



INSTITUTE OF DIRECTORS
IN IRELAND



The Senior Executive Accountability Regime (SEARs):

What Directors Need to Know and Do

with Josh Hogan, Partner, McCann FitzGerald LLP, and Donal Hamilton, Partner, McCann FitzGerald LLP

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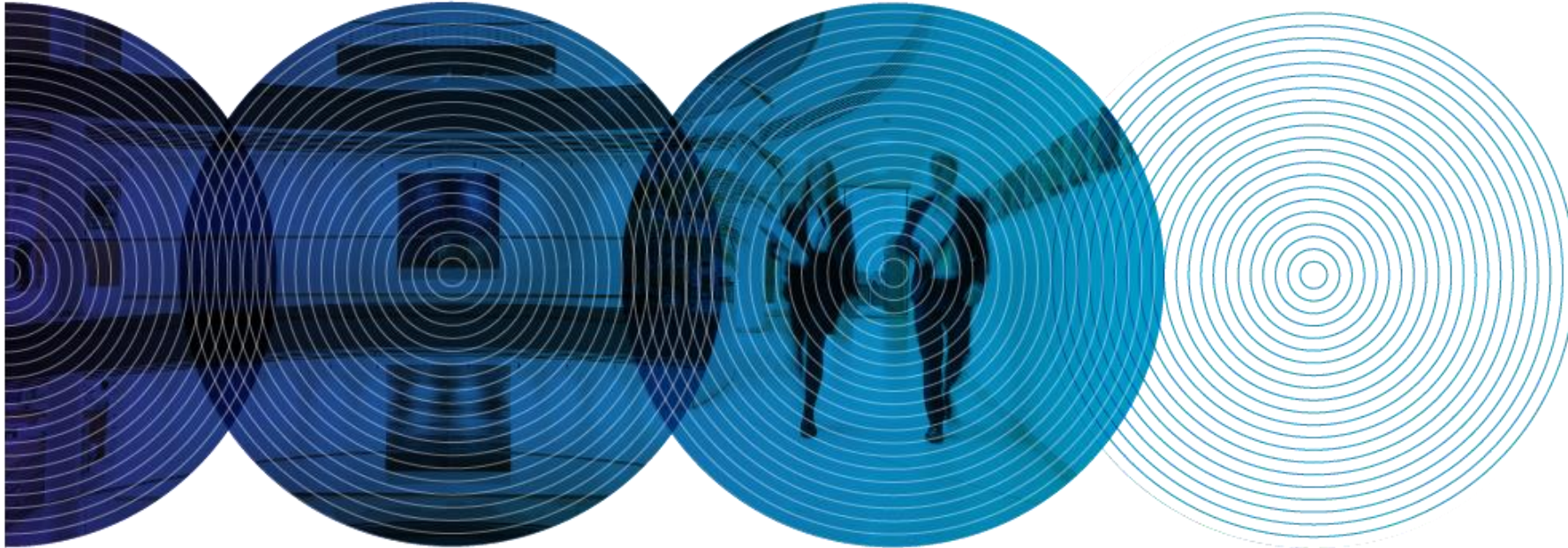


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The Individual Accountability Framework Presentation to the Institute of Directors

1 December 2022

Josh Hogan, Partner, and Donal Hamilton, Partner



Agenda

- The Individual Accountability Framework (IAF)

- Key elements of the IAF

- SEAR
- Conduct Standards
- Duty of Responsibility
- Improved F&P Regime
- Enhanced enforcement powers

- Timing, implementation and consequences

- Some topical issues

The Individual Accountability Framework

- The Individual Accountability Framework, currently mapped-out in the Central Bank (Individual Accountability Framework) Bill 2022, will have a number of key elements:
 - 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 is bespoke.
- SEAR and the Individual Accountability Framework will be introduced by means of: a new Act (the Central Bank (Individual Accountability Framework) Bill), new regulations that the Bill will empower the CBI to make, and CBI guidance



SEAR – what is it, and how will it operate?

