



INSTITUTE OF DIRECTORS
IN IRELAND



Individual Accountability Framework Update

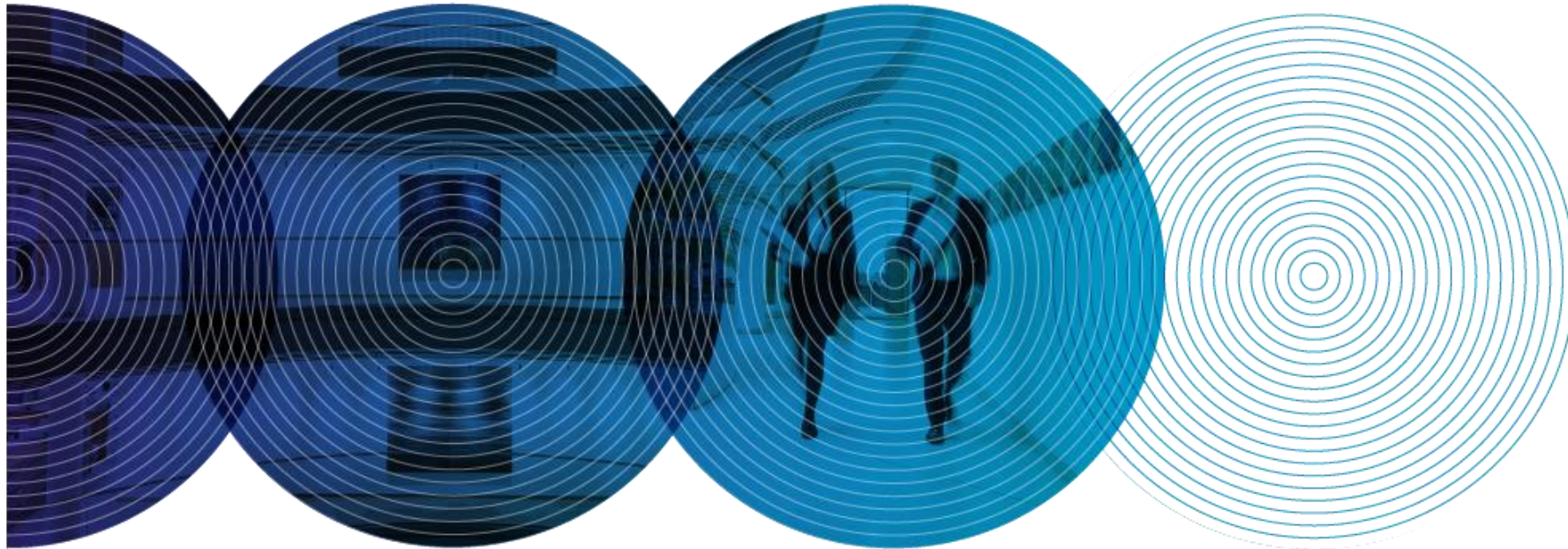
with Josh Hogan, Partner, McCann FitzGerald LLP,
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IoD Ireland Briefings Series: Sponsored by Accenture

The Individual Accountability Framework

Institute of Directors in Ireland - 14 December 2023

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Agenda

- Overview of the Individual Accountability Framework (IAF)

- Key elements of the IAF
 - SEAR
 - Common Conduct Standards
 - Additional Conduct Standards
 - Duty to take Reasonable Steps
 - F&P Certification Requirements
 - Enhanced Enforcement Capabilities
- Timing and implementation

- Practical Considerations

The Individual Accountability Framework

- The Central Bank (Individual Accountability Framework) Act 2023 (the “**Act**”) was signed into law on 9 March 2023 and partially commenced on 19 April 2023. It introduces:
 - SEAR
 - New individual and business conduct rules
 - A duty of responsibility
 - Enhancements to the Fitness & Probity Regime
 - Enhancements to the Central Bank of Ireland’s powers.
- The Individual Accountability Framework, including SEAR, is a national initiative: it is not mandated by EU law.
- It bears some similarity to the Senior Managers and Certification Regime introduced in the UK in 2016, though it is bespoke.

The IAF Legal Framework

The legal framework constituting the IAF consists of:

1. The Central Bank (Individual Accountability Framework) Act, 2023 (the “**Act**”);
2. Regulations issued by the Central Bank in relation to (i) SEAR; (ii) Fitness and Probity Certifications; and (iii) holding companies; and
3. Central Bank Guidance on the IAF published in November 2023 (the “**IAF Guidance**”).

