

Individual Accountability & SEAR: An Implementation Action Plan

March 2023

INTRODUCTION

On 9 March 2023, the Central Bank (Individual Accountability Framework) Act 2023 (the **Act**) was signed into law by the President of Ireland.

The Act aims to increase levels of individual and personal accountability and responsibility in the Irish financial services sector and provides a legislative basis for the introduction, by the Central Bank of Ireland (the **Central Bank**), of an individual accountability framework comprising a Senior Executive Accountability Regime (**SEAR**), standards of conduct for regulated financial service providers (**RFSPs**) and individual function holders in those RFSPs as well as increased enforcement powers for the Central Bank which will allow for the direct pursuit of individuals for contraventions of the conduct standards or responsibilities under SEAR. The individual accountability framework will also include enhancements to the existing regime which sets the standard for the fitness and probity of individuals performing controlled functions and pre-approval controlled functions within RFSPs.

On 1 March 2023, when the legislation was passed by Dáil Eireann, the Minister for Finance, Michael McGrath, stated that all sections of the Act will be commenced as soon as possible, except for sections on SEAR, the conduct standards and the fitness and probity certification requirement respectively. These sections are expected to commence following completion of the Central Bank of Ireland's public consultation. The Minister also stated that the Act will be fully implemented in 2023.

BACKGROUND

In 2018, the Central Bank published a Report on Behaviour and Culture of the Irish Retail Banks (2018 Report) outlining cultural failings within the banking sector as a significant contributory factor to the financial crisis.

To address these failings, the 2018 Report outlined the four pillars of an individual accountability framework, including:

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

In July 2021, the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 (**Heads of Bill**) was published.

A year later, in July 2022, the Department of Finance published the Central Bank (Individual Accountability Framework) Bill 2022 (**Bill**). The main features of the Bill were aligned with the Heads of Bill, which originated from the 2018 Report.

INDIVIDUAL ACCOUNTABILITY REGIME

The Act provides a framework for the individual accountability regime whilst conferring broad powers on the Central Bank to prescribe, through implementing regulations or guidance, measures to strengthen and enhance individual accountability in the financial 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**).

Now that the Act has been signed into law, the Central Bank's individual accountability framework consultation on draft implementing regulations and guidance is expected to begin.

We have been helping many of our clients for some time to prepare for the individual accountability regime. In this updated and consolidated version of William Fry client publications on this topic taking account of the enactment of this legislation, we set out key actions to benchmark your firm's compliance action plan under each of the four pillars of the individual accountability framework.

1. CONDUCT STANDARDS

The three categories of conduct standards

The three categories of conduct standards are business conduct standards, common conduct standards and additional conduct standards.

I. BUSINESS CONDUCT STANDARDS

The **business conduct standards** are intended to create a single benchmark of conduct that all RFSPs must meet, regardless of sector.

Business conduct standards applicable to all RFSPs 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

The **common conduct standards** will apply to all persons performing controlled function roles (**CFs**) in RFSPs.

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.

III. ADDITIONAL CONDUCT STANDARDS

The **additional conduct standards** will apply (in addition to the common conduct standards) to more senior persons, namely, those performing pre-approval controlled function roles (PCFs) and others who perform any other function by which they exercise significant influence over the conduct of the firm.

Persons subject to additional conduct standards must take any steps that are reasonable in the circumstances to take 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:

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- 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 will issue further guidance on its expectations regarding compliance with common conduct standards and additional conduct standards as part of the individual accountability framework consultation.

An RFSP must (to ensure compliance with the common conduct standards and additional conduct standards) notify CFs and/or PCFs of the conduct standards applying to them and provide training to such persons so that they have appropriate knowledge of the conduct standards applying to them.

A firm must also establish and give effect to policies within the organisation on how common conduct standards will be integrated into its business.

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 Central Bank's Administrative Sanctions Procedure (**ASP**).

Firms

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

STANDARDS FOR INDIVIDUALS AND THE DUTY TO TAKE STEPS

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.

The Heads of Bill provided for a less onerous threshold than the Act in respect of the duty to take steps (i.e. that it would be a defence if the individual could show that they acted "*reasonably in all the circumstances of the case*" as against a requirement in the Act that an individual take "*any steps that it is reasonable in the circumstances for the person to take*").

Material issues to be clarified

- **Regulatory guidance regarding common conduct standards and additional conduct standards**

The legislation provides that the Central Bank must prepare guidelines, for individuals who are 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. We expect further guidance to issue from the Central Bank in this regard and such guidance may provide greater clarity on how these individuals will be expected to meet the standards applicable to them.

- **Regulatory guidance regarding the roles which are in scope for additional conduct standards**

The legislation 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”. The precise scope of that concept requires clarification for consistent application of the additional conduct standards. For example, the Head of Legal of a firm is not a PCF role but it is not clear whether such role holder could be deemed to “exercise significant influence over the conduct of the firm” thereby coming within the scope of the additional conduct standards.

ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING THE CONDUCT STANDARDS

DEVELOP A POSITIVE, JOINED-UP INTERNAL COMMUNICATIONS STRATEGY	It is vital that firms ensure that staff feel the firm is prepared and will support them as they adapt to the individual accountability regime. This requires that firms adopt a positive internal communications strategy with input from senior management and all relevant stakeholder functions and that firms avoid a siloed approach.
CONDUCT INITIAL TRAINING	Conduct 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.
IDENTIFY REQUIRED SUPPORTS	Consider what ongoing supports staff are likely to require 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; adequacy of systems for tracking and communicating updates to regulatory requirements/guidance).
IDENTIFY HOW CONDUCT STANDARDS WILL BE EMBEDDED ACROSS THE FIRM	Consider how policies, procedures and documentation will need to be amended 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).
REVIEW WHISTLEBLOWING PROCEDURES	Review whistleblowing procedures to ensure that they capture whistleblowing relating to alleged breaches of the conduct standards.
REVIEW D&O COVER	Review D&O cover to ensure it makes appropriate provision for liabilities of individuals for breach of the conduct standards.

2. FITNESS AND PROBITY REFORMS

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 standards of fitness and probity for individuals performing CF roles and PCF roles (the **F&P Standards**).

The Central Bank has also published FAQ and guidance documents on fitness and probity to help firms and individuals performing CF and PCF roles to comply with their respective fitness and probity obligations.

Fitness and probity reforms introduced by the Act apply to all RFSPs.

Breaches of fitness and probity requirements are enforceable against RFSPs through the Central Bank's ASP.

Key reforms to fitness and probity under the Act include:

SCOPE

In addition to RFSPs, financial holding companies, mixed financial holding companies, insurance holding companies and investment holding companies established in the State fall within scope of the fitness and probity regime following enactment and commencement of the legislation.

AUTHORISATION

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

CERTIFICATION

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

- i. cannot be granted unless the firm is satisfied on reasonable grounds that the person meets required fitness and probity standards;
- ii. must be revoked if the firm is no longer so satisfied.

Agreement to comply with fitness and probity standards must also be received in writing by the firm from the person concerned.

The Central Bank will have the power to:

- i. make regulations requiring firms to furnish reports and/or certificates to the Central Bank as to relevant persons' fitness and probity; and
- ii. prescribe specified formats and periods of validity for fitness and probity certificates, as well as procedures, systems and checks in relation to the giving or revocation of such certificates and the form of a compliance agreement to be given by the holder of a CF.

INVESTIGATION

There will be a six-year look back limitation on a Central Bank investigation into a person's fitness and probity. Individuals under investigation must be kept informed of the progress of an investigation and certain information will be notifiable to them.

The Act provides for (i) matters to be considered by the Central Bank before preparing a report of a fitness and probity investigation and (ii) the right of a person who is the subject of a fitness and probity investigation to make submissions on the report before it is finalised.

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.

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) unless it is extended by the High Court to a maximum of twenty-four months.

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, such that the High Court would make a different decision on whether to confirm the notice.

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).

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

CONDUCT A FITNESS AND PROBITY GAP ANALYSIS	Review existing fitness and probity policies, procedures and practices and conduct an initial gap analysis against the proposed fitness and probity reforms and the Central Bank's expectations as communicated in recent Dear CEO letters.
REVIEW EMPLOYMENT CONTRACTS	Review the employment contractual framework and HR policies to identify amendments needed to adequately cater for fitness and probity.
REVIEW APPRAISALS PROCEDURES	Put appropriate structures around performance appraisals in place to take account of enhanced obligations of RFSPs including as to reporting to the Central Bank.
REVIEW D&O POLICIES AND DOCUMENT RETENTION	Consider D&O insurance run off cover, file access and document retention periods in respect of persons who perform or previously performed CF or PCF roles in the firm.

3. SENIOR EXECUTIVE ACCOUNTABILITY REGIME (SEAR)

SEAR will place obligations on in-scope RFSPs and senior individuals in those firms, which are designed to promote greater transparency about responsibility for different areas of the business and to facilitate holding senior individuals to account for matters falling within their area of responsibility.

The SEAR regime will be implemented through regulations issuing from the Central Bank.

SCOPE

Unlike the other three pillars of the individual accountability framework, which will generally apply to all regulated firms from the outset, we expect that SEAR will only apply to a subset of firms in its initial phase, including:

- Credit institutions (excluding credit unions).
- Insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings and insurance SPVs).
- MIFID investment firms which underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client monies or client assets.
- Third country branches of any of the above.

In April 2022, the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach recommended that the scope of SEAR should be extended to other RFSPs within one year of the commencement of the individual accountability framework.

RESPONSIBILITIES

In-scope firms will be required to set out responsibilities applicable to particular senior executives.

