

Individual Accountability & SEAR: Time for Action

March 2023

1. INTRODUCTION

It is time for the regulated financial services industry to take action to progress preparations for individual accountability in this sector in Ireland, with the enactment on 9 March 2023, of the Central Bank (Individual Accountability Framework) Act 2023 (the **Act**).

The Act lays the foundations of an individual accountability framework (**IAF**) comprising of four pillars:

1. Conduct standards.
2. Enhanced fitness and probity (**F&P**) regime.
3. Reforms to simplify regulatory enforcement against individuals.
4. The senior executive accountability regime (**SEAR**).

On 13 March 2023, the Central Bank of Ireland (the **Central Bank**) published a consultation paper [CP153](#) (**CP153**) together with draft regulations and extensive draft guidance on the IAF and launched a three-month consultation period closing on 13 June 2023.

Although CP153 provides regulated firms (**firms**) with considerable additional detail about the Central Bank's proposals, it does not cover the following key aspects of the IAF:

- **Business conduct standards** under the conduct standards pillar - these will be developed as part of a separate consultation on proposed updates to the Consumer Protection Code.
- **Changes to fitness and probity investigations** - proposed updates to the Central Bank's investigations regulations and guidance reflecting the individual accountability legislation will follow separately in March 2023 and will not be subject to a consultation.
- **Changes to the administrative sanctions procedure (ASP)** - a separate consultation will be launched in mid-2023 on updates to the Central Bank's core ASP documents.

However, we believe firms now have a sufficient basis for making real progress in their implementation of their IAF/SEAR projects. In this context, we examine the conduct standards, fitness and probity reforms and SEAR pillars in detail based on new information available in CP153. We also recommend practical actions which firms can take now regarding each pillar.

2. IMPLEMENTATION TIMEFRAME

CP153 proposes that:

- Conduct standards will apply from 31 December 2023.
- The main fitness and probity updates (including certification of fitness and probity and extension of the fitness and probity regime to holding companies established in Ireland) will apply from 31 December 2023.
- SEAR will apply to firms falling within the initial phase of SEAR from 1 July 2024.

3. INDIVIDUAL ACCOUNTABILITY FRAMEWORK

The Act is the primary legislation for the IAF and it confers broad powers on the Central Bank to prescribe, through implementing regulations or guidance, measures to strengthen and enhance individual accountability in the financial services sector. The Act provides for amendments to existing Central Bank Acts, as amended from time to time, including:

- The Central Bank Act 1942 (**1942 Act**);
- The Central Bank Reform Act 2010 (**2010 Act**);
- The Central Bank (Supervision and Enforcement) Act 2013 (**2013 Act**).

We have been helping many of our clients for some time to prepare for the individual accountability regime.

In this client briefing, taking account of the enactment of the primary legislation and the Central Bank consultation paper CP153 and appended draft regulations and guidance, we set out key actions to benchmark your firm's implementation action plan under each of the four pillars of the individual accountability framework.

A. CONDUCT STANDARDS

The three categories of conduct standards under IAF are:

- Business conduct standards;
- Common conduct standards; and
- Additional conduct standards.

Chapter 4 of the Central Bank's draft guidance sets out overarching guidance on the conduct standards. Guidance on common conduct standards is in Chapter 5, and guidance on additional conduct standards is in Chapter 6. The detail included in both the Act and the guidance is extensive. The key issues and the steps individuals and firms can take in response are set out below.

I. BUSINESS CONDUCT STANDARDS

The business conduct standards are intended to create a single benchmark of conduct that all firms must meet, regardless of sector. They reflect the general principles of the Consumer Protection Code and will therefore be standards that firms will be already operating towards.

As outlined earlier, business conduct standards will be developed as part of a separate Central Bank review of the Consumer Protection Code.

Under the Act, business conduct standards applicable to all firms include:

- › To act in the best interests of customers and of the integrity of the market.
- › To act honestly, fairly and professionally.
- › To act with due skill, care and diligence.
- › To not mislead a customer as to the advantages or disadvantages of any financial service.
- › To maintain adequate financial resources.
- › To control and manage its affairs and systems sustainably, responsibly, and in a sound and prudent manner.
- › To prevent or identify and appropriately manage, conflicts of interest.
- › To arrange adequate protection for assets held by the firm on behalf of a customer.

-
- › To engage and cooperate in good faith and without delay with the Central Bank and other relevant regulatory authorities.
 - › To disclose to the Central Bank promptly, and in a manner appropriate to the circumstances, any matter relating to the firm of which the Central Bank would reasonably expect notice.