Pillar 1: SEAR

- The “Senior Executive Accountability Regime” (“SEAR”) is a key element of the Individual Accountability Framework.
- SEAR will require in-scope firms to set out clearly and fully where responsibility and decision-making lie within the firm’s senior management - including preparing “statements of responsibility” for each senior executive and “responsibility maps” for the entire firm.
- SEAR will be implemented on a phased basis, and will initially apply from 1 July 2024 to credit institutions (excluding credit unions), certain insurance undertakings and investment firms, and third country branches of such firms.
- Importantly, funds and fund management companies are not within scope of SEAR (at least in the initial implementation phase for SEAR). The CBI has the power to roll out SEAR via regulations to other sectors in due course.
- Deferral of the introduction of the SEAR for INEDs/NEDs (of in-scope firms) until 1 July 2025. The other parts of IAF including the Common Conduct Standards and Additional Conduct Standards will apply to INEDs/NEDs from 29 December 2023.



Pillar 2: Conduct Standards

- The Conduct Standards set out a single set of applicable standards of behaviour which will apply to relevant individuals in all regulated firms, irrespective of sector (and are not linked to whether a firm is in scope of SEAR).
- The **Common Conduct Standards** will apply to all persons who perform a controlled function (“**CFs**”) in all regulated firms (CFs include all persons who perform a pre-approval controlled function (“**PCFs**”) as a subset of CFs).
- **Additional Conduct Standards** apply to PCFs or persons performing the CF1 role (i.e. individuals with the ability to exercise a significant influence on the conduct of the affairs of the firm).
- Both the Common Conduct Standards and Additional Conduct Standards will apply to directors of regulated funds (as PCFs).
- Defence to any enforcement action in relation to a breach of the Conduct Standards or of the Additional Conduct Standards if the person can show that she or he acted reasonably in all of the circumstances of the case.
- The **Business Standards** are currently set out in the Consumer Protection Code 2012 and are being considered as part of the current review of the Code. The Central Bank intends to update those standards separately as part of a review of the Code.
- Further guidance from CBI in respect of the Conduct Standards in Chapters 4 to 6 of the IAF Guidance.

Common Conduct Standards – Section 53E IAF Act 2023

The Central Bank (Individual Accountability Framework) Act 2023

- a) **that the person acts with honesty and integrity, including—**
- i. having regard to the legitimate interests of the regulated financial service provider, its staff, customers and other persons with whom it engages,
 - ii. operating without bias and preventing, or identifying and appropriately managing, conflicts of interest,
 - iii. not exerting pressure or influence on a customer so as to limit his or her ability to make an informed choice in relation to any financial service,
 - iv. not misusing or misappropriating any assets or information of the regulated financial service provider or its customers, and
 - v. reporting appropriately, and not impeding others from reporting, to the management of the regulated financial service provider—
 - I. information relevant to, or giving rise to a suspicion of, the commission of a prescribed contravention or contravention of any other legal obligation or standard imposed on the regulated financial service provider, and
 - II. any matter otherwise adversely affecting the activities or interests of customers, the regulated financial service provider, its related undertakings, or the financial system in the State

Guidance on the IAF

- The person must counteract cognitive bias of individuals and groups in decision making by seeking out broader perspectives and contrarian views.
- The person needs to adhere to all company policies in respect of perceived and actual conflict of interest.
- Examples of not acting with honesty and integrity include not adhering to firm policies and procedures, misreporting, destroying documents, not fully disclosing or providing invalid, misleading or incorrect information to the firm, its customers, employees or the regulator, or misusing assets or confidential information in respect of the client or their firm.