- The proposed “Senior Executive Accountability Regime” (“SEAR”) is a key element of the incoming Individual Accountability Framework.
- SEAR will be implemented on phased basis, and initially apply to credit institutions (excluding credit unions), certain insurance undertakings and investment firms, and third country branches of such firms.
 - Other sectors may be included in the future.
- SEAR will apply primarily to those performing senior executive functions, which will be aligned with the list of pre-approval controlled functions (“PCF”)
- Detail expected to be provided in regulations.

SEAR – what is it, and how will it operate?

SEAR will require every in-scope RFSP to set out clearly where responsibility and decision-making lies within the organisation.

This will involve:

1. Responsibility allocation

- ‘Prescribed responsibilities’ will be identified by the CBI, and these must be assigned to senior executives in each RFSP.
- RFSPs will also be obliged to ensure that other, ‘inherent’, responsibilities’ (such as those typically assigned to a CEO) are appropriately and clearly allocated.

SEAR – what is it, and how will it operate?

2. Statements of Responsibility

- RFSPs will need to put a “statement of responsibility” in place for each PCF, clearly setting out their role and the areas of the business for which they are accountable.
- These statements are intended to promote ‘clarity, transparency, and accountability’, and ‘*will enhance the Central Bank’s ability to hold individuals to account for regulatory breaches in the area for which they are responsible*’ – General Scheme.

3. Responsibility Maps

- RFSPs will be obliged to prepare a “management responsibility map” for the entire organisation, illustrating areas of individual responsibility, governance structures and the reporting lines to which each senior executive is subject.
- The Responsibility Map will be a single source of reference for governance arrangements within the RFSP.

New Business and Conduct Rules

- New conduct standards will have wide application within RFSPs:
 - **“Standards for Business”**: These will apply to the RFSP itself (and will inform how it is managed and governed).
 - **“Conduct Standards”**: These will apply to every Controlled Function (“CF”) in an RFSP and not merely to PCFs. As every obligation of a CF applies also to a PCF, PCFs too will be subject to the Conduct Standards.
 - **“Additional Conduct Standards”**: These will apply to every PCF in every RFSP (irrespective of whether the relevant RFSP is within the SEAR regime) and to every other person *“who exercises significant influence on the conduct of an RFSP’s affairs”*.

It will be a 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.



New Business and Conduct Rules

- Examples of conduct standards can be found in the Bill but further detail and guidance is expected by way of regulations.
- Key themes arising across the standards in the Bill are the obligations:
 - to act honestly and with integrity;
 - to act with due skill, care and diligence;
 - to act in the best interest of the customer;
 - to avoid conflicts of interest
 - to maintain and follow adequate controls and procedures, and
 - to engage with the regulator in good faith and without delay.
- Standards are broad – *‘with integrity’*
 - Could capture a wide range of conduct.
 - Non-Financial Misconduct, such as discriminatory conduct or sexual harassment, is an area of particular interest in the UK.

Duty of Responsibility

A “Duty of Responsibility” will apply.

- CFs will be required to take
 - *‘any steps that it is reasonable in the circumstances for the person to take’ to ensure that Conduct Standards are met.*
- PCFs, and any person who may exercise a significant influence on the conduct of the RFSP’s affairs shall take
 - *‘any steps that it is reasonable in the circumstances for the person to take’ to ensure that the Additional Conduct Standards are met.’*
- Full section of guidance in the Bill, and guidelines are also expected from the CBI.

Duty of Responsibility



All relevant factors should be considered in assessing whether the duty of responsibility has been complied with including:

- The nature, scale and complexity of the RFSP;
- The functions of the relevant executive;
- The level of knowledge of the relevant executive, and the level of knowledge that they could reasonably be expected to have;
- The existence and application (or otherwise) of
 - effective controls, systems and governance;
 - effective oversight of delegated responsibilities;
 - Appropriate and effective procedures for identifying and remediating problems.



