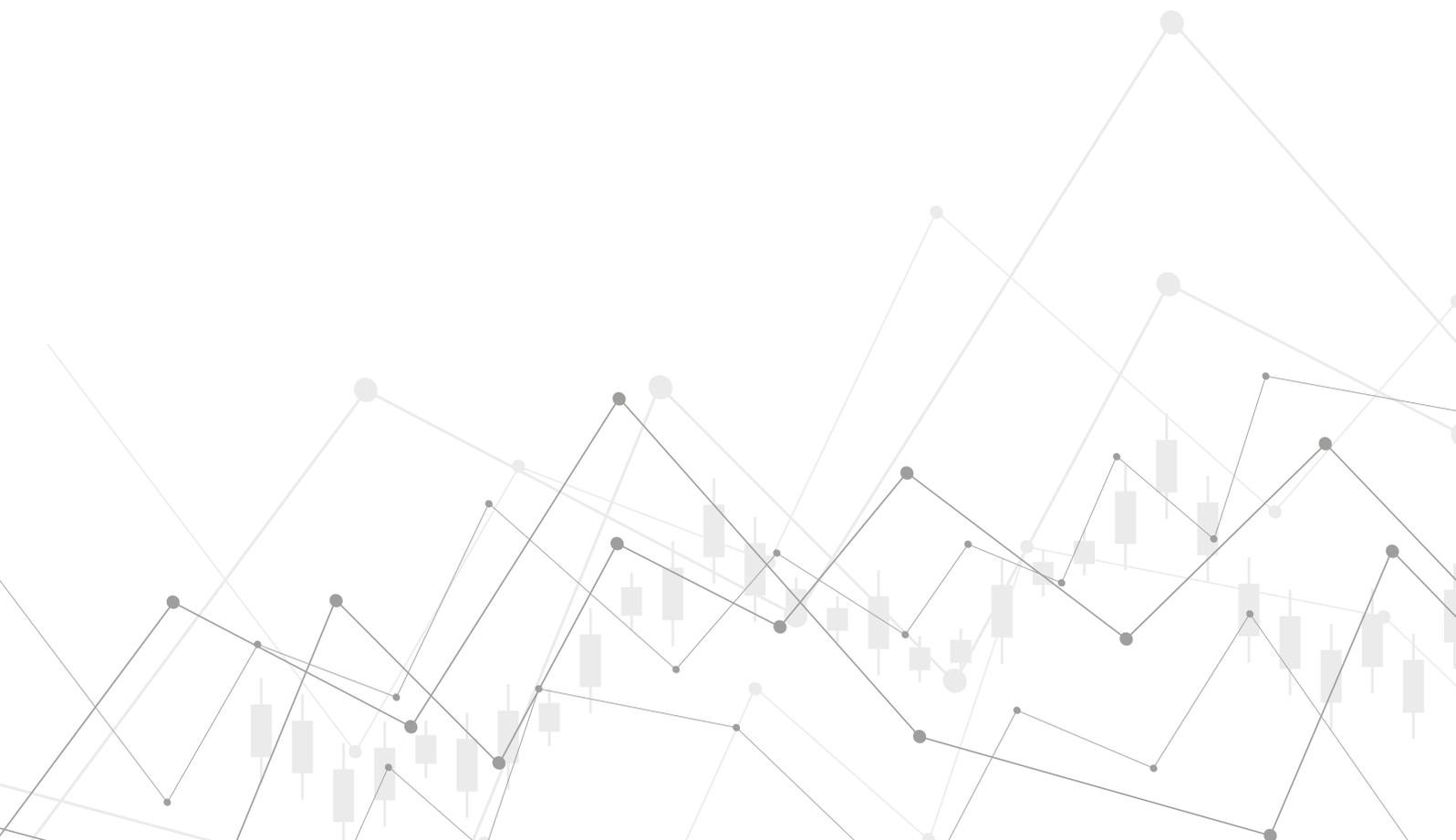




Heads of Bill Published on Individual Accountability in the Regulated Financial Service Sector

July 2021

A significant milestone in the path to greater individual accountability within regulated financial service providers (“RFSPs”) was reached on 27 July 2021 with the publication of the Heads of Bill of the Central Bank (Individual Accountability Framework) Bill 2021 (the “Heads of Bill”).