II. COMMON CONDUCT STANDARDS

Under the Act, persons subject to common conduct standards must take any steps that are reasonable in the circumstances to take to:

- › Act with honesty and integrity.
- › Act with due skill, care and diligence.
- › Cooperate in good faith and without delay with the Central Bank and other comparable authorities.
- › Act in the best interests of customers and treat them fairly and professionally.
- › Operate in compliance with standards of market conduct and trading venue rules to which the firm is subject by law and any market codes that apply to the affairs of the firm.

Common conduct standards set out the standards of behaviour expected of individuals carrying out controlled function (**CF**) roles. The common conduct standards will apply to all CFs (including pre-approval controlled functions or **PCFs**) in all regulated firms, including Non-Executive Directors (**NEDs**), Independent Non-Executive Directors (**INEDs**) and those exempt from the F&P regime (e.g. outsourced CF roles and intra-group arrangements).

According to the Central Bank, these are basic standards of behaviour that *“should underpin the provision of financial services and the relationships of trust that are central in this area”*.

The common conduct standards are standards to which most individuals in regulated firms already hold themselves. However, under the IAF legislation, any individual performing a CF role (including a PCF role), must take any steps that it is reasonable in the circumstances for the individual to take to ensure that the common conduct standards are met. Under the IAF, a breach

of the common conduct standards by an individual holding a CF role will be directly enforceable by the Central Bank against that individual.

III. ADDITIONAL CONDUCT STANDARDS

The additional conduct standards will apply (in addition to the common conduct standards) to more senior persons, namely, those performing PCF roles and to CF1s (being individuals with the ability to exercise a significant influence on the conduct of the affairs of a firm) in any firm, including temporary PCF appointments.

However, unlike the common conduct standards, the additional standards do not apply to those PCF roles exempt from pre-approval under the F&P outsourcing exemption unless the holder is a CF1.

There are four additional conduct standards under the Act concerning control, compliance, delegation and disclosure. Specifically, the Act imposes an obligation on PCFs and CF1s to take any steps that are reasonable in the circumstances to:

- Ensure that the business of the firm for which they are responsible is controlled effectively.
- Ensure that the business of the firm for which they are responsible is conducted in accordance with its obligations under financial services legislation.
- Ensure that any delegated tasks for which they are responsible are assigned to an appropriate person with effective oversight.
- Disclose promptly and appropriately to the Central Bank any information of which the Central Bank would reasonably expect notice including, information relating to the following:
 - › commission of an offence;
 - › commission of a prescribed contravention or any other breach of obligations under financial services legislation;
 - › concealment or deliberate destruction of evidence;
 - › provision of false or misleading information to the Central Bank;
 - › obstruction or impeding of an investigation;

-
- › commencement of legal proceedings (relating to financial services legislative breaches) by or against the firm;
 - › commencement of legal proceedings (impacting the firm's ability to trade) against the firm;
 - › anything that may otherwise interfere significantly with the operation of the firm or its compliance with financial services legislation;
 - › a decision by the firm to cease to provide financial services.

The Central Bank has provided draft guidance on the regulatory expectations for compliance with the additional conduct standards (in Chapter 6 of the draft guidance). As with the draft guidance on common conduct standards, this provides significant insight into the Central Banks' expectations, and familiarity with this Guidance will be crucial for every impacted individual.

IV. EMBEDDING CONDUCT STANDARDS

The Act also provides that a firm must establish and give effect to policies within the organisation on how conduct standards will be integrated into its business.

The IAF requires firms to:

Notify CFs of the common and additional conduct standards, as appropriate, and record such notifications.

Establish and maintain policies for integrating the conduct standards into the conduct and culture of the firm (e.g. as part of performance and promotion reviews) and ensure they are reviewed and subject to senior management oversight and challenge.

Adopt a framework to identify, monitor and action potential breaches of the conduct standards and report to the Central Bank on formal disciplinary actions (formal warning, suspension, dismissal, pay reduction) for actual breaches of these standards.

Establish a training programme, subject to senior management oversight and challenge, to provide initial (post-IAF implementation), pre-appointment and ongoing CF training on the conduct standards, so that role holders are aware of their obligations vis-à-vis the standards and what is expected of them in their role. Training records should be maintained and made available to the Central Bank upon request.

Responsible person: Firms within scope for SEAR must allocate responsibility for embedding the conduct standards throughout the firm to a PCF. For firms outside the scope of the initial phase of SEAR, the Central Bank considers the CEO (PCF-8) to be the responsible person. Any individual responsible for embedding the conduct standards throughout the firm should be aware of the importance of this role and that their actions in carrying out this responsibility will likely come under scrutiny if an individual within the firm breaches or is suspected of breaching a conduct standard. The responsible person will want to be able to demonstrate that they discharged their embedding responsibility by reference to documentary evidence.

