
Briefing

Financial Services: Individual Accountability Draws Closer



INSTITUTE OF DIRECTORS
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The draft legislation to introduce an individual accountability framework in the provision of regulated financial services in Ireland has been published. When the draft law is implemented, the responsibilities of key personnel in regulated financial service providers will have to be clear and documented. Regulated financial service providers, and those performing controlled functions and pre-approval controlled functions within them, will be subject to new conduct standards and senior executives will have to take reasonable steps to ensure that their firm does not breach its obligations under financial services legislation. It is anticipated that the new requirements will be phased in within different areas of regulated financial services rather than being applied to all immediately.

Publication of the Bill

In an important and anticipated development, the Minister for Finance has introduced the Central Bank (Individual Accountability Framework) Bill (here) in Parliament. When (as is likely) the Bill is enacted later in 2022, it will be a significant development in financial services regulation and as regards the expectations of – and consequences for – regulated financial service providers (“RFSPs”) and many of their personnel.

The Minister has stated that the Bill is a priority for Government and, subject to amendments in the parliamentary process, it is likely to advance through the parliamentary process reasonably quickly. It has previously been reported that, when enacted, the new regulatory requirements will be phased in – applied in discrete areas of regulated activity – initially, rather than applied to all RFSPs immediately.

What does the Bill propose?

As anticipated, the Bill provides for:

- the creation of a senior executive accountability regime (“SEAR”);
- the introduction of new conduct standards for both regulated businesses and many of their personnel;
- an enhanced fitness and probity regime; and
- expansions to the powers of the Central Bank of Ireland (including the Administrative Sanctions Regime).

The Senior Executive Accountability Regime

The Central Bank will be empowered to require responsibility mapping within RFSPs, obliging RFSPs to set out clearly where responsibility and decision-making lies within the organisation. The Minister anticipates that this will ensure greater transparency and clearer accountability within the financial services sector.

An in-scope RFSP will have to:

- identify and document the responsibilities that are inherent to each senior executive role (those performing a pre-approval controlled function (“PCF”)) in that RFSP;
- allocate to a senior executive any particular, further prescribed responsibilities that the Central Bank considers an RFSP must ensure are assigned to a senior role;
- prepare a statement of responsibilities for each of the RFSP’s senior executives, setting out clearly that person’s role and areas of responsibility; and
- produce a management responsibility map, documenting key management and governance arrangements in a comprehensive and accessible way within a single source of reference.

Highly significantly, and effectively the foundation of “individual accountability” to which the Bill refers, a senior executive that is subject to SEAR will commit a prescribed contravention if she or he fails to take reasonable steps to avoid a contravention by the RFSP occurring (or continuing to occur) in the areas of the firm’s business for which that person is individually responsible, having regard to all relevant circumstances.

New conduct standards

The Bill will introduce conduct standards of three varieties:

- business standards (applicable to the RFSP itself);
- common conduct standards (applicable to every person in a controlled function (“CF”) role); and

- additional conduct standards (applicable to every person in a PCF role, and to those who exercise significant influence over an RFSP's affairs).

Business standards

The Central Bank will be empowered to prescribe business standards for RFSPs themselves, informing how the RFSP is managed and governed. These are intended to create a single reference-point that sets out clearly the conduct standards that every RFSP, regardless of sector, must meet. The stated objective is that these business standards will ensure that an RFSP acts:

- in the interests of customers and of the integrity of the market;
- honestly, fairly and professionally; and
- with due skill, care and diligence.

The Central Bank will issue guidance on compliance with business standards.

Common conduct standards

These will apply to every individual in a CF role in an RFSP and not merely to PCFs. However, as every obligation of a person in a CF role applies also to a person in a PCF role, those in a PCF role will also be subject to the common conduct standards.

The common conduct standards will require a person in a CF role to:

- act honestly and with integrity;
- act with due skill, care and diligence, including acting appropriately in any decision-making, including collective decision-making, ensuring decisions are properly informed;
- co-operate with the Central Bank and other regulators or authorities and deal with them in good faith and without delay;
- act in the best interests of customers and treat them fairly and professionally; and
- observe proper standards of market conduct.

A person performing a CF role will have to take such steps as are reasonable in the circumstances in order to meet the common conduct standards. The Bill provides guidance on how this test of reasonableness is to be applied and sets out a non-exhaustive list of behaviours that will be expected of a person in order to comply with the standard.