New Fitness and Probity Certification Requirements

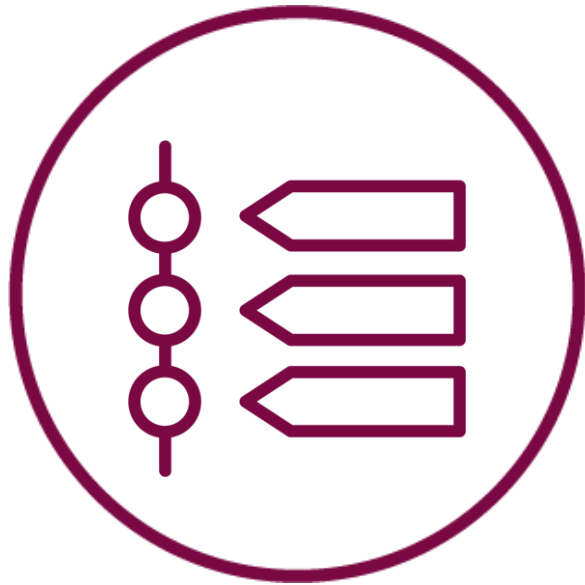
The CBI's **Fitness and Probity regime** will be updated to introduce certification, due diligence and reporting obligations in respect of the fitness and probity of persons in CF and PCF roles.

The certification obligation in respect of CFs may be periodic, most likely annual, so that:

- an RFSP must not permit a person to perform a CF (which would include a PCF) unless the particular RFSP 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 RFSPs must undertake prior to certifying persons in CF roles, the adoption of fitness and probity policies and procedures, etc.

The CBI will also have the power to investigate former CF or PCF holders, even where they no longer perform CF/PCF functions.

Enhanced Enforcement Capabilities

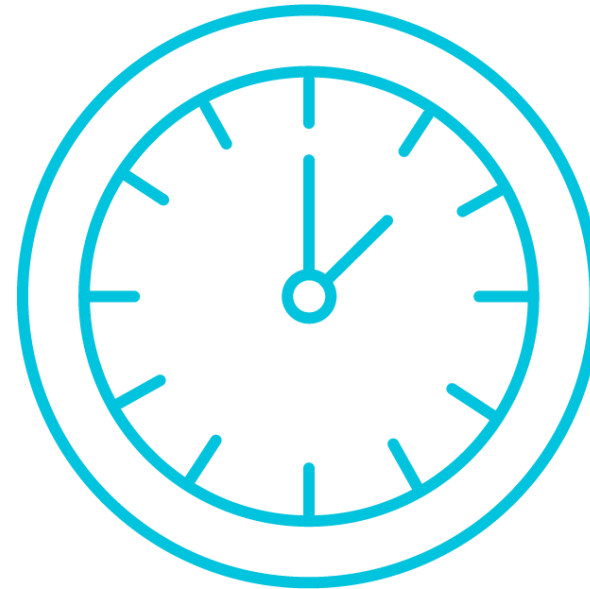


- Commentary from the CBI indicates that the legislation will remove the so-called “participation link” so that the CBI will no longer have to first find that an RFSP has committed a regulatory breach before it can take enforcement action against any individual in that RFSP.
- The legislation will also 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 RFSP itself.

Timeframe

Enactment – Q4 2022/ Q1 2023

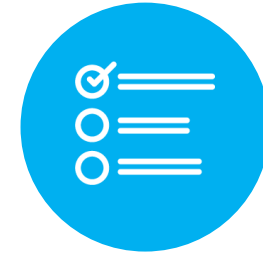
Commencement – Likely Q3 2023 onwards



Implementing the IAF

- Implementing the IAF will be a significant undertaking for many RFSPs, and will involve considerable management time.
- Developing a Responsibility Map and Statements of Responsibility for individuals carrying out senior executive functions will require many RFSPs 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.
 - RFSPs 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 in the culture of each RFSP.

Some topical issues



- Collective responsibility versus individual responsibility'
- Reporting obligations
 - Proactive obligation to report v privilege against self-incrimination
 - *“Nothing in this part requires a person ... to do anything that might tend to incriminate the person”*
 - Divergence of interest between RFSP's and individuals
 - Protected Disclosures

Questions?



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