



WILLIAM FRY

William Fry Response to CP158

Insurance & Reinsurance Department

7 June 2024

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MEMO

TO: Central Bank of Ireland - Consultations
FROM: William Fry LLP
DATE: 07 June 2024

Submission to the Central Bank of Ireland - Consultation Paper 158

Consumer Protection Code

This submission is made on behalf of the Insurance and Reinsurance Dept. of William Fry LLP.

Introduction

William Fry welcomes the publication of Consultation Paper 158 ("**CP158**", "**the consultation paper**") on the "*Consumer Protection Code*" (the "**new CPC**") by the Central Bank of Ireland ("**the Central Bank**") and the opportunity to provide our comments on the consultation paper.

William Fry strongly supports the objectives of consumer protection and an appropriate framework that secures this objective. We note the public commentary that the majority of the provisions of the new CPC (which will take the form of two new Central Bank regulations) are drawn from the Consumer Protection Code (2012) (as amended) ("**Current Code**").

However, we have several concerns in relation to certain aspects of the CP158 proposals, when it comes to the applicability of the new CPC and the proposed "*Standards for Business*" and their potential impact on the reinsurance business conducted by regulated financial service providers ("**RFSPs**") in Ireland.

While our particular emphasis is on the impact to reinsurance business, our views should be considered within a broader review by the Central Bank of the impact of the proposed new CPC on B2B business. We are also concerned that the proposals could disadvantage Irish Firms compared to similar undertakings authorised in another EEA member state.

Format of the new CPC

The following draft regulations were published as part of CP158, and they will be applicable (to varying degrees) to RFSPs:

1. Standards for Business – Central Bank Reform Act 2010 (Section 17A) Regulations (the "**draft Business Standards Regulations**") – i.e., a set of over-arching principles for RFSPs when dealing with their customers and/or consumers ("**Business Standards**"); and
2. General Requirements – Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations (the "**draft General Requirements Regulations**") – i.e., a set of more specific (whilst still being quite general) requirements for RFSPs when dealing with their customers and/or consumers.

The draft Business Standards Regulations and the draft General Requirements Regulations will together, once they come into force, form the new CPC.

Draft Business Standards Regulations

You have indicated that the draft Business Standards Regulations "*build on and update the existing General Principles of the Code*" (i.e. the Current Code), and they will apply, as appropriate, to all RFSPs when dealing with "customers"¹ and/or "consumers".

The Business Standards will apply to RFSPs themselves (i.e. as distinct from the personnel "within" them). Certain personnel in RFSPs are already subject to the Central Bank's Conduct Standards since 29 December 2023². The Conduct Standards are comprised of the Common Conduct Standards (which apply to all PCFs and CFs in a RFSP) and the Additional Conduct Standards (which apply to PCFs and CF-1s in a RFSP).

Our reading of the draft Business Standards Regulations (including the proposed definition of "customer") is that:

1. The definition of "customer" includes any person to whom a RFSP provides or offers financial services. As reinsurers provide financial services to other (re)insurers, the definition includes a reinsurer's customers. Therefore, the proposed Business Standards (with the exception of the duty to "*secure its customers interests*") **would apply to** reinsurers and to reinsurance business (this is in contrast to the Current Code which expressly excludes reinsurance business from its scope).
2. Furthermore, the proposed scope of the draft regulations is not confined to the activities of a RFSP in the Irish State nor to a RFSP's dealings with "customers" and/or "consumers" who are based in the Irish State.

Irish authorised (re)insurers are subject to a comprehensive (primarily EU derived) legal and regulatory framework under, in particular, the (i) European Union (Insurance and Reinsurance) Regulations 2015 (as amended) ("**Solvency II Regulations**") and (ii) European Union (Insurance Distribution) Regulations 2018 (as amended) ("**IDR**").

The IDR, while providing for conduct of business obligations on insurers when conducting "insurance distribution", do not impose conduct of business rules on reinsurers and insurers when carrying out "reinsurance distribution".³ The Solvency II Regulations do not impose conduct of business rules on reinsurers and similarly, the Current Code does not apply to reinsurance business.⁴ This approach reflects the business-to-business basis on which a reinsurer and their customer (another (re)insurance undertaking) contracts and which, in our view, does not require the same protection as a consumer.

It is our view that reinsurers in general should not be expected by the Central Bank to act in accordance with pre-determined conduct of business rules (unilaterally imposed by Central Bank regulations) and that this should be left to these entities to determine for themselves as a matter of commercial negotiation. We would submit that this approach should be followed in the final published Business Standards Regulations.