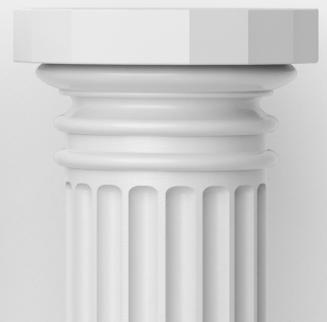
In line with earlier proposals (please see our earlier briefing [here](#)), the Heads of Bill provide for an individual accountability framework comprising of **four pillars**:

1. New Senior Executive Accountability Regime (“SEAR”)

2. New Conduct Standards

3. More onerous requirements for RFSPs regarding the fitness and probity

4. Streamlined enforcement process



applicable initially only to banks, certain insurance firms and certain investment firms, requiring in-scope entities to allocate responsibility for different areas within the entity to particular individuals;

providing greater clarity about the behaviour expected of all RFSPs and individuals working in RFSPs;

of persons exercising controlled functions (“**CFs**”) and pre-approval controlled functions (“**PCFs**”); and

designed to break the “*participation hurdle*” so that the Central Bank of Ireland (“**CBI**”) will no longer be required to first prove a contravention of legislation against an RFSP before it can take enforcement action against an individual.

In this, the first of a series of William Fry briefings on individual accountability, we provide an overview of the main components of each of the four pillars of the individual accountability framework based on the additional detail set out in the Heads of Bill.

SENIOR EXECUTIVE ACCOUNTABILITY REGIME (“SEAR”)

The Heads of Bill provide additional detail on SEAR, the pillar of the individual accountability framework which has attracted the most attention to date.

PHASED ROLL OUT OF SEAR

Whilst the primary legislation will not specify the types of RFSPs that will be subject to SEAR initially (as this will be confirmed by CBI regulations), the Heads of Bill reconfirm earlier indications that the intention is that SEAR will be rolled out on a phased basis and that it will apply, in the initial phase, to:

- Credit institutions (excluding credit unions);
- Insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings and insurance special purpose vehicles);
- Investment firms which 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 the above RFSPs.

The Heads of Bill also indicate that other RFSPs may be brought within the scope SEAR in the future, after the legislation is enacted.

CBI REGULATIONS TO GIVE EFFECT TO SEAR

The Heads of Bill empower the CBI to issue regulations to flesh out and give effect to SEAR. In these regulations the CBI will be required to provide for the following:

- Responsibilities that are inherent to each senior executive function (“**SEF**”);
- Prescribing responsibilities which RFSPs must allocate to individuals carrying out SEFs;
- The identification and allocation of other responsibilities by RFSPs to relevant SEFs;
- Imposing requirements on RFSPs to produce a statement of responsibility to the CBI for SEFs which clearly sets out their role and areas of responsibility (see further detail below);
- Imposing requirements on RFSPs to produce a management responsibility map documenting key management and governance arrangements (see further detail below).

Helpfully, the Heads of Bill indicate that SEFs will be aligned PCF functions of in-scope RFSP’s.

**OBLIGATIONS OF
IN-SCOPE FIRMS
UNDER SEAR**

SEAR will place an obligation on in-scope RFSPs to provide clarity about individual responsibilities within a firm. RFSPs will be required:

- To provide a statement of responsibility to the CBI for each SEF clearly documenting their role and areas of responsibility. This statement must be individual to the SEF and must contain both inherent responsibilities applicable to the role and any prescribed or supplementary responsibilities allocated to the individual. The statement of responsibility is intended to enhance the CBI's ability to hold individuals to account for regulatory breaches in the areas for which they are responsible.
- To produce a management responsibility map which describes the management, governance and reporting arrangements of the RFSP in a comprehensive and accessible way within a single source of reference. This should include governance arrangements for the board, board committees and other decision making committees or groups, reporting lines of SEFs, including within the wider RFSP group, and, if relevant, the interaction between the RFSPs and the RFSP group's governance and management arrangements.