V. CONSEQUENCES OF BREACH OF THE CONDUCT STANDARDS

Individuals

A breach of the **common conduct standards** or the **additional conduct standards** by an individual may:

- provide a basis for suspecting or concluding that an individual is not fit and proper to perform a PCF or CF role; and/or
- result in the imposition of sanctions under the ASP.

Firms

A breach of the **business conduct standards** by a firm may result in the imposition of sanctions under the ASP.

VI. CONDUCT STANDARDS FOR INDIVIDUALS AND THE DUTY OF RESPONSIBILITY

Primary Legislation

The Act provides that individuals subject to the common conduct standards and/or the additional conduct standards shall be required to take “any steps that it is reasonable in the circumstances for the person to take” to ensure that relevant conduct standards are met.

Factors to be considered in determining relevant circumstances include:

- the nature, scale and complexity of the business,
- the level of knowledge and experience the role holder has and could reasonably be expected to have,

-
- the existence and application of relevant systems, safeguards and procedures,
 - the extent to which such matter was within their control or influence; and
 - any guidelines published by the Central Bank.

Central Bank Consultation

CP153 provides further clarity on the following aspects:

Regulatory guidance regarding common conduct standards and additional conduct standards

The Act provides that the Central Bank must prepare guidelines, for individuals subject to the common conduct standards and/or the additional conduct standards, relating to the application and operation of related conduct standards provisions in the legislation. Accordingly, draft guidance on the conduct standards is set out in Chapters 4, 5, and 6 of the guidance.

Regulatory guidance regarding reasonable steps in the context of SEAR and the conduct standards

The Central Bank has provided extensive draft guidance on how firms and individuals can meet their obligations regarding conduct standards.

In the case of both SEAR and the conduct standards, the IAF operates on the principle of reasonable steps, and if these have been taken, that will be sufficient to discharge the relevant obligation.

In assessing the steps that an individual took in any given circumstances, the draft guidance sets out a non-exhaustive list of considerations that the Central Bank may take into account as follows:

Prevailing regulatory landscape: the overall circumstances and environment at that point in time and not applying standards retrospectively or with the benefit of hindsight.

Role of judgement: recognising that while judgement may be wrong in a given circumstance, with the benefit of hindsight, it may have been reasonable at the time.

Firm type: the nature, scale and complexity of the business of the firm.

Prevailing environment: the overall circumstances in which the individual was operating at the time, including how the individual responded to developments, the information available and how the individual reviewed and challenged it, and the individual's participation in collective decision-making.

Role: seniority of the individual's role, length of time in the role and at that level of seniority.

Competencies: the knowledge, relevant professional qualifications, and previous experience the individual had or could reasonably be expected to have had.

Responsibilities: including individual/shared responsibilities and those for other areas of the firm.

Function: the individual's contribution to the assessment, monitoring and review of the adequacy and effectiveness of systems of governance, operation and risk management relevant to their business area.

Delegation: effectiveness of the individual's oversight of delegated responsibilities and their implementation of safeguards against inappropriate delegation.

Resourcing: steps taken by the individual to ensure adequate and appropriate deployment of resourcing, including for risk and control functions.

Solutions focus: efforts by the individual to ensure timely identification, remediation and mitigation of problems, breaches or issues.

Consumer protection focus: steps taken by the individual to prevent breaches of customers' consumer protection and/or contractual rights.

Extent of control/influence: the individual's prioritisation of matters, response to new developments and if these were informed by an appropriate risk assessment utilising firm procedures, and if not, why not.

Roles which are in scope for additional conduct standards

The Act provides that the additional conduct standards will apply to PCFs and individuals who "exercise a significant influence on the conduct of the firm's affairs".

Regulatory guidance regarding collective decision-making

The Central Bank notes in CP153 the continued importance of collective decision-making, which it says is not altered by the IAF. The role of collective decisions and the recording of individual contributions to decision-making in the context of the IAF is addressed in the draft guidance, which provides that CF role holders should ensure that all decisions are properly informed, that they exercise sound judgement and contribute to collective decisions, as would be appropriate.

VII. ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING THE CONDUCT STANDARDS

Action - Develop and implement internal notification - Firms are required to ensure that staff are notified of the conduct standards. The nature, substance and timing of this notification should be considered now if this still needs to be done, bearing in mind the need to develop and deliver training and take the other actions necessary to embed the standard before 31 December 2023. This requires strategy with input from senior management and all relevant stakeholder functions and firms should ensure they avoid a siloed approach.

Action - Prepare initial training - Devise, develop and deploy mandatory initial training on each of the three categories of conduct standards and current proposals regarding regulatory expectations of behaviours required to meet those standards.

Action - Identify how conduct standards will be embedded across the firm - Amend policies, procedures and documentation to embed the conduct standards within the firm (e.g. employment agreements, letters of appointment, fitness and probity procedures, Central Bank reporting procedures, general HR procedures, sales procedures etc.).