These include:

- **Inherent responsibilities** are responsibilities inherent to the particular PCF role.
- **Allocated responsibilities** are responsibilities which must be allocated to a PCF role holder.

STATEMENTS OF RESPONSIBILITIES

A statement of responsibilities for each PCF role, reflecting their responsibilities, should be prepared by firms.

IMPLEMENTING ARRANGEMENTS AND DOCUMENTATION

A RFSP 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.

MANAGEMENT RESPONSIBILITY MAP

In-scope regulated firms must prepare a document which maps the responsibilities of all PCFs and shows governance arrangements regarding the board, board committees and any other decision-making fora as well as showing the reporting lines of PCFs (both within the regulated firm and across its group where applicable).

The management responsibility map should be an accessible document which clearly shows the Central Bank which PCF is responsible for each area of responsibility without leaving any gaps. It is likely to be required to be a standalone document without cross-references to any other document.

The finer detail on SEAR including the Central Bank's requirements relating to responsibilities for RFSPs and individuals, statements of responsibilities and management responsibility maps will be set out in Central Bank regulations, draft versions of which will be issued as part of the consultation.

DUTY OF RESPONSIBILITY UNDER SEAR

Each PCF with inherent responsibilities or allocated responsibilities (within an in-scope firm) will have a duty to take any steps that it is reasonable in the circumstances for the person to take to secure that, while that person has that responsibility, the aspect of the business for which they are responsible, is conducted so as to avoid contravention by it of its obligations under financial services legislation.

MATERIAL ISSUES TO BE CLARIFIED

We await publication of the Central Bank consultation to see how the draft regulations and guidelines might close any gaps or open issues relating to the following:

- **Duty of responsibility under SEAR** - detailed regulatory guidance will be required on how individuals are expected to comply with the duty of responsibility under SEAR.
- **List of responsibilities** - The Central Bank has not yet provided detail on the information required in respect of the inherent responsibilities or allocated responsibilities applying to PCFs.
- **Statement of responsibilities** - The Central Bank is yet to provide detail on its requirements (e.g. the form and content) for these statements.
- **Scope of responsibilities** - The scope of responsibilities held by Non-Executive Directors remains to be clarified.
- **Management responsibility map** - The Central Bank is yet to provide detail on its requirements (e.g. the form and content) for the management responsibility map.

ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING SEAR

IDENTIFY POTENTIAL SENIOR INDIVIDUALS	Identify the potential population of senior individuals in the Firm with reference to the firm's existing population of PCFs.
CONDUCT PROVISIONAL SCOPING, MAPPING AND GAP ANALYSIS	Seek input from existing PCFs on initial scoping and mapping of responsibilities and a preliminary gap analysis. A holistic, collaborative approach will be important here, particularly as complexities are likely to arise where different individuals/ functions in the firm contribute to the performance of an area of responsibility.
PREPARE PRELIMINARY DRAFT STATEMENTS OF RESPONSIBILITIES AND MANAGEMENT RESPONSIBILITY MAPS	Review outputs from the initial scoping and mapping of responsibilities and preliminary gap analysis and prepare preliminary working drafts of statements of responsibilities for each PCF and of a management responsibility map.
CONSIDER INTERACTION WITH EXISTING GOVERNANCE ARRANGEMENTS	Consider the interaction with existing management, governance and operational processes such as delegation of authority, third party management and outsourcing arrangements, recruitment etc. Check that terms of reference exist for all existing governance fora.

4. 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.

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 allows for direct enforcement by the Central Bank against an individual for such contraventions.

PERSON CONCERNED IN THE MANAGEMENT

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

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

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

Bank in the first 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.

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.

APPEAL

A finding by the Central Bank 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 the Irish Financial Services Appeals Tribunal but the grounds for such appeal have been narrowed.

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 Irish Financial Services Appeals Tribunal 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.

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.

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.

CLARIFICATION

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 which occurred after the legislation is commenced.

ACTIONS WHICH FIRMS CAN TAKE NOW REGARDING ENFORCEMENT REFORMS

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.
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 “ <i>persons concerned in the management</i> ” of the firm.

NEXT STEPS

Now that the individual accountability legislation has become law, regulated firms should review their plans for implementation of the individual accountability legislation including the conduct standards, fitness and probity reforms, enforcement reforms and (for in scope firms) the senior executive accountability regime/SEAR.

William Fry has been assisting regulated financial service providers with their preparations for the individual accountability regime for some time and now is a good time to engage or re-engage with the William Fry Financial Regulation team.

See our Individual Accountability & SEAR webpage [here](#). We will continue to support firms as the Central Bank draft guidance is published and its consultation is launched.

CONTACT US

For more information, please contact Shane Kelleher, Louise Harrison, Derek Hegarty or any member of the 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 & Investigation
+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
ciaraneherlihy@williamfry.com

**Hilary Rogers**

CONSULTANT
Litigation
+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