

// FINANCIAL REGULATION

Individual Accountability
& SEAR:
Central Bank (Individual
Accountability Framework) Bill 2022

August 2022

INTRODUCTION

On 28 July 2022, the Department of Finance published the Central Bank (Individual Accountability Framework) Bill 2022 (the **Bill**).

The main features of the Bill are aligned with those of the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 (the **Heads of Bill**) which was published on 27 July 2021.

The origins of the Heads of Bill can be found in the Central Bank's 2018 Report on Behaviour and Culture of the Irish Retail Banks (the **2018 Report**). The 2018 Report originally outlined the four pillars of the individual accountability framework (**IAF**) including:

1. conduct standards
2. fitness and probity reforms
3. reforms to simplify regulatory enforcement against individuals
4. the senior executive accountability regime (**SEAR**).

The Explanatory Memorandum to the Bill sets out the purpose of the Bill, namely to confer powers on the Central Bank to strengthen and enhance individual accountability in the financial services sector.

While the Bill contains greater detail on the individual accountability framework, it does not greatly alter the key features of the four pillar structure set out initially in the 2018 Report and expanded on in the Heads of Bill published in July 2021.

There continues to be political impetus to implement this framework as soon as possible. We have been helping many of our clients for some time to prepare for the individual accountability regime.

Some notable features of the Bill examined under each of the four pillars of the individual accountability framework include the following:

1. CONDUCT STANDARDS

A. STANDARDS FOR BUSINESS

Business conduct standards will apply to all regulated financial services providers (**RFSPs**) regardless of sector. The standards for business are substantially the same as those in the Heads of Bill with the key differences being:

Market integrity – the reference to an RFSP's obligations regarding the integrity of the market, which had been included as a market conduct obligation in the 2018 Report but not mentioned in the Heads of Bill, has reappeared in the Bill.

Dealing with regulators - an RFSP's obligations when dealing with regulators will be expanded in two ways (i) engagement and cooperation with regulators should be in good faith and without delay and (ii) for this purpose regulators will include financial regulation authorities outside the State performing functions comparable to those performed by the Central Bank under financial services legislation.

B. STANDARDS FOR INDIVIDUALS

Common conduct standards will apply to persons performing controlled function (**CF**) roles. Some expected behaviours for each particular standard are set out in the Bill.

Market conduct – The concept of observing proper standards of market conduct, which was included in the Heads of Bill, will include a requirement to conduct operations in compliance with trading venue rules to which the RFSP is subject by law and any market codes that may apply.

Dealing with regulators - The Bill will expand an obligation on CFs under the Heads of Bill to cooperate with the Central Bank in good faith and without delay, to financial regulation authorities outside the State.

Additional conduct standards will apply (in addition to the common conduct standards) to more senior persons, those performing pre-approval controlled functions (**PCFs**) in relation to all RFSPs and others who perform any other function by which the person may exercise a significant influence on the conduct of the RFSPs affairs.

STANDARDS FOR INDIVIDUALS AND THE DUTY TO TAKE STEPS

In relation to common conduct standards and additional conduct standards, breach and enforcement, the Heads of Bill published in July 2021 provided that it would be a defence if the individual could show that he or she acted "*reasonably in all the circumstances of the case*", and it provided a non-exhaustive list of matters that may be relevant to assessing whether a person acted reasonably.

The Bill provides that individuals subject to common conduct standards and/or additional conduct standards shall be required to take "*any steps that it is reasonable in the circumstances for the person to take*" to ensure 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, procedures,
- the extent to which such matter was within his or her control and
- any guidelines published by the Central Bank.

The change in the wording between the Heads of Bill and the Bill - which now refers to a requirement for individuals to take “*any steps that it is reasonable in the circumstances for the person to take*” - may give rise to concerns within the regulated financial services industry that this amounts to raising the threshold to a level that is not dissimilar to the original proposal in the 2018 Report that relevant individuals would be required to take “*all reasonable steps*” and that this is an unduly onerous threshold, particularly if additional detail is not provided about the Central Bank’s expectations regarding what reasonable steps a person performing particular senior management roles is expected to take to show that they meet Central Bank expectations.