Common Conduct Standards – Section 53E IAF Act 2023

The Central Bank (Individual Accountability Framework) Act 2023

- b) **that the person acts with due skill, care and diligence, including**
- i. having appropriate knowledge of the business activities of the regulated financial service provider relevant to the controlled function, and the associated risks of those activities
 - ii. having appropriate knowledge of the legal and regulatory framework, including any legal obligation or standard imposed on the regulated financial service provider, relevant to the controlled function,
 - iii. operating in compliance with the systems and controls, processes, policies and procedures of the regulated financial service provider and any legal obligation or standard imposed on the regulated financial service provider,
 - iv. acting without detriment to customers, the regulated financial service provider, its related undertakings, or the financial system in the State,
 - v. ensuring that any communication, including any record, provided to a customer or other person is clear, accurate, up to date and not misleading,
 - vi. acting appropriately in any decision-making, including collective decision-making, ensuring decisions are properly informed and exercising sound judgement, and
 - vii. monitoring the performance of any delegated tasks and ensuring that those tasks are appropriately performed

Guidance on the IAF

- In the performance of their role, a person must exhibit the skill, care and diligence that would be reasonably expected from an individual in that role with the relevant qualifications, knowledge and expertise.
- When a person considers that a decision made by the firm is not in the best interests of the firm, they are required to report to relevant regulatory bodies where required.
- Examples of unacceptable conduct include providing advice or guidance to customers where an individual is not competent to do so, engaging in acts, omissions or business practices that could be reasonably expected to cause customer detriment, failing to explain the risks of a product to a customer or providing false, inadequate or misleading information to others including details relating to a product, an individual's qualifications, past employment record or experience.

Common Conduct Standards – Section 53E IAF Act 2023

The Central Bank (Individual Accountability Framework) Act 2023

- c) **that the person cooperates in good faith and without delay with the Bank, and with authorities that perform functions in a jurisdiction other than the State that are comparable to one or more of the functions performed by the Bank under financial services legislation, including—**
- i. responding to requests and requirements under financial services legislation in an open and timely manner,
 - ii. disclosing information or records when required to do so under financial services legislation,
 - iii. attending meetings and interviews when required to do so under financial services legislation,
 - iv. not providing false, inaccurate or misleading information, records or explanations,
 - v. not destroying, hiding or putting beyond reach information or records that it is reasonable for the person to expect to be required to be disclosed under financial services legislation, and
 - vi. not engaging in evasive, misleading or obstructive conduct

Guidance on the IAF

- This is not a duty to proactively report or disclose information – if received a specific request for information or attendance at a meeting, the individual should accommodate any such request in a timely, co-operative and transparent manner, answering any questions openly and honestly.
- Examples of unacceptable conduct include being untruthful, providing false or misleading information or being uncooperative, failure to report information in accordance with the existing internal processes, influencing a decision not to report an issue or obstructing the reporting of information, pressuring others in respect of reporting of information, failing to attend an interview or failing to reply to questions or requests for information in a timely manner without good reason.

Common Conduct Standards – Section 53E IAF Act 2023

The Central Bank (Individual Accountability Framework) Act 2023

- d) **that the person acts in the best interests of customers and treats them fairly and professionally, including –**
- i. ensuring that customers are informed in a clear manner of relevant information relating to financial services of which they ought to be aware, and not impeding the provision of relevant information to customers,
 - ii. communicating with customers in a timely manner having regard to the urgency of any matter and the time required by the customer to consider the relevant information,
 - iii. assessing 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,
 - iv. ensuring that customers are not misled as to the advantages of any financial service,
 - v. acknowledging and seeking to resolve any complaints received from customers,
 - vi. resolving errors or mistakes affecting customers, and disclosing errors or mistakes to the customers affected in a timely manner,
 - vii. not acting in a manner that is unfair to customers
- e) **That the person operates in compliance with standards of market conduct and trading venue rules to which the regulated financial service provider is subject by law and any market codes that apply to the affairs of the regulated financial service provider.**

Guidance on the IAF

- For (d), examples of unacceptable conduct include undertaking, recommending or providing advice on transactions without a reasonable understanding of the risk to a customer or of the downsides of a product, or generally providing advice or guidance to customers where you are not competent to do so.
- For (e), the relevant person must understand the relevant regulatory framework and the risks relevant to role the person performs.

Additional Conduct Standards – Section 53F IAF Act 2023

The Central Bank (Individual Accountability Framework) Act 2023

- a) that the business of the regulated financial service provider is controlled effectively
- b) that the business of the regulated financial service provider is conducted in accordance with its obligations under financial services legislation
- c) that any delegated tasks are assigned to an appropriate person with effective oversight

Guidance on the IAF

- For a), an individual must keep up to date with all aspects of the business.
- For b), an individual must ensure that the area they are responsible for has suitable procedures to enable compliance with all regulations and that staff understand the need for compliance.
- For c), an individual should delegate only when they are satisfied that the delegate has the competence, knowledge, seniority, skill and capacity to deal with the delegated task.