Action - Identify required supports - Consider what ongoing supports staff are likely to need to ensure that the firm and all in-scope individuals comply with applicable conduct standards (e.g. frameworks for delegation of tasks for individuals to whom additional conduct standards apply and the approach to recording how the conduct standards are being met on an ongoing basis).

Action - Review D&O cover - Review D&O cover to ensure it makes appropriate provision for liabilities of individuals for breach of the conduct standards.

B. ENHANCED FITNESS AND PROBITY REGIME

The fitness and probity regime is designed to ensure that individuals in key roles in the regulated financial services industry meet minimum standards of fitness (i.e. competence and capability) and probity (i.e. honesty, ethical behaviour, integrity and financial soundness). The fitness and probity regime is grounded in the 2010 Act. The Central Bank has issued statutory codes under the 2010 Act, setting out minimum fitness and probity standards for individuals performing CFs (the **F&P Standards**). The Central Bank has also published FAQs and guidance documents on fitness and probity to help firms and individuals performing CFs comply with their respective fitness and probity obligations.

Fitness and probity updates introduced by the IAF apply to all firms. Breaches of fitness and probity requirements are enforceable against firms through the Central Bank's ASP.

Key updates to the fitness and probity regime under the IAF include:

I. SCOPE - EXTENSION TO HOLDING COMPANIES ESTABLISHED IN THE STATE

Financial holding companies, mixed financial holding companies, insurance holding companies, and investment holding companies established in the State will be brought within the scope of the fitness and probity regime.

The draft Regulations appended to CP153 set out proposed CFs and PCFs for holding companies established in the State.

II. CERTIFICATION

Currently, firms must satisfy themselves of CF holders' initial and ongoing compliance with the F&P Standards and must obtain CF holders' agreement to abide by those standards. The IAF introduces an additional step for firms of issuing a certificate of compliance regarding each CF.

The Act provides that a firm or in-scope holding company, must not permit someone to perform a CF unless there is a certificate from the firm in force confirming that person's fitness and probity. Such a certificate:

- i. cannot be issued unless the firm is satisfied on reasonable grounds that the person meets required F&P Standards;
- ii. must be revoked if the firm is no longer so satisfied.

The firm must also obtain agreement to comply with the F&P Standards in writing from the individual concerned.

The Central Bank indicates in the draft guidance that it will not prescribe a specified format for F&P certification but that the F&P certificate must cover key items including:

- i. the firm's conclusion that an individual complies with the F&P Standards;
- ii. the individual's agreement to comply with the F&P Standards; and
- iii. details of the CF(s) performed by that person.

Where an individual performs multiple CFs, these should each be addressed in the F&P certificate for that individual.

Firms must maintain a register of F&P certificates and allow the Central Bank to inspect the register and records of underlying diligence upon request.

While the F&P certificates will not be filed with the Central Bank, the annual PCF return by firms will now confirm that a F&P certificate is in force for all CFs.

Firms will have two months after the updated F&P regime comes into effect within which to issue F&P certificates in respect of holders of CF roles.

III. RESPONSIBLE PERSON

A designated individual in a firm will have ultimate responsibility for the firm's compliance with its F&P obligations. In firms which fall within scope of the initial phase of SEAR, this will be the individual who is assigned prescribed responsibility 2 or PR2. In other firms, this will be the CEO (PCF-8).

IV. ADDITIONAL CF DUE DILIGENCE

Currently, PCF, CF1 and CF2 holders are subject to "enhanced" due diligence under the F&P regime. The IAF applies this higher level of due diligence to all CFs meaning that, instead of relying on self-certification, firms are expected to carry out regulatory sanctions checks, director restriction/disqualification checks, and judgement searches, as well as carry out professional body checks and any other role/firm specific checks on all CFs.

V. DISCIPLINARY REPORTING

Firms must report to the Central Bank any disciplinary action taken against a relevant individual, where it relates to their compliance with F&P Standards. Disciplinary Action is defined for this purpose as the imposition of a specified sanction, being any of (i) a formal written warning, (ii) suspension, (iii) dismissal or (iv) recovery of or reduction in remuneration. The disciplinary reporting obligation will engage if the sanction in question is relevant to an individual's compliance with F&P Standards, including for a breach of the incoming conduct standards or financial services legislation more generally.

VI. INVESTIGATION

The Central Bank will be able to investigate an individual who held a CF during a six-year lookback period from the commencement of the investigation. Currently the Central Bank's ability to commence such an investigation at any time is limited to individuals who hold (or are proposed to take up) a CF at that time.

As outlined earlier, proposed updates to the Central Bank's fitness and probity investigations regulations and guidance on these updates will follow separately.

