Consultation Response

CBI Consultation Paper 153 'Enhanced Governance, Performance and Accountability in Financial Services'

13 June 2023

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the Central Bank of Ireland (CBI) **CONSULTATION PAPER 153 'ENHANCED GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY IN FINANCIAL SERVICES'** ("the consultation"). AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

Overall, AFME welcomes the intention of the Individual Accountability Framework (IAF) and appreciates the work that the CBI has done on the design of the regime. Our response raises a number of points where amendments or further clarification would be appreciated. In particular:

- We are strongly concerned with the proposed implementation timings. Firms will have very little time from the publication of final rules (especially given the forthcoming Sanctions and Consumer Protection Code consultations) to implement policies and train staff appropriately. Additionally, the interplay between the Conduct Standards and the rest of the IAF needs to be considered. We recommend that the two implementation dates are aligned at 1 July 2024.
- We suggest some changes to Prescribed Responsibilities which will make them easier to apply within the differing structures of firms, including that the CBI reconsiders its prohibition on splitting responsibilities. This would support firms in allocating responsibilities according to their own structures and business models.
- In relation to Conduct Standards, we suggest that Statements of Responsibility might be useful for those performing Controlled Functions (CF) and that clarification of the applicability of the Standards to delegates of CF or Preapproved Controlled Functions (PCF) individuals would be appreciated.
- There may arise some competitive disadvantage for some of the international banks in Ireland from the extraterritorial nature of the SEAR provisions. This is particularly due to the lack of equivalent regimes applying to PCF role holders for banks headquartered in other EU jurisdictions. This may appear in a corresponding effect on talent attraction. Clarity on enforcement expectations and proportional application will help to alleviate this.

- Further guidance on the delineation between the Fitness and Probity standards and the Conduct Standards would be welcome.
- Some clarifications of the approach to disciplinary actions would be appreciated, including the applicability of relevant employment law and the CBI's planned approach to using the information it will receive.

Questions

Q1. What are your views and comments on the draft SEAR Regulations and related draft guidance?

We consider that the proposed implementation timeline is highly ambitious and request that the full suite of measures should not come into force before 1 July 2024. This is based on the following factors:

- Given the consultation closing date of 13 June, final rules cannot reasonably be expected until the autumn, which gives firms very little time to finalise their implementation before the current proposed implementation date of 31 December 2023 for the first phase of the IAF.
- The consultation on the CBI's proposed changes to the Administrative Sanctions Procedure (ASP) has yet to be released, meaning that final rules in this area could be released even later. Further to this, any revision to the Business Standards will not be visible until the consultation relating to the Consumer Protection Code is issued which is not expected until Q4 2023. On the current schedule, we are concerned that firms will be designing their SEAR implementation without these key details about how the IAF will be enforced.
- The application of the Conduct Standards and the expansion of the Fitness and Probity Regime from 31 December 2023 will be challenging, as the date coincides with year-end for many firms, reducing the resources available for implementation of the new rules.
- Furthermore, there appears a disconnect between the application of the Conduct Standards from 31 December 2023 and the allocation of responsibility for embedding the conduct standards throughout the firm (PR3) from 1 July 2024. We feel the application of the Conduct Standards and SEAR are intrinsically linked and the deadline of the 1 July 2024 should be applied for both elements.
- Finally, the short deadline for the application of the Conduct Standards means that employee training in this area may have to occur off-cycle, as there will not be sufficient lead time for firms to include it in their existing training programmes.

Therefore, we suggest that application for all aspects of the IAF should be harmonised at 1 July 2024.

In relation to the CBI's proposal that the IAF will be reviewed after three years, we suggest that there may be elements of the IAF that would merit review with affected firms within that timeframe. In particular, we suggest that the CBI discusses with firms the guidance on reasonable steps, as it should be apparent within the first year whether this is proving helpful or requires some revision. This could be in the form of informal workshops with the industry, rather than a full consultation.

We acknowledge that the Central Bank has committed to reporting to the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach within one year of commencement of the Act in terms of a plan of approach in relation to the possible phased extension of SEAR to other firms/sectors. However, we would also welcome further clarity on the CBI's expectations in relation to firms not yet in scope of the full IAF. For example, at the point at which the Conduct Standards apply, not all firms will be mandated to allocate PR3.

