decision-support role.

• Recognising the role of EU consumer protections concerning climate and sustainability, do you have any comments on the proposed Code protections relating to climate?

No answer.

Do you agree with our approach to including sustainability preferences with existing suitability criteria? Have you any suggestions on how we can ensure all suitability criteria, including those relating to financial circumstances and sustainability preferences, are given an appropriate level of consideration?
No answer.

• Are there specific elements of the revised Code that should be tailored to BNPL, PCP, HP and consumer hire providers?
No answer.

Are there other protections within the General Requirements under the revised Code that we should apply to High Cost Credit Providers?
No answer.

• Are there elements of the revised Code that you think should be applied to SMEs?
No answer.

• Do you have any comments on the change to the definition of "consumer" under the revised Code to include incorporated bodies of less than €5m in annual turnover?

- The EMA do not agree with this proposed increased threshold for SME customers falling within the definition of consumer. We do not believe that raising the annual turnover value to €5 million from 3 million is the right way to ensure "that a similar population of small businesses are afforded the protections of the Code to the firms that were protected when the Code was introduced in 2006."
- As already noted above, we believe this is not in keeping with the spirit of the CBI's objective to protect individual customers and 'small' businesses as consumers in ireland. In fact, members believe that it could possibly even result in diluting intended support by extending the consumer definition too wide.
- We would be interested to view any evidence the CBI has considered to lead to the position that €5 million is a fair turnover amount within which to consider an SME as a Consumer under the revised Consumer Protection framework in Ireland.
- The amended definition of an SME as consumer will place Irish firms at a disadvantage compared to service providers in other jurisdictions, as they will have to apply the CPC and other consumer protection measures and regimes designed for consumers to a greater cohort of customers than their counterparts in other EU member states. We consider that the best approach to determining the scope of the consumer protection framework would be to align with EU Member States. Specifically, we suggest the definition should be aligned with the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises below:

***Article 2*, Staff headcount and financial ceilings determining enterprise categories**, Point 3 states: "Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million."

- Under the 2005 European Commission SME Definitions, updated with that new SME Definition Guide - User guide and model declaration - a micro-enterprise has fewer than 10 staff and annual Turnover or Annual balance sheet total of less than €2 million, and a small firm is less than 50 stall and annual Turnover or Annual balance sheet total of less than €10 million.
- Firms offering B2B services may be in a position where their SME consumer transitions in or out of scope of the Code over a short period of time. The provider's target market is not CPC firms, and may not be set up to provide the protections set out in the Code. The commercial reality may result in such firms being offboarded and losing access to the services of that provider.

Do you have any comments on the proposals to apply an explicit opt-in requirement for gadget, travel, dental and pet insurance only?
No answer.

Do you have any comments on the proposals to introduce an additional renewal notification for non-life insurance products?
No answer.

Do you have any comments on the proposed enhanced disclosures for long-term investment products and pensions?
No answer.

• Do you have any comments on the proposed revised requirements for handling of errors or complaints?

- Members welcome the removal of the requirement for firms to notify the CBI of any error that affects consumers, and which remains unresolved after 40 days. Resolution of some errors may require IT development or be delayed for other reasons.
- Section 3.5 of the consultation paper sets out the supervisory reporting obligations for firms, including notifying the CBI of "more significant" errors. The CP indicates the CBI will engage with firms in relation to these errors as part of their ongoing supervisory activity; firms would welcome further information regarding what might constitute a "more significant" error, and indeed what reference points to consider in making a determination on whether something is significant or not.
- "Section 48 - Conduct of Business Regulations", section 107 (5); we would note that regulated financial service providers providing payment services are excluded from the scope of certain applicable timelines. The European Union (Payment Services) Regulations 2018 outlines different complaint response timelines, at clause 124.. It would be helpful to clarify if this is what is meant by section 107 (5) or to make reference to the PSR 2018 timelines alongside these enumerated expectations. .
- Where a regulated service provider delivers a digital-only service, it would be helpful if the CBI could please clarify if *electronic mail* is an acceptable medium for all complaint responses in regard to 107 (4), for complaints received through all channels (phone, post, email, web). In keeping with innovation being encouraged in the jurisdiction, the idea to facilitate the submission of complaints by post and electronically could be problematic. It

could be considered instead to recommend that firms are required to offer an alternative medium for customers to submit complaints, allowing firms to develop a solution that aligns with their business model, for example telephone complaint submission options, rather than having to also set up a postal process.

• Do you have any comments on the proposed changes to the record keeping requirements?

No answer.

• Do you have any views on our analysis of the overall benefits associated with the proposals set out in this consultation paper?

- We welcome the cost-benefits being properly considered and outlined in the Consultation Paper.

• Do you have any views on our analysis of the costs associated with the implementation of the proposals set out in this consultation paper?

No answer.

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

- The EMA believe that at least a 12 month implementation, from the launch of the new Code due by end 2024, may be appropriate and would not propose any earlier introductions.
- However, if a number of the above recommendations are considered, the EMA would propose that a longer implementation period would be necessary for (at least) some aspects of the new Code requirements.