**DUTY OF RESPONSIBILITY
FOR PERSONS
PERFORMING SEFS**

The Heads of Bill provide that a legal duty will be imposed on individuals performing SEFs in RFSPs which fall within the scope of SEAR to take reasonable steps to avoid the commission or continuance of a prescribed contravention by the RFSP, within the SEF's area of responsibility. An individual will be considered to be in breach of this legal duty where:

- At a time when the individual was performing a SEF, the RFSP committed or continued to commit a prescribed contravention;
- The individual was, at that time, responsible for the business area relevant to that prescribed contravention; and
- The individual did not take reasonable steps to avoid the prescribed contravention occurring or continuing.

**DUTY OF RESPONSIBILITY
FOR PERSONS
PERFORMING SEFS
(CONTINUED)**

The Heads of Bill provide that when considering whether a SEF holder took reasonable steps to avoid a prescribed contravention occurring or continuing to occur, the CBI must have regard to all relevant circumstances including but not limited to a non-exhaustive list of factors set out in the Heads of Bill including:

- The nature and scale of the business;
- The level of knowledge and experience of the individual;
- Whether the person took such steps as a person in his or her position could reasonably have been expected to take to:
 - › Ensure there were appropriate and effective systems, controls and governance arrangements in place;
 - › Ensure the effective oversight of any delegation of responsibilities and the implementation of effective safeguards against inappropriate delegation;
 - › Implement appropriate and effective procedures for identifying and remediating problems that could arise; and
 - › Apply such systems, controls, arrangements, safeguards and procedures to the circumstances of the case.
- Whether the person performing the relevant SEF acted in accordance with any statutory, common law or other legal obligations.

A breach of this duty will be a considered a prescribed contravention enforceable against the individual.

CONDUCT STANDARDS

The Heads of Bill provide for the introduction of three new sets of conduct standards, which will apply to all RFSPs, whether or not they fall within the initial phase of SEAR

STANDARDS FOR BUSINESS FOR ALL RFSPS

The Standards for Business will require all RFSPs:

- To conduct business professionally, honestly, ethically and with integrity;
- To conduct business with due care skill and diligence and to take appropriate steps to prevent or effectively manage conflicts of interest;
- To act in the best interests of customers and to treat them fairly and professionally;
- To maintain adequate financial resources and controls and manage their affairs and systems sustainably, responsibly and in a sound and prudent manner;
- To arrange adequate protection of client assets when responsible for them; and
- To deal with its regulators in good faith, and in an open and cooperative way and disclose to the CBI promptly, proactively and appropriately anything relating to the firm of which the CBI would reasonably expect notice.

The Heads of Bill provide that the Standards for Business will be further elaborated on in CBI regulations.

A breach of the Standards for Business will be a considered a prescribed contravention enforceable against the RFSP.

**COMMON CONDUCT
STANDARDS FOR
INDIVIDUALS
PERFORMING CF OR PCF
ROLES IN RFSPS**

The Common Conduct Standards impose binding obligations on individuals with respect to expected standards of conduct in the performance of their roles in RFSPs. The Common Conduct Standards will apply to all persons performing CF or PCF roles in RFSPs including the requirement:

- To act honestly, ethically and with integrity;
- To act with due skill, care and diligence;
- To be cooperative with the CBI and other regulators or authorities and deal with them in good faith and without delay;
- To act in the best interests of customers and treat them fairly and professionally; and
- To observe proper standards of market conduct.

A non-exhaustive list of examples of expected behaviours required by the Common Conduct Standards is included in the Heads of Bill under five headings. Further practical guidance regarding the Common Conduct Standards is to be provided by the CBI.

The Heads of Bill also set out certain safeguards which the CBI may prescribe for RFSPs to have in place, so that staff are aware of what is expected of them. This may include notification of applicable Common Conduct Standards, training of relevant staff and reporting on disciplinary action arising from breach of the Common Conduct Standards. RFSPs will also be required to establish and maintain policies in respect of how the Common Conduct Standards are implemented throughout the organisation.

ADDITIONAL CONDUCT STANDARDS FOR PERSONS IN SENIOR ROLES

Additional Conduct Standards will apply to persons performing PCF roles and those exercising significant influence on the conduct of an RFSP. Additional Conduct Standards will require such persons:

- To ensure that the business of an RFSP for which that person is responsible is controlled effectively
- To ensure that the business of an RFSP for which that person is responsible complies with relevant regulatory requirements;
- To ensure that any delegation of tasks for which they are responsible is to an appropriate person and that they oversee the discharge of the delegated task effectively;
- To disclose promptly, proactively and appropriately to the CBI any information of which the CBI would reasonably expect notice; and
- To participate effectively in collective decision making.