Furthermore, there may be individuals performing roles that would be PCFs if in a different category of firm (for example, branch managers at incoming EEA branches). Additional detail on the CBI's approach to such examples would be appreciated, particularly in light of the statements in the CP encouraging firms to work within the "spirit" of the regime. An indication of the timing of any planned expansions to the scope of obligations, would also be welcome.

Finally, we would appreciate further guidance on how the IAF will operate in relation to individuals based abroad. There will be practical and legal challenges common to all firms to whom this will apply, for which a harmonised approach would be beneficial.

Q2. Do you agree with our proposed approach to the Inherent Responsibilities?

AFME has no comments in response to this question.

Q3. Do you agree with our proposed approach to the Prescribed and Other Responsibilities?

In the area of financial crime compliance, we suggest that it may be more practical to split out the role of the Money Laundering Reporting Officer from responsibility for the wider function. For instance, under UK SMCR, 'Money Laundering Reporting Function' (Senior Management Function "SMF" 17) is separate from FCA Prescribed Responsibility 3 "Responsibility for the firm's policies and procedures for countering the risk that the firm might be used to further financial crime". The latter may either be allocated to the Money Laundering Reporting Officer (MLRO) or to another SMF holder who has oversight of the MLRO. This is a helpful distinction, as the MLRO and the operational head of financial crime compliance are often separate individuals.

On responsibility for a firm's culture, we note that PR4 is to be allocated to a Non-Executive Director. While the Board should influence the overall culture of the firm as part of its "tone from the top", we are concerned that, in practice, elements of PR4 will need to be delegated to the management of the firm, for example to the CEO. Clarity on the CBI's expectations in this area would be welcome.

In relation to PCF16 "Branch Manager of branches established outside the State", we note that in some host countries, individuals are subject to employment or data privacy laws which restrict the collection or sharing of data. Further guidance would be welcome on the practical application of the IAF in such situations.

Q4. Do you agree with our proposed approach to the sharing of roles and responsibilities including job sharing?

While AFME supports the CBI's approach to job sharing, we are concerned by the blanket prohibition on splitting responsibilities. As noted in our response to Q3 above, there are areas where, as currently drafted, the inability to split responsibilities is likely to prove problematic.

We also ask whether the CBI intends to give further guidance for PCFs that work a reduced working week.

Q5. Do you agree with our proposed approach to the inclusion of INEDs/NEDs within scope of SEAR?

We welcome the CBI's consideration of the potential impact of the new requirements on the recruitment of Non-Executive Directors, including Independent Non-Executive Directors (INEDs/NEDs). Noting that many jurisdictions, including other EU Member States, do not have a comparable approach to individual (as opposed to collective) management accountability, we are concerned that this could be a disincentive for overseas individuals considering a role at an Irish firm.

While the Guidance recognises that NEDs and INEDs do not manage a firm's business in an executive capacity, the Prescribed Responsibilities outlined in the guidance extend beyond the responsibilities expected of NED's and INED's under SMCR by prescribing responsibilities to them that one would typically allocate to the CEO of the Firm. For example, PR6 notes that "Responsibility for overseeing the development of, and embedding positive ethical culture, consumer protection and conduct risk into, the firm's remuneration policies and practices." should be allocated to a NED/INED. Although the Firm acknowledges that NEDs and INEDs play an important role with respect to challenge, governance and oversight of the activities of the Firm we feel that allocating responsibilities such as this to an INED/NED is stepping into executive management territory.

Q6. Do you agree with our proposed approach to the Statements of Responsibilities?

The guidance sets out the expectation that firms retain a record of Management Responsibility Maps (MRMs) and Statements of Responsibility (SoRs) for each PCF holder for a period of 10 years but also notes that firms retain SoRs for former PCF holders for a period of 10 years after that person cased to be a PCF holder in the firm. We would welcome clarification on the latter expectation as to whether the Central Bank expects firms to maintain a record of all SoRs for former PCF role holders for a period of 10 years or if that record is limited to the last SoR in place for that former PCF holder.

Q7. Do you agree with our proposed approach to the Management Responsibilities Map?

AFME has no comments in response to this question.

Q8. Do you agree with our proposed approach to submission of documents?

AFME has no comments in response to this question.

Q9. Do you agree with our proposed approach to outsourcing in the context of SEAR?