VII. SUSPENSION

The Central Bank may issue a suspension notice where it has imposed a prohibition on the person from carrying out a CF, or part thereof. Suspension notices can be appealed to the Irish Financial Services Appeals Tribunal (**IFSAT**). The Act provides that where a person is the subject of a suspension order, the maximum period of the suspension order will be six months (it was previously three months), subjected to extension by the High Court to a maximum of twenty-four months.

VIII. PROHIBITION

A prohibition notice will not take effect unless confirmed by the High Court, subject to an exception where the Central Bank and the individual agree in writing on the prohibition notice. The Central Bank or a prohibited person may apply to the High Court to amend or remove a prohibition notice where there has been a change in circumstances.

IX. ECB COMPETENCE

The Act clarifies that the ECB has competence in relation to PCF assessment of individuals proposed for appointment to key function holder positions in significant institutions (a significant institutions list is maintained by the ECB).

X. AUTHORISATION

Additional information-gathering powers are granted to the Central Bank under the Act to request information from firms which are in the process of applying for regulatory authorisation.

XI. ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING THE FITNESS & PROBITY REFORMS

Action - Review and update F&P processes and record-keeping systems - Firms should now conduct a review of their existing F&P processes and record-keeping systems and should update these to build in alerts or flags which would trigger an F&P review. The draft guidance harmonises the various diligence checks required, so that the enhanced checks which previously applied only to PCF roles, CF1 and CF2 - examples being judgment searches and regulatory sanctions checks - now apply across all CFs. Diligence checks will now need to be periodically refreshed. A helpful and sensible suggestion in the draft guidance is that a firm's F&P certification process might be incorporated into its annual performance appraisals framework.

Action - Review performance appraisal principles - Firms should now look to get in place performance appraisal principles which should be reasonably standardised across the employee population. The shift to firm certification brings into focus the need for firms to have a more proactive, structured framework in place. Where performance management procedures do not take a clear structure with some degree of predictability and transparency for the employee, the process can be vulnerable to legal challenge.

Action - Review employment documentation - Firms should also undertake a comprehensive review of all documents making up the employment contractual framework and their written workplace policies and codes of conduct to ensure that the documents adequately cater for the updated F&P regime. This may (but will not necessarily) involve amending employment contracts, but what is clear is that a review will be needed to determine what updates may be necessary if existing terms in the employment contract are not sufficiently flexible. Disciplinary and investigation policies will need particular attention and should be updated to build in compliance with the conduct standards as an ongoing factor in the assessment of fitness and probity.

C. SENIOR EXECUTIVE ACCOUNTABILITY REGIME (SEAR)

The purpose of SEAR is to improve governance, performance and accountability in firms by placing obligations on firms and senior individuals within them to set out clearly where responsibility and decision-making lie.

The Act provides that a firm must implement arrangements and documentation to ensure the proper conduct of its affairs, to monitor the performance of PCFs, and identify and clarify the management and governance structures of its lines of authority and accountability.

I. SCOPE & TIMING

The Central Bank's consultation confirms that the sub-set of firms which will fall within the scope of SEAR in its initial phase will include:

- Credit institutions (excluding credit unions);
- Insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings and insurance SPVs);
- Investment firms which underwrite on a firm commitment basis and/or deal on own account and/or are permitted to hold client assets; and
- Incoming third country branches of any of same.

It is expected that the scope of SEAR will be extended to other firms on a phased basis, following the initial phase of SEAR implementation.

SEAR will apply to all PCF holders in in-scope firms.

One of the key new developments from the Central Bank consultation is that the timing for the SEAR pillar to come into effect has been pushed out. The Central Bank now proposes that the regulations giving effect to SEAR will apply to in-scope firms from 1 July 2024.

II. ALLOCATION OF RESPONSIBILITIES

In-scope firms will be required to set out responsibilities applicable to particular PCFs. The Central Bank consultation provides industry with considerable additional detail on this topic.

These include:

Inherent responsibilities are those which are intrinsic to a particular PCF role. For example, the inherent responsibility attaching to the role of Head of Finance (PCF-11) is overall responsibility for managing the financial resources, financial planning and financial reporting of the firm and reporting directly to the Board on financial affairs.

Prescribed responsibilities are those which must be allocated by a firm to a PCF without the Central Bank specifying which PCF. The Central Bank consultation distinguishes between general prescribed responsibilities (which must be allocated by all firms) and sector or circumstance specific prescribed responsibilities (which must be allocated by a sub-set of firms). The consultation indicates that the Central Bank is proposing a proportionate approach to the prescribed responsibilities which low PRISM impact in-scope MiFID investment firms and incoming third country branches are required to allocate to PCFs.

Other responsibilities are material activities or risks which are not listed as inherent responsibilities or prescribed responsibilities. As these are bespoke to the particular circumstances and activities of each firm they are not pre-formulated by the Central Bank in its guidance and in-scope firms are required to formulate them and allocate them to a PCF.