The Central Bank can, under section 17A(8) of Central Bank Reform Act 2010 (the "**2010 Act**"), choose to apply the Business Standards to a "specified class" of RFSPs, customers or financial services and can include different provisions for different classes of entity. Keeping in mind the Central Bank's acknowledged parallels between the Business Standards and the General Principles of the Current

¹ "customer" means -

(a) any person to whom a regulated financial services provider provides or offers financial services,
(b) any person who requests the provision of financial services from the regulated financial services provider,
(c) a relevant borrower in a case where a regulated financial services provider undertakes credit servicing in respect of the credit agreement concerned, or
(d) a hirer in a case where a regulated financial services provider undertakes credit servicing in respect of the consumer-hire agreement or hire-purchase agreement concerned,
save for Regulation 4(1)(a) and Regulation 5 where 'customer' means only a consumer as defined.

² Central Bank (Individual Accountability Framework) Act 2023 and related guidance issued by the Central Bank.

³ Regulation 30(1) of European Union (Insurance Distribution) Regulations 2018 [S.I. No. 229 of 2018] states: "*insurance distributors carrying out insurance distribution shall ensure that they act honestly, fairly and professionally in accordance with the best interests of their customer*".

⁴ CBI 2012 Consumer Protection Code at 9.

Code,⁵ and having regard to section 17A(8), we would submit that the Central Bank should reconsider its proposal to apply all of the Business Standards (with the exception of the duty to "*secure its customers interests*") to reinsurance business (given the business-to-business nature of it), and any guidelines on their interaction with 'customers'.

It also appears that the draft Business Standards Regulations do not confine their application to the activities of a RFSP in the Irish State nor to a RFSP's dealings with "customers" and/or "consumers" who are based in the Irish State. We would submit that the Central Bank should clarify the potential extraterritorial impact of the Business Standards.

Conduct Standards

Separately, reinsurers are currently not subject to any conduct of business rules under the Individual Accountability Framework. However, PCFs and CFs in reinsurers are captured by the Common and Additional Conduct Standards. As we see it, there is currently a divergence in obligations on a reinsurer itself and its 'in scope' personnel.

PCFs and CFs within a RFSP (including reinsurers) are required under section 53E of the 2010 Act to:

- act with honesty and integrity;
- act with due skill, care and diligence;
- cooperate in good faith and without delay;
- act in the best interests of customers and treat them fairly and professionally; and
- operate in compliance with standards of market conduct and trading venue rules.

Difficulties for reinsurers in interpreting these Conduct Standards arise particularly in relation to the duty to act in the best interests of customers.

Unlike the draft Business Standards Regulations, "customers" is undefined by the 2010 Act and in our view the examples in the CBI Guidance envisage a "B2C" relationship between the RFSP PCF/CF and the customer. RFSP PCFs/CFs are required to inform their customers in a clear manner of relevant financial information. It also requires the individual to:

"assess the needs and circumstances of customers, including their level of knowledge and experience of financial services, their financial circumstances and the range of options available to them, and ensuring that any advice or recommendation provided to customers is appropriate and tailored to their needs and circumstances".

These would appear to us to be examples of behaviour that would be inconsistent with reinsurance business. The language employed creates an expectation and outlines circumstances which relate, as we see it, more specifically to the relationship between natural persons engaging with, in an insurance context, policy holders. We think that such an interpretation is also consistent with the current general approach to reinsurance business discussed above.

Section 53D of the 2010 Act states that in the application of the Common Conduct Standards in relation to a RFSP, matters to be considered include "(a) the nature of the business of the regulated financial services provider, including its scale and complexity" and "(f) ...any guidelines published by the Bank under section 53G". Therefore, in the context of a reinsurance agreement between a reinsurer and its customer, we are unsure why the Common Conduct Standards (which apply directly to PCFs and CFs in RFSPs (as opposed to the RFSP itself)) apply (at least on a granular basis) to the PCF/CFs individuals in a reinsurer in this context.

We would welcome additional clarity on the operation of the Common Conduct Standards to PCFs and CFs within reinsurers. While they appear to be subject to some obligations (unlike reinsurers themselves), it is unclear if the Central Bank foresees all aspects of the standards applying to them. We would question why consumer-related duties would apply to PCFs and CFs in reinsurers (or in insurers when conducting reinsurance business). Counterparties to reinsurance business are sophisticated

⁵ In CBI Guidance on IAF at 14, it states "[t]he Business Standards will be developed in conjunction with the separate review and consultation on the Consumer Protection Code noting the parallel with the General Principles and the importance of alignment of the regulatory framework and the conduct obligations imposed on firms in this regard."

regulated (re)insurers in their own right and such transactions are conducted on a business-to-business basis.

Conclusion

In conclusion, the Business Standards should not be applicable to reinsurance business (or reinsurers). Allied to this, we are of the view that the expectations on PCF/CFs involved in reinsurance business should change. For this reason, we would ask the Central Bank to revise the application of the Conduct Standards to align with our suggested revised approach to Business Standards.

WILLIAM FRY

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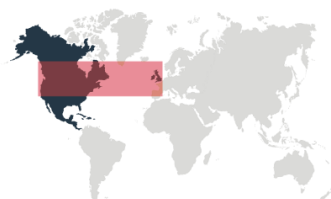
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