Further guidance on outsourcing would be appreciated by industry. We request clarification, where a Firm uses an outsourcing exemption, as to whether the Firm should classify the individual in the outsourced role as holding a Controlled Function irrespective of the overall responsibility for that role being documented on the SoR of the individual who is ultimately responsible for it within the firm.

If a Firm were to outsource to a 'service company' for example would responsibility for that arrangement lie solely with the individual who has been allocated the PR21 and or PR36?

Q10. Do you agree with our proposed approach to reasonable steps in respect of SEAR and the Conduct Standards?

We suggest that it would be helpful for individuals performing CFs to have Statements of Responsibility, against which they could demonstrate their performance of reasonable steps. This would give such individuals the same level of comfort as PCF holders in assessing whether they are adequately discharging their obligations. Furthermore, this demonstrates the linkage between SEAR and the Conduct Standards, relating to our concern in Q1 above about the implementation timeline.

Further to the requirement to be able to document the reasonable steps an individual takes with respect to their responsibilities, under the Conduct Standards there is a requirement to ensure that there is effective oversight of any delegation of responsibilities. The Conduct Standards apply to those who hold a CF/PCF

position. Therefore, should they deem it necessary to delegate any of their responsibilities, would the individual taking on the delegation be then classified as holding a Controlled Function? If they were not to be classified as holding a Controlled Function, then the Conduct Standards would not be applicable to them which we imagine was not the intention of the IAF.

Q11. Does the guidance assist you in understanding the Duty of Responsibility and the non-exhaustive list of factors to be considered with regard to reasonable steps?

The guidance appears generally helpful. However, as noted in our general comments under Q1 above, we suggest that the CBI considers having dialogue on this element of the guidance with the industry sooner than the proposed three-year review of the full IAF.

Q12. What are your views and comments regarding the guidance on the Common Conduct Standards and Additional Conduct Standards?

First, regarding interaction between F&P Standards and Conduct Standards, the CP notes at Sections 4.10 and 4.11: *"Conceptually, there is overlap in the F&P Standards and the Common Conduct Standards that will apply to individuals. For example, both sets of standards include requirements in relation to honesty and integrity… However, the purpose of the F&P Standards is different to the purpose of the Conduct Standards."* Section 2.9.3 of the CP provides that *"The F&P Regime addresses the suitability of individuals to fulfil relevant roles. The SEAR is about their responsibilities while performing those roles."* We consider that it is still unclear how exactly the two regimes are to interact.

Although the Guidance states that the regimes service different purposes, there is a significant overlap between their applicability on an ongoing basis. We consider that the application of similar, but not identical, standards across two regimes may lead to confusion and would request additional clarification from the Central Bank as to the circumstances in which each of the regimes will in practice apply. We note the Central Bank's statement at 4.14 of the CP which provides that an individual may breach a conduct standard but still comply with the F&P Standards and vice versa. It is difficult to think of any scenario in which, for example, a breach of the conduct standard to act with due skill, care and diligence would not amount to a breach of F&P Standard requiring competent and capable conduct. Further guidance would be helpful in this regard.

Second, Section 5.3.6 of the CP provides that the introduction of the IAF does not alter the concepts of collective responsibility shared by directors as board members, and collective decision-making, which is dependent on the appropriate contributions of individual members of senior management in order to be robust. The CBI notes that expectations of individuals have not changed and that it is important to ensure that collective decision-making is not negatively impacted as a result of an increased focus on individual responsibilities. The CP also requires that where an individual considers that a decision may not be in the best interest of customers, following appropriate and effective challenge, they should take appropriate follow-up action, including reporting to relevant regulatory bodies where required. We consider that it would be helpful to be provided with more guidance around how firms can continue to implement collective decision-making while recognising the impact that the increased focus on individual responsibility and requirements to make reports to the Central Bank will have on how boards interact in practice.

Third, the Guidance does not provide direction with regards to the application of CF1 with respect to individuals who exercise significant influence on the conduct of a firm's affairs. Further guidance is sought in circumstances where a PCF delegates responsibilities to an individual who is not a CF and does not fall within the current category of CF's. For instance, would these individuals be classified as CF1s? Do they meet the definition of significant influence? What is the definition of significant influence? If the delegate cannot fall

within any of the PCF categories, this means they will not be subject to the Common Conduct Standards or the F&P requirements, which can pose a significant risk for PCF holders and the firm as a whole.