III. SHARING OF RESPONSIBILITIES

The Central Bank consultation states that sharing or splitting of PCF roles amongst individuals is not permitted under SEAR except in the case of job sharing. Whilst each job sharing individual will have full accountability for the relevant responsibility, this will be discharged where the individual can demonstrate that they took reasonable steps to discharge the responsibility, including in relation to the manner in which activities and tasks were shared amongst job sharers. Details of job-sharing arrangements must be set out in statements of responsibilities and management responsibilities maps.

IV. STATEMENTS OF RESPONSIBILITIES

Documentation - A statement of responsibilities for each PCF role, reflecting their responsibilities, should be prepared by firms. This will be a concise document setting out the inherent responsibilities attaching to their PCF role together with any prescribed responsibilities and any other responsibilities allocated to them. The Central Bank consultation includes a draft one-page template statement of responsibilities which may be enhanced following the consultation process.

Reporting - The Central Bank does not propose that there would be a periodic reporting of statements of responsibilities. Instead, the Central Bank proposes that a statement of responsibilities approved by the firm would be submitted to the Central Bank with the IQ form when approval for a PCF role is being sought by an in-scope firm. In-scope firms would be required to treat statements of responsibilities as living documents which are maintained and kept up-to-date and signed by the PCF holder, to review them on a regular basis, to approve them on initial implementation of SEAR and whenever they are updated and to retain them for ten years and make them available to the Central Bank on request.

V. MANAGEMENT RESPONSIBILITIES MAPS

Documentation - In-scope firms will be required to maintain an up-to-date management responsibilities map which provides a single source of reference identifying the individuals to whom all inherent, prescribed and other responsibilities are allocated by the firm leaving no gaps and describing all key management and governance fora and their terms of reference.

Whilst the Central Bank has provided a concise diagram for a management responsibilities map as part of its consultation, it has not provided a template on the basis that the detail will vary from firm to firm and that it is the responsibility of each firm to develop and maintain a management responsibilities map which accurately reflects the structure, size and complexity of the firm including any group governance arrangements. The Central Bank proposes to give firms discretion as to how they document this using text and graphics provided that firms respect certain parameters including that the management responsibilities map should be a single, composite document leaving no governance or responsibilities gaps.

Reporting - The Central Bank does not propose that there will be periodic reporting of management responsibilities maps. Instead, the Central Bank proposes that in-scope firms would be required to approve their management responsibilities map on the initial implementation of SEAR and whenever it is updated, to keep them up-to-date, to review them on a regular basis and to retain them for ten years and make them available to the Central Bank on request.

VI. DUTY OF RESPONSIBILITY UNDER SEAR

A new statutory duty of responsibility applies to all PCFs at in-scope firms to take any steps that it is reasonable in the circumstances for them to take to avoid a contravention or the continuation of a contravention by their firm of its obligations under financial services legislation in relation to any part of the firm's affairs for which the PCF is responsible under SEAR.

The duty of responsibility is designed to underpin the inherent responsibilities, prescribed responsibilities and other responsibilities allocated to each PCF. It does so by imposing an enforceable legal duty on each PCF in relation to the responsibilities allocated to each PCF. A contravention of the duty of responsibility is a prescribed contravention which may trigger enforcement action against the relevant PCF under the ASP which may result in sanctions including monetary penalties.

A key issue for industry to date regarding the duty of responsibility has been the need for regulatory guidance on Central Bank expectations regarding reasonable steps. The draft guidance from the Central Bank includes guidance on the considerations to be taken into account in determining whether reasonable steps have been taken under SEAR and under the conduct standards.

Whilst individual accountability is designed to identify the individual PCF who is responsible for a part of the business where there is a suspected regulatory breach in that area of the business, the Central Bank notes that it is possible that more than one PCF role holder may be responsible under SEAR for part of the firm's affairs and that more than one PCF will contravene the duty of responsibility where each of them fails to take reasonable steps to avoid the firm breaching its obligations in relation to that aspect of the firm's affairs.

VII. NON-EXECUTIVE DIRECTORS AND THE DUTY OF RESPONSIBILITY

The Central Bank has provided greater clarity on how the duty of responsibility will apply to non-executive directors. The Act does not distinguish between executive and non-executives in relation to the duty of responsibility, but the draft guidance recognises that the responsibilities of non-executive directors and independent non-executive directors are more limited than those of executive directors and other senior executives and that they are not expected to assume executive responsibilities. Instead, their responsibilities will be limited to non-executive functions including, for example, overseeing and monitoring the strategy and management of the firm for non-executive directors and chairing meetings of the Board or a Board committee and overseeing the performance of same for the Chair of the Board or of Board committees.