The CBI will also have the power to impose requirements on RFSPs regarding notification of applicable Additional Conduct Standards, training of relevant RFSP staff and reporting on disciplinary action arising from breach of the Additional Conduct Standards.

CONSEQUENCES OF BREACH OF COMMON CONDUCT STANDARD OR ADDITIONAL CONDUCT STANDARDS BY INDIVIDUALS

A breach of the Common Conduct Standards or the Additional Conduct Standards by an individual will constitute a “prescribed contravention” allowing the CBI to take action against the individual under the administrative sanctions procedure (“**ASP**”).

It will be a defence to an alleged breach of the Common Conduct Standards or the Additional Conduct Standards if the relevant person can show that they acted reasonably in all the circumstances of the case.

The Heads of Bill provide that a breach of the Common Conduct Standards or of the Additional Conduct Standards will be a basis for forming an opinion to suspect or conclude that a person is not of the necessary fitness and probity to perform a PCF or CF role.

STRENGTHENED FITNESS AND PROBITY REQUIREMENTS

The Heads of Bill impose more onerous obligations on firms in relation to the fitness and probity regime and introduce a number of enhancements to the fitness and probity regime designed to ensure the effective operation of the individual accountability framework.

NEW OBLIGATION OF RFSPS TO CERTIFY THE FITNESS AND PROBITY OF CF AND PCF ROLE HOLDERS

The Heads of Bill provide that RFSPs will be required to certify in writing that it is satisfied that individuals performing CF and PCF roles meet the fitness and probity standards. The current regime requires firms to ask persons performing a CF or PCF role to confirm their compliance with the CBI's fitness and probity standards on an annual basis. This reform will impose a significant new regulatory burden on RFSPs which will need to be in a position to evidence the grounds on which they have concluded they are satisfied with any such certification. The Heads of Bill envisages that the CBI will issue regulations to:

- require RFSPs to adopt fitness and probity policies and procedures to ensure that persons in CFs meet the appropriate standards;
- require RFSPs to carry out specific due diligence checks on persons in CF and PCF roles;
- specify formal requirements of the certification regime, including the period of validity of the certification; and
- specify requirements for firms in relation to the reporting of information to the CBI.

INVESTIGATION OF FORMER CF OR PCF ROLE HOLDERS

The Heads of Bill provide for the CBI to have the power to conduct an investigation regarding the fitness and probity of a person who previously performed a CF or PCF role but no longer does so, where it suspects the individual poses a danger to consumers or the financial system. A time period during which such an investigation may take place will be specified in the Bill, however the Heads of Bill outline that an exception will be included for situations where the CBI is of the opinion that there is a reason to suspect that the person has:

- engaged in serious misconduct in relation to a regulated firm;
- misled the CBI;
- failed to disclose certain required information to the CBI;
- failed to comply with an evidentiary notice; or
- been convicted of certain serious criminal offences relevant to the person's honesty and integrity.

**FINANCIAL HOLDING
COMPANIES TO FALL
WITHIN THE FITNESS AND
PROBITY REGIME**

The Heads of Bill provide for extension of the F&P regime to directors and staff of ‘Financial Holding Companies’ established in Ireland.

**ECB COMPETENCE
REGARDING PCFS
IN SIGNIFICANT
INSTITUTIONS**

In order to comply with requirements under the Single Supervisory Mechanism, the Heads of Bill provide for the ECB (rather than the CBI) to have competence for PCF assessment of key function holders in ‘Significant Institutions’.

STREAMLINED ENFORCEMENT PROCESS

The Heads of Bill provide for removing the “*participation hurdle*” in current legislation which requires the CBI to first prove a contravention of legislation by a RFSP before it can take action against an individual. The Heads of Bill also provide for numerous other amendments to the administrative sanctions procedure (“**ASP**”).

**EXTENSION OF THE CBI
ENFORCEMENT PROCESS**

The Heads of Bill extend the scope of the CBI’s powers of investigation and enforcement against individuals performing CF and PCF roles. The Heads of Bill also abolish the concept of a “*person concerned in the management*” of a RFSP thereby removing the requirement for a “*participation link*”, which requirement has been identified by the CBI as hindering the CBI in holding individuals to account and promoting a culture of individual accountability.