Fourth, we refer to our response to Q1, where we note that for some firms the Conduct Standards will apply even though SEAR does not. Further guidance on how this should be approached in practice would be welcome. For example, is there an expectation that firms will appoint relevant PCFs despite not being required to do so.

Finally, it would be useful to provide more detailed guidance on the types of scenarios in which the CBI would expect an individual to make a report in respect of *"any information of which the Bank would reasonably expect notice in respect of the business of the regulated financial service provider"*. At present the CBI has stated in the Consultation that individuals are expected to have the 'expertise to recognise when' the information is something the Central Bank would expect notice of. Further guidance would help individuals understand what exactly is expected of them and would help avoid over- or under-reporting.

Q13. What are your views and comments on the guidance in relation to obligations on the firm in respect of Conduct Standards?

AFME has no comments in response to this question.

Q14. Do you agree with our proposed approach to temporary appointments within scope of SEAR and the Conduct Standards?

We would welcome clarification on the CBI's definition of "temporary" and suggest that it should be a significantly long period to accommodate an individual's departure plus the typical notice period of a new hire. On this basis, we would recommend that a temporary appointment is no less than three months, ideally longer. We would also welcome greater clarity in respect of events that qualify for "temporary" assignments. The need for temporary appointments does not arise exclusively in exceptional circumstances as it can occur due to sick leave, parental leave, bereavement leave, sabbaticals etc. In the interest of diversity and inclusion, it would be helpful to provide greater clarity in this regard.

Q15. What are your views and comments on the draft Certification Regulations and related guidance?

Firms are required to maintain all information collected in compliance with its obligations under the Certification Regulations for minimum of 6 years. However, data relating to SoRs, and MRMs must be retained for 10 years. Is it the CBI's intention to increase the requirement to hold certain data from 6 years to 10 years to align the timelines?

Q16. Do you agree with our proposed approach to roles prescribed as PCF roles for holding companies in the draft Holding Companies Regulations?

AFME has no comments in response to this question.

Q17. Do you agree with our proposed approach to reporting of disciplinary actions?

Under the Certification Regulations, the CBI imposes a legal obligation on firms to report disciplinary actions arising from breaches of the Conduct Standards to the CBI. Although the guidance notes that a 'disciplinary action' in

relation to an individual means the issuing of a formal written warning or the suspension/dismissal of the individual or the reduction or recovery of any of the individual's remuneration, it is not clear how this obligation marries with the legal obligations under employment law.

Furthermore, the CBI expects firms to notify them of instances where disciplinary action has been taken prior to any appeal being heard or concluded. We would like to understand how the CBI will treat information shared in relation to disciplinary action taken against an individual who successfully appeals that decision. It is our view that such information originally shared with the CBI should be removed from the CBI's records.

The Guidance sets out the expectation that firms notify the CBI of any disciplinary action taken as a result of a breach of a Conduct Standard as soon as practicable and in any case, within 5 business days from when the disciplinary action has been concluded. Such notifications should include details of any appeal by the individual. It is standard practice to allow up to five days for an individual to appeal the conclusion of a disciplinary action. We would ask the CBI to consider extending the timeline expected to notify the CBI to allow due process to conclude and allow an individual's right to appeal prior to any notification to the CBI.

Is it the CBI's intention that Firms inform them that formal disciplinary review is taking place (before the process has been completed) in the event of a PRISM reviews, engagement meetings and/or regulatory inspections overlapping with the disciplinary process or will Firms only be expected to disclose a disciplinary review once concluded and the outcome resulting in disciplinary action being taken? If a Firm notifies the CBI of a regulatory issue and has not had an opportunity to consider if a disciplinary review is required at the time of the notification, does the CBI expect Firms to note this in the notification or can Firms rely on the requirement to issue a report once the disciplinary review has been completed and the outcome resulting in disciplinary action being taken?

Q18. Do you agree with our proposed approach to introducing the Head of Material Business Line role for insurance undertakings and investment firms?

AFME has no comments in response to this question.

AFME Contacts
Louise Rodger
Director, Head of Compliance
louise.rodger@afme.eu
+44 (0)20 3828 2742

Fiona Willis
Associate Director
fiona.willis@afme.eu
+44 (0)20 3828 2739