Additional Conduct Standards – Section 53F IAF Act 2023

The Central Bank (Individual Accountability Framework) Act 2023

- d) that any information of which the Bank would reasonably expect notice in respect of the business of the regulated financial service provider is disclosed promptly and appropriately to the Bank, including information relevant to, or giving rise to a suspicion or expectation of, any of the following:
- i. commission of an offence by the regulated financial service provider or a person performing a controlled function in relation to it;
 - ii. commission of a prescribed contravention or any other breach of obligations under financial services legislation by the regulated financial service provider or a person performing a controlled function in relation to it;
 - iii. Concealment or deliberate destruction of evidence relating to a matter referred to in subparagraph (i) or (ii);
 - iv. provision of false or misleading information to the Bank relating to a matter referred to in subparagraph (i) or (ii);
 - v. obstruction or impeding of an investigation relating to a matter referred to in subparagraph (i) or (ii);
 - vi. commencement of legal proceedings by or against the regulated financial service provider arising from its obligations under financial services legislation;
 - vii. commencement of legal proceedings against the regulated financial service provider which may impact on its ability to continue to trade;
 - viii. anything that may otherwise interfere significantly with the operation of the regulated financial service provider or its compliance with its obligations under financial services legislation;
 - ix. a decision by the regulated financial service provider to cease to provide financial services of a particular description.

Guidance on the IAF

- When an individual becomes aware of information that the Central Bank could reasonably expect notice of, they should disclose the information if the information falls within the scope of their responsibilities.
- When a decision is made not to report the matter, the individual must be able to demonstrate that this decision was made after reasonable enquiry and analysis of the situation.

Duty to take ‘Reasonable Steps’

- The Act imposes a duty on all CFs (including PCFs) to “*take any **steps that it is reasonable in the circumstances for the person to take***” to ensure that the Common Conduct Standards are met.
- In addition, PCFs and CFs subject to the Additional Conduct Standards are under a similar obligation to “*take any steps that it is reasonable in the circumstances for the person to take*” to ensure that the Additional Conduct Standards are met.

What are the Reasonable Steps? Indicative Factors to Determine if Reasonable Steps are being taken



- **Nature of the business (including scale and complexity)**
 - Large complex firms with multiple product lines would be expected to have more extensive risk management frameworks and controls in place than a smaller less complex firm
- **Role of the Control Function**
 - Role / relationship to responsibilities of other individuals / shared responsibilities / matrix management structures. Be clear on your own responsibilities and how they relate to those of others in the Firm– understand the risk and consequence of your decisions and be satisfied with output of data from other areas if needed to enable you do your job/ individuals coming into a more senior role will be on a learning curve but subject to minimum competence and capability expectations
- **Level of knowledge and experience of the Control Function**
 - Time in role / awareness of regulatory requirements / ongoing professional development including participation in firm training and industry conferences / steps taken to ensure awareness of key risks and developments impacting area of business for which responsible

What are the Reasonable Steps? Indicative Factors to Determine if Reasonable Steps are being taken



- **Existence and application of appropriate and effective systems (risk management systems, internal control mechanisms and governance arrangements)**
 - Extent individual assesses and monitors adequacy of arrangements / Awareness of material changes to risks in timely manner / steps taken to implement adequate controls including policies / actions from reviews implemented on timely basis
- **Effectiveness of oversight of delegation / safeguards against inappropriate delegation**
 - Did the individual assess if appropriate to delegate considering required capacity, competence, knowledge, seniority and skill / steps taken to ensure delegate understood what was required / how did the person oversee the discharge of the delegated task: timing; material developments & risks; escalation (including culture and whistleblowing)
- **Safeguards against inappropriate delegation**
 - Did the individual establish the following for their area of responsibility: clear reporting lines; procedures to review delegates to ensure their suitability; succession plans and resourcing plans; orderly transition of responsibilities where required

What are the Reasonable Steps? Indicative Factors to Determine if Reasonable Steps are being taken