Also, the Common Conduct Standards (which will apply to persons performing CF or PCF roles) and the Additional Conduct Standards (which will apply to persons performing PCF roles) and the duty of responsibility under SEAR will each be directly enforceable against individuals, enabling the CBI to pursue individuals directly for their own misconduct.

MONETARY SANCTIONS FOR INDIVIDUALS

The Heads of Bill outline that when imposing a monetary sanction on an individual for a breach of the Conduct Standards, the CBI must ensure that the sanction is effective, proportionate and dissuasive, and that in assessing the appropriate sanction it has taken into account all relevant circumstances, including:

- the nature, seriousness and impact of the contravention;
- the conduct of the individual during and after the contravention;
- the relevant previous record of the individual; and
- the financial position of the individual.

The Heads of Bill empower the CBI to publish guidelines in respect of the determination of the appropriate sanctions and the level of the monetary penalty which may be imposed on a person.

REMAINING CHALLENGES RELATING TO ENFORCEMENT ACTION AGAINST INDIVIDUALS

Further challenges can be expected in the path to simplification of regulatory enforcement action against individuals and the move towards greater individual accountability. The Department of Finance stated that it worked closely with the Attorney General in preparing the Heads of Bill and that *“the additional powers that will be provided to the Central Bank are significant and, in drafting these Heads, care has been taken to adopt the correct balance between these powers and the protection of individuals’ constitutional rights.”* Several provisions of the Heads of Bill appear designed to alleviate constitutional concerns around individual enforcement actions. For example, the Heads of Bill provide that the CBI shall publish particulars relating to the resolution of an administrative sanctions procedure with a person/entity only *“as it thinks appropriate in the circumstances”* and that the decision to publish shall be subject to consideration of professional secrecy, confidentiality and/or unfair prejudice to a person’s reputation. However, where individuals are subjected to individual regulatory enforcement action which may have a severe impact on their reputation, livelihood and career prospects in the regulated financial services sector, challenges on constitutional grounds can be expected and it remains to be seen whether the proposed legislation, including the broad powers to be assigned to the CBI, strike the correct balance between the promotion of greater individual accountability and the constitutional rights of individuals.

NEXT STEPS

The Central Bank (Individual Accountability Framework) Act will be drafted on the basis of the Heads of Bill after any applicable pre-legislative scrutiny is concluded. The CBI has confirmed that it will launch a public consultation on the implementation of the Individual Accountability Framework once the legislation has been passed.

While finalising the legislation and consulting on and finalising the terms of related CBI regulations and guidance to implement the individual accountability framework may take some time, the publication of the Heads of Bill and the prospective launch of a CBI consultation on individual accountability should put individual accountability firmly on the agenda of all RFSPs and their PCFs and CFs.

All RFSPs should familiarise themselves with the Heads of Bill, as a reliable indicator of the direction in which the Individual Accountability Framework will be taken. RFSPs should also

monitor the passage of the legislation and the CBI's response, in particular through its consultation process.

The key to compliance with the individual accountability framework is to ensure buy-in from senior management and a joined-up approach across relevant functions (including the Senior Management Team, Legal, Compliance and HR) to build-on the culture of compliance in the RFSP and to ensure that this regulatory implementation project is prioritised consistently throughout the firm.

RFSPs can also prepare themselves by mapping existing roles and responsibilities, embedding the conduct standards outlined in the Heads of Bill, reviewing of employment contractual documentation with a view to timely updates and reviewing and updating of fitness and probity policies and procedures and staff training programmes.

HOW CAN WILLIAM FRY ASSIST YOU?

William Fry's financial regulation team has vast experience:

- Advising on regulatory enforcement action against firms;
- Advising on regulatory enforcement action against individuals;
- Assisting witnesses in advance of regulatory enforcement interviews with the CBI;
- Working with clients to ensure compliance with the CBI's fitness and probity regime including:
 - › Drafting and reviewing fitness and probity policies and procedures;
 - › Preparing candidates for fitness and probity interviews with the CBI; and
- Advising firms on preparing for SEAR and the implementation of the individual accountability framework.

CONTACT US

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