VIII. OUTSOURCING

A firm with outsourcing arrangements in place should nominate a PCF role holder to be responsible for those arrangements. Where a PCF role is outsourced, the role holder should fall under the oversight of a PCF role holder within the firm. Such arrangements should be reflected in the relevant Statement of Responsibilities and the Management Responsibilities Map.

IX. ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING SEAR

Action - Map existing allocation of responsibilities and conduct a gap analysis

A good starting point is to map the population of senior executive function holders and the responsibilities as currently allocated within the firm. This should identify gaps and overlaps in allocation of responsibilities and any inconsistency between how responsibilities are performed in practice and how this is documented in employment agreements, job descriptions and organisation charts. Terms of reference for existing governance fora should also be reviewed. This exercise will require engagement with existing PCFs and a collaborative approach will be important as challenges may arise where different individuals and functions contribute to the performance of an area of responsibility.

Action - Conduct preliminary allocation of responsibilities

Whilst inherent responsibilities will be allocated automatically to a particular PCF role holder, given that the Central Bank has published a draft list of prescribed responsibilities it is now possible for firms to conduct a preliminary allocation of prescribed responsibilities though it will not be possible to finalise this before the Central Bank consultation closes and the Central Bank confirms the final list of prescribed responsibilities. Even though the prescribed responsibilities are drafted in concise terms, firms should not underestimate how much time it will take to engage with senior managers to complete this allocation of responsibilities given that there is likely to be pushback, negotiation, border disputes and requests for reassurance about regulatory compliance before some individuals agree to be individually accountable for a breach arising in a particular area of the firm's business.

Action - Prepare preliminary draft statements of responsibilities

Given that the Central Bank has published a draft template statement of responsibilities, it is now possible for firms to prepare a draft statement of responsibilities for each PCF though these should not be finalised until the Central Bank consultation closes and the Central Bank confirms the final template statement of responsibilities.

Action - Prepare preliminary draft management responsibilities map

Given that the Central Bank has confirmed that it does not propose to publish a template management responsibilities map but has provided guidance on the required content and format of the management responsibilities map, we believe it is now possible for firms to prepare a draft management responsibilities map though these should not be finalised until the Central Bank consultation closes and the Central Bank confirms any final comments on the format of the management responsibilities map.

D. ENFORCEMENT REFORMS

Under the Act, the operation of the Central Bank's ASP has changed to clarify certain processes and provide for the standards of fairness in the administration of justice examined in the Supreme Court decision in *Zalewski v. An Adjudication Officer and Others* (2021)¹.

As outlined earlier, CP153 does not cover changes to the ASP under the IAF. A separate Central Bank consultation will be launched in mid-2023 on updates to the Central Bank's core ASP documents.

I. PARTICIPATION LINK

Before the enactment of the Act, the Central Bank's enforcement powers against individuals were limited to circumstances in which the individual was suspected of having participated in a breach committed by a regulated firm. The Central Bank could not pursue individuals directly for suspected breaches in their own right. The "participation hurdle" will not apply for contraventions of the relevant conduct standards and SEAR responsibilities provided for in the Act and this would facilitate for direct enforcement by the Central Bank against an individual for such contraventions.

II. PERSON CONCERNED IN THE MANAGEMENT

Amendments to the 1942 Act replaced the original concept of "a person concerned in the management" of a firm with the concept of a person performing and having responsibility for a CF in relation to a firm (and certain holding companies).

III. INVESTIGATIONS AND INQUIRIES

When the Central Bank suspects an individual has committed or is committing a regulatory breach it may commence an investigation under the ASP. Provisions relied on by the Central Bank to conduct an enforcement investigation are strengthened by the Act. There had been little statutory guidance on the conduct of investigations and the Act attempts to address this. It provides that the person to whom an investigation relates will be kept informed of its progress and where an investigation is discontinued, reasons must be provided by the Central Bank. The Act also specifies that balance of probabilities is the appropriate standard of proof at inquiry. Draft investigation reports must be prepared by the Central Bank in the first

¹ *Zalewski v The Workplace Relations Commission, an Adjudication Officer, Ireland and the Attorney General* [2021] IESC 24

instance and a person who is subject to such investigation will have the right to make submissions on the draft report. Such submissions must be considered by the Central Bank before the report is finalised.

IV. SETTLEMENT OF ENFORCEMENT INVESTIGATIONS

The Central Bank can settle an enforcement investigation where a contravention is:

- **Acknowledged** - i.e. the person acknowledges the commission of/participation in the contravention and the final investigation report has been considered or there are undisputed facts that render an investigation unnecessary. In these circumstances, the Central Bank may alternatively hold an inquiry to specifically determine what (if any) sanction should be imposed.
- **Not acknowledged** - i.e. the Central Bank suspects on reasonable grounds that a person is committing or participating in or has committed or participated in a prescribed contravention, which contravention is not acknowledged by such person.