Additional conduct standards

These will apply to every person in a PCF role in every RFSP, irrespective of whether at that time the relevant RFSP has been brought within the SEAR regime, and to every other person who exercises significant influence on the conduct of an RFSP's affairs.

A person in such a senior role will be required to take reasonable steps to:

- ensure that those aspects of the business of the RFSP for which the person is responsible are controlled effectively and comply with relevant regulatory requirements;
- ensure that any delegation of tasks for which the person is responsible is to an appropriate person and that the person oversees the discharge of the delegated task effectively; and
- disclose to the Central Bank, promptly and appropriately, any information of which the Central Bank would reasonably expect notice.

A person performing a PCF role, or any other function by which the person may exercise a significant influence on the conduct of the affairs of an RFSP, will have to take such steps as are reasonable in the circumstances in the performance of that function in order to meet the additional conduct standards. Again, the Bill also provides guidance on how this test of reasonableness is to be applied.

Embedding the standards

An in-scope RFSP will have to establish and maintain policies setting out how the RFSP will embed the conduct standards throughout the RFSP. The Central Bank will be empowered to impose binding obligations on RFSPs and their employees with respect to these conduct standards.

An RFSP will also have to:

- notify every relevant person of the conduct standards that apply to her or him;
- provide suitable training to staff on the conduct standards; and
- in a timely manner, report to the Central Bank in respect of any disciplinary action that arises from any breach of the conduct standards.

Consequences of breach

A breach of the business standards by an RFSP, or of the common conduct standards or the additional conduct standards by any person, will be a prescribed contravention so that the Central Bank will be empowered to take enforcement action against, and may impose a sanction on, an RFSP or person that is responsible for such a breach.

Fitness and probity

The Bill will also amend and extend the existing fitness and probity regime and will apply it to certain categories of holding company and to persons performing a CF role in relation to them. RFSPs and holding companies will each be required to certify that it is satisfied that every person performing a CF role in relation to that entity is a fit and proper person to do so.

The Bill will also adjust the operation of the fitness and probity regime in order to ensure that it conforms to the required standards of fairness in the administration of justice, in light of the 2021 decision of the Supreme Court in *Zalewski v An Adjudication Officer*¹.

Central Bank powers

The Bill will also amend the legislation that underpins the Central Bank's Administrative Sanctions Procedure ("ASP"). These amendments will be to the operation of the ASP to ensure that it conforms to the required standards of fairness in the administration of justice, as required by the *Zalewski* decision.

Other changes to be made by the Bill include the breaking of the so-called "participation link" that, currently, requires that wrongdoing by an RFSP must be proved before any enforcement action can be taken against those persons that have been involved in the management of the relevant firm and who may have participated in the particular wrongdoing. It is intended that this breaking of the "participation link" will facilitate individual accountability of the relevant personnel.

Next steps and application of the regime

The Bill will progress through the stages of the legislative process and, upon enactment, consideration will turn to commencement and introduction of the legislation in specific areas of financial services activity, on a phased basis. Reports have indicated that the regime will be applied initially to areas including:

- credit institutions (but not credit unions);
- insurance undertakings (but not reinsurance undertakings, captive insurance undertakings; captive reinsurance undertakings, insurance SPVs or reinsurance SPVs);
- investment firms that underwrite on a firm commitment basis and / or deal on own account and / or are authorised to hold client monies / assets; and
- third country branches of any of the above.

Preparing for SEAR

Implementing the new regime will be a significant undertaking for many RFSPs, and will involve considerable management time.

RFSPs that are likely to be in scope should prepare to establish a cross-functional SEAR implementation group (commercial, regulatory, compliance, legal, HR, and other relevant stakeholders) that has board access. An affected RFSP should also identify those in the organisation that are performing senior executive functions and

1 [2021] IESC 24.

prepare an initial “responsibility map” based on existing job descriptions. This will help in identifying any existing gaps in responsibilities or any activity for which no identified role is currently responsible.

There are also likely to be some HR implications that can be addressed in due course, and an RFSP’s policies (such as codes of conduct, disciplinary procedures, and the introduction of new policies such as a Breach Reporting Policy) are also likely to be affected. When the Bill is nearing enactment, training (at all levels in an RFSP) will be key to embedding new conduct standards in the culture of every RFSP. Indeed, such training will be mandated by the Bill itself.

However, at this point, an important, early step is to raise awareness of the coming changes within RFSPs.

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