- **Appropriateness and effectiveness of procedures for identifying and remedying problems**
 - Appropriate controls and reporting of potential issues/escalation procedures/ issues reviewed thoroughly and documented/ issues reported internally and externally as required/ assess lessons learned and wider implications. Individual must be aware of assessing risk across three lines of defence/necessity of seeking explanation of issues/ when to escalate to board or relevant senior management/ when to obtain internal or external expert advice
- **Prevention of breaches of customer consumer protection rights and/or contractual rights**
 - The individual must ensure that they and the firm take a customer-centric approach with adequate resources, policies and controls to this end (for example, ensure that customer complaints are handled in a fair and consistent manner) / disclose all relevant information to customers in adherence with legislative and regulatory requirements/ engage with customers where there is a breach, rectify the breach and address any failings/ co-operate with the CBI
- **How much of the above factors are under the control or influence of you as a Control Function**
 - In deciding whether any of the above factors are under your control, the CBI will consider: the overall environment (for example, how the individual prioritised matters and responded to new developments and whether these were informed by an appropriate risk assessment) / how the individual reviewed, challenged and sought out information available to them / approach taken by individual in effectively participating in collective decision making

Reasonable Steps - IAF Guidance

- Concept of reasonable steps should already be embedded in CF role holders' day-to-day actions in managing their areas of responsibility.
- The CBI acknowledges that human error can occur and perfection is not the required standard.
- The CBI will look at the overall circumstances and environment as they existed at the time. It will not apply standards retrospectively or with the benefit of hindsight.
- The CBI has declined to list exhaustive steps that CF holders can follow.
- An individual should not adopt a check-box mentality in applying the guidance.
- The CBI's expectation is that individuals in CF roles are experienced, competent professionals and should be in a position to fully understand the area of the business for which they are responsible, take the necessary steps required to ensure that it is managed appropriately e.g. by questioning/challenging, being thorough, making informed decisions, delegating appropriately and being in a position to discharge their duties.

Pillar 3: New Fitness and Probity Certification Requirements



The CBI's **Fitness and Probity regime** will be updated to introduce certification, enhanced due diligence and reporting obligations in respect of the fitness and probity of persons in CF and PCF roles.

The annual certification obligation requires that:

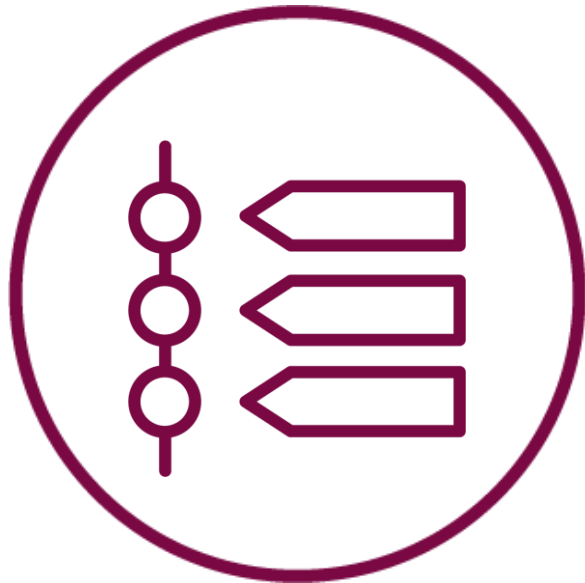
- a firm must not permit a person to perform a CF (which includes a PCF) unless the particular firm has certified in writing that it is satisfied that the person complies with the applicable standards of fitness and probity; and
- the CBI may make regulations specifying requirements in relation to certification, the due diligence that firms must undertake prior to certifying persons in CF roles, the adoption of fitness and probity policies and procedures, etc.

The CBI has clarified its expectations with regard to ongoing due diligence requirements in accordance with Fitness & Probity Regime.

The CBI will have the power to investigate former CF or PCF holders for six years after performing CF/PCF functions.