V. APPEAL

A Central Bank finding as to whether a person has committed or participated in, a prescribed contravention or a decision to impose a sanction following Central Bank inquiry can be appealed to IFSAT but the grounds for such appeal have been narrowed under the Act.

VI. HIGH COURT CONFIRMATION

In a notable departure from the previous position, High Court confirmation of settlement with acknowledgement of the commission of/participation in a contravention will be required under amendments to the 1942 Act. High Court confirmation of settlement without acknowledgement of the commission of/participation in a contravention will not be required. The Act also provides that the High Court shall confirm the sanction (following inquiry or an IFSAT decision), unless it is satisfied based on evidence considered by the Central Bank that the Central Bank made a manifest error of law in its finding or that the sanction is manifestly disproportionate. This is a significant change to the ASP process, which did not require any such court confirmation before enactment of the Act and commencement of the legislation.

VII. JUDICIAL REVIEW AND APPEAL

The Act changes the circumstances in which decisions of the Central Bank can be subject to judicial review and appeal and, the compatibility of these amendments with constitutionally protected rights is likely to be the subject of careful consideration by impacted parties.

VIII. SANCTIONS

The Act includes factors to be considered by the Central Bank, where relevant, in seeking to impose a sanction on a natural person and the level of any monetary penalty.

IX. CLARIFICATION

The Act clarifies that enhanced powers of disqualification under section 33AQ of the 1942 Act (disqualifying a person from performing any CF and/or imposing conditions in the performance of that CF) will only apply to wrongdoing occurring after the commencement of the legislation.

X. ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING ENFORCEMENT REFORMS

Action - Review systems and processes for documentation of compliance

Review and update systems and processes to ensure compliance of individuals with their responsibilities is appropriately documented. It is important for individuals, not only to comply with their regulatory obligations but also to be able to demonstrate such compliance by reference to documentation if challenged.

Action - Review D&O cover

Review D&O cover to ensure it makes appropriate provision for relevant individuals, bearing in mind that the scope for relevant individuals will expand beyond “persons concerned in the management” of the firm.

4. OTHER

NEW PCF ROLE - INSURANCE UNDERTAKINGS and INVESTMENT FIRMS

Following the introduction of the Head of Material Business Line as a PCF role for credit institutions, the Central Bank proposes introducing a new Head of Material Business Line PCF role for insurance undertakings and investment firms.

THIRD COUNTRY BRANCHES

The draft guidance (Table 11, Appendix 5) sets out a scheme of IAF application for incoming and outgoing EEA and third-country branches.

5. NEXT STEPS

It is time for the regulated financial services industry to take action to progress preparations for individual accountability in this sector in Ireland, with the enactment on 9 March 2023 of the individual accountability legislation and the publication on 13 March 2023 of CP153 and draft Regulations and Guidance.

William Fry has been assisting firms with their preparations for the individual accountability regime for some time and now is a sensible time to engage or re-engage with the William Fry IAF/SEAR team.

See our Individual Accountability & SEAR web page [here](#).

CONTACT US

For more information, please contact Shane Kelleher, Louise Harrison, Derek Hegarty, any member of the IAF/SEAR team or Financial Regulation Unit or your usual William Fry contact.

**Shane Kelleher****PARTNER**

Head of Financial Regulation

+353 1 639 5148

shane.kelleher@williamfry.com**Louise Harrison****PARTNER**

Employment & Benefits

+353 1 489 6580

louise.harrison@williamfry.com**Derek Hegarty****PARTNER**

Litigation & Regulatory Enforcement

+353 1 639 5040

derek.hegarty@williamfry.com**Patricia Taylor****PARTNER**

Asset Management & Investment Funds

+353 1 639 5222

patricia.taylor@williamfry.com**John Aherne****PARTNER**

Asset Management & Investment Funds

+353 1 639 5321

john.aherne@williamfry.com**Ian Murray****PARTNER**

Insurance and Reinsurance

+353 639 5129

ian.murray@williamfry.com**Louise McNabola****PARTNER**

Banking & Finance

+353 1 639 5196

louise.mcnabola@williamfry.com**Ciarán Herlihy****PARTNER**

Banking & Finance

+353 1 639 5234

ciaran.herlihy@williamfry.com**Hilary Rogers****CONSULTANT**

Litigation & Regulatory Enforcement

+353 1 489 6550

hilary.rogers@williamfry.com**WILLIAM FRY**

DUBLIN | CORK | LONDON | NEW YORK | SAN FRANCISCO

William Fry LLP | T: +353 1 639 5000 | E: info@williamfry.com**williamfry.com**