2. FITNESS & PROBITY REFORMS

Certification - An RFSP or holding company of an RFSP, will be required not to permit someone to perform a CF unless there is a certificate from the RFSP in force confirming that CF’s fitness and probity. Such a certificate (i) cannot be granted by the RFSP unless the firm is satisfied on reasonable grounds that the person meets required fitness and probity standards and (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 make regulations on the firm’s giving of reports (including certain disciplinary reports) and certificates to the Central Bank. It will also be able to make provision regarding the form and content and period of validity of such a certificate and on procedures, systems and checks in connection with giving or revoking of a certificate and the form and content of a compliance agreement to be given by 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.

Suspension order - Where a person is the subject of a suspension order, the maximum period of the suspension order will be six months (it is currently three months) unless it is extended by the High Court to a maximum of twenty four months.

3. SEAR

General - As previously indicated, in its initial phase it is expected that SEAR will apply to credit institutions, insurance undertakings, certain investment firms and third country branches of these entities and those performing PCF roles in those in-scope firms. Whilst the structures and key features of SEAR as set out in the 2018 Report and the Heads of Bill have not changed (i.e. allocation of responsibilities, statements of responsibilities and management responsibility maps) the finer detail on SEAR is expected to be set out in Regulations to be issued by the Central Bank following the enactment of the Bill.

SEAR AND THE DUTY TO TAKE STEPS

The duty of responsibility under SEAR applies the same threshold (i.e. a requirement for individuals to take "*any steps that it is reasonable in the circumstances for the person to take*", to avoid contravention by the RFSP of its obligations under financial services legislation) as the threshold applicable to individuals under common conduct standards and additional conduct standards (discussed above). The factors to be considered in determining relevant circumstances are also the same as those set out under conduct standards.

As discussed above, the change in the wording between the Heads of Bill and the Bill may give rise to concerns within the regulated financial services industry that this is an unduly onerous threshold, particularly if additional detail is not provided about the Central Bank's expectations regarding what reasonable steps a person performing particular senior management roles is expected to take to show that they meet Central Bank expectations.

4. ENFORCEMENT REFORMS

General - Under the Bill, changes are proposed to the Central Bank's Administrative Sanctions Procedure (**ASP**) to change its operation, 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).

Participation Link - Under current legislation, the Central Bank's enforcement powers against individuals are limited to circumstances in which the individual is suspected of having participated in a breach committed by a regulated firm. The Central Bank cannot currently pursue individuals directly for suspected breaches in their own right. As expected, the "*participation hurdle*" will be removed by a series of amendments provided for in the Bill. This will allow for direct enforcement by the Central Bank against an individual, under the ASP. Relevant amendments to the Central Bank Act 1942 replace the concept of a person concerned in the management of a regulated firm with the concept of a person performing 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 breach it will commence an investigation under the ASP. The Bill provides that the person to whom an investigation relates will be kept informed of its progress. Equally, where an investigation is discontinued, reasons must be provided by the Central Bank. Investigation reports must be prepared and a person who is subject to such investigation will have the right to make submissions on the draft report.

High Court Confirmation - In a notable departure from the current position, High Court confirmation of settlement will be required under proposed amendments to the Central Bank Act 1942. The Bill also provides that the High Court shall confirm the sanction, 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 existing ASP process, which does not require any such court confirmation.

Judicial Review and Appeal - The Bill provides for amendments to 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 Bill 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.

5. OTHER

Privilege - the treatment of privileged legal material will be clarified to permit the provision of information to the Central Bank for specific purposes without waiving privilege.

Standard of proof - the standard of proof required in relation to a finding by the Central Bank on whether a person has committed a prescribed contravention or participated, while performing a relevant CF, in the commission of a prescribed contravention is on the balance of probabilities.

Holding companies - will be brought within the scope of the IAF and individuals in charge of those companies will be subject to the fitness and probity regime and the ASP.

Timing & Commencement - The Government will debate the Bill in Dáil Eireann after it resumes in mid-September 2022. It is possible that enactment of the legislation will happen by the end of 2022, followed by Central Bank publication of implementing regulations and guidelines for public consultation. Given the steps involved, we expect the regime to come into force in mid to late 2023, at the earliest.

CONCLUSION

William Fry's experienced multi-disciplinary IAF/SEAR team is already helping clients to prepare for implementation of IAF and SEAR. Please visit our dedicated [Individual Accountability & SEAR](#) web page for our analysis and commentary to date.

For more information, please contact any member of the [Financial Regulation Unit](#) listed or your usual William Fry contact.

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