F&P Regime (Certification and inclusion of Holding Companies) to apply from **29 December 2023**

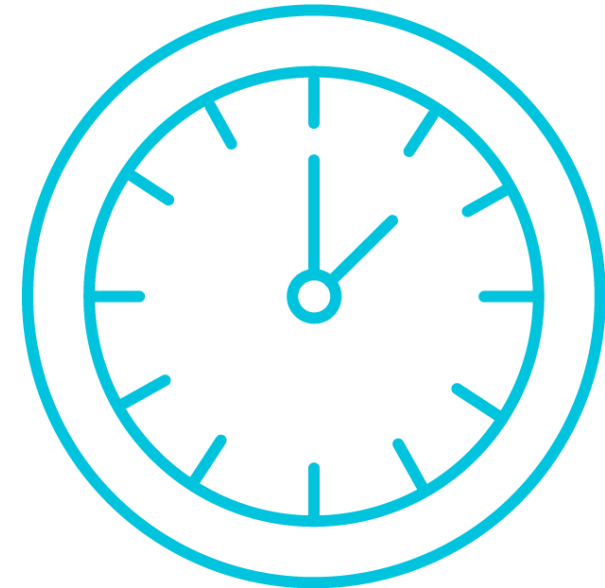
Pillar 4: Enhanced Enforcement Capabilities



- The legislation has removed the so-called “participation link” so that the CBI will no longer have to first find that a firm has committed a regulatory breach before it can take enforcement action against any individual in that firm.
- The legislation will also amend the CBI’s Administrative Sanctions Regime and the Fitness and Probity Standards, so that breach of the new Conduct Standards will be a prescribed contravention of financial services legislation, such that the CBI will be able to take action against the individual(s) who are accountable.
- The General Scheme has confirmed that the CBI’s approach to making a decision to take enforcement will remain unchanged, and that it will be ‘proportionate and risk-based’.
- Focus will be on individuals, as well as the firm itself.

Timeframe

- Conduct Standards to apply from **31 December 2023**;
- F&P Regime (Certification and inclusion of Holding Companies) to apply from **31 December 2023**; and
- Regulations prescribing responsibilities of different roles and requirements on firms to clearly set out allocations of those responsibilities and decision-making to apply to firms from **1 July 2024**.



Implementing the IAF

- Implementing the IAF will be a significant undertaking for firms and will involve considerable management time.
- Developing a Responsibility Map and Statements of Responsibility for individuals carrying out senior executive functions will require many firms to rethink their decision making and governance arrangements. Look at this as an opportunity.
- Roll out of statements of responsibilities will require consultation with relevant employees. HR and other internal policies will need to be updated.
- SEAR and the IAF will likely mark the end of informal decision making.
 - Firms will need to consider how they can continue to make effective decisions promptly, while ensuring that ‘reasonable steps’ are taken to ensure that Conduct Standards are complied with.
- An extensive staff communications exercise, and training at all levels, will be key to embedding new Conduct Standards into the culture of each firm.
- Insurance policies for directors and officers must be reviewed.

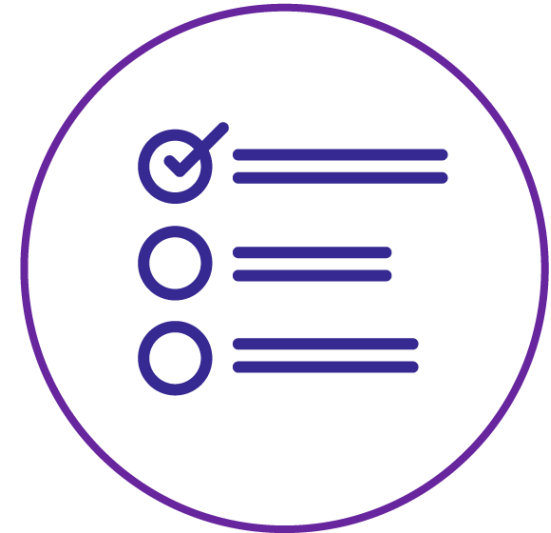
Some Practical Considerations

- Independent Non-Executive Directors
- Controlled function role holders - the scope of application of the IAF to the personnel of EEA institutions (such as banks) that are providing services to Irish customers on a branch or cross-border services basis
- Holding companies
- Collective Decision making



Some Practical Considerations

- **Approach of the regulator**
 - ‘proportionate and risk based’
- **Tensions**
 - Stakeholder interests
 - *Smith v RSA* (EAT) and *Jones v JP Morgan* (UK)
 - D&O/Legal Advice
- **Reporting Obligations**
 - ‘Disciplinary actions’/concerns regarding an individual’s F&P
 - Interaction with Protected Disclosures
- **Looking forward**
 - Non-financial misconduct (*Frensham* – UK)



Any other questions?



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