Central Bank of Ireland

CP153 - Enhanced governance, performance and accountability in financial services Regulation and Guidance under the Central Bank (Individual Accountability Framework) Act 2023

Submission of the Financial Services Bar Association

13 June 2023

Executive summary

A. In Consultation Paper CP 153, the Central Bank of Ireland ("**CBI**") invites submissions in relation to key aspects of the implementation of the Individual Accountability Framework ("**IAF"**), including draft regulations and guidance.

B. The FSBA welcomes the opportunity to comment on the draft SEAR Regulations and draft guidance. While the FSBA's view of the draft regulations and guidance is broadly positive, the FSBA has some concerns which are set out below.

C. As a preliminary and general observation, the FSBA has overarching concerns regarding the legal and regulatory framework which requires consolidation: both as to the Central Bank Acts and individual sectoral measures. The FSBA submits that the standard of accessibility to aim for is that a reasonably informed and diligent individual should be able to identify the applicable legal and regulatory framework by visiting the CBI website, selecting the relevant authorisation types and printing or downloading a tailored rulebook comprising the applicable primary and secondary legislation, codes and guidance. That is not the case at present. The CBI's presentation and exposition of the legal and regulatory framework could be criticised as being fragmented and opaque in several respects. The

FSBA respectfully submits that more structured and focused guidance is required.

D. The condition of the legal and regulatory framework adds to the expense and difficulty of ascertaining the legal rights and obligations of individuals and firms involved in financial services in Ireland. It also raises concerns in relation to the rule of law and the principle of legal certainty. These issues are discussed where relevant in relation to conduct standards.

E. Broadly, the FSBA agrees with the approach in the draft regulations subject to some specific observations.

F. The FSBA submits that the draft guidance in many cases could be more informative and concrete and less subjective and aspirational in order meaningfully to assist an individual seeking to identify their obligations, and their potential exposure to enforcement action.

G. The FSBA is particularly concerned with certain references in the draft guidance which suggest that when applying the legal and regulatory framework in its supervisory, enforcement and disciplinary functions, the CBI is entitled to go beyond the "black letter" of the regulations and apply an unspecified higher standard with "technicalities" and "loopholes" excised. Indeed, the suggestion that the CBI would take enforcement action against individuals who would seek to rely upon the actual law is troubling.

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

Structure and format of the consultation

1.1. The Central Bank (Individual Accountability Framework) Act 2023 (the "**2023 Act")** is complex legislation which introduces far-reaching changes to the Central Bank Act 1942 (the "**1942 Act")**, the Central Bank Reform Act 2010 (the "**2010 Act")** and the Central Bank (Supervision and Enforcement) Act 2013 (the "**2013 Act")**.

1.2. These Acts all interact but have not been formally consolidated. The Law Reform Commission has produced a revised consolidated version of the 1942 Act up to 5 December

2022.[1] The 2010 Act has been revised up to 4 April 2022.[2] The 2013 Act has been revised up to 23 January 2023.[3] The 2023 Act was passed on 9 March 2023. Accordingly, there is no publicly available consolidation of the 1942, 2010 and 2013 Acts which takes account of the 2023 amendments. That is the position in respect of amendments which have been made and commenced by the 2023 Act and those which have been enacted but not yet commenced. The FSBA notes in passing that the Oireachtas debates on the Bill which became the 2023 Act did not have the benefit of a consolidated text.

1.3. The FSBA submits that firms, their employees and directors, and their respective advisers, and the financial services sector generally would benefit from a more accessible framework. There is a pressing need for consolidation of the Central Bank Acts. Pending consolidation, the FSBA considers that the CBI should publish and maintain (unofficial) consolidations of each of the core Central Bank Acts. Certainly, it would be appropriate that the current consultation process would be supported by a consolidated presentation of the underlying primary legislation which is the basis for the draft secondary legislation in the form of draft regulations and the draft guidance.

Context

1.4. The Individual Accountability Framework has significant potential to impact on individuals through an administrative sanctions process under Part IIIC of the 1942 Act ("**ASP**"), other enforcement processes, or disciplinary / gatekeeper action under the 2010 Act.

1.5. In ***Purcell***[4] it was held that the ASP under Part IIIC of the 1942 Act does not involve the administration of justice. This case preceded the decision of the Supreme Court and especially the judgment of O'Donnell J in ***Zalewski***[5] which cautions against the application of the criteria in ***McDonald v Bord na gCon*** [1965] I.R. 217 as a statutory checklist.[6]

1.6. Whether or not the ASP involves the administration of justice or has the indicia of criminal proceedings under Irish law, the FSBA considers that the ASP may in some cases involve a criminal charge for the purposes of the European Convention on Human Rights.

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[1] https://revisedacts.lawreform.ie/revacts/alpha#C – visited 12:04 11 June 2023
[2] https://revisedacts.lawreform.ie/revacts/alpha#C – visited 12:04 11 June 2023
[3] https://revisedacts.lawreform.ie/revacts/alpha#C – visited 12:04 11 June 2023
[4] *Purcell v Central Bank of Ireland* [2016] IEHC 514
[5] *Zalewski v An Adjudication Officer* [2021] IESC 24

1.7. This is to be approached with reference to the criteria identified in ***Engel v the Netherlands***, 1976 (§§ 82-83):

1.7.1. classification in domestic law;

1.7.2. nature of the offence;

1.7.3. severity of the penalty that the person concerned risks incurring.

1.8. Of the ***Engel*** criteria, the most significant is the nature and degree of severity of the potential penalty. The maximum sanction for an individual is a monetary penalty of €1,000,000.[7] The description of the monetary penalty by the CBI as a fine[8] is indeed apposite. A monetary sanction does not function as a disgorgement of profits or gains, nor is it compensatory in nature. The same potential sanction applies in every category of ASP case without any gradation. There is a clear argument to be made that ASP cases could in some cases constitute a criminal charge for the purposes of Article 6 of ECHR.

1.9. The same conclusion arises in relation to Article 47 of the Charter of Fundamental Rights in light of caselaw such as ***Garllsson*** (C-537/16) and ***DB v CONSOB*** (C-481/19) insofar as an ASP case involves the application of European law – such as directly applicable EU regulations.

1.10. It could also be argued that in many cases enforcement action effectively determines the obligations of individuals within the meaning of Article 6.1 ECHR.

1.11. The Convention and requirements of due process require certainty in the law - namely that the content of legal obligations should be reasonably ascertainable by persons affected by it. The FSBA submits that the legal and regulatory framework calls for reflection in light of this standard.

1.12. The FSBA has some criticisms of the material produced by the CBI in relation to the legal and regulatory framework and these are furnished in the response to Question 10.

1.13. The CBI's draft regulations include several necessarily general and subjective statements in the form of conduct standards. The purpose of guidance is to elucidate the regulations and to inform individuals (and their advisers) so that they can order their conduct appropriately.

[7] Section 33AQ(4)(b) of the 1942 Act

[8] see e.g. https://www.centralbank.ie/news-media/press-releases/enforcement-action-the-governor-and-company-of-the-bank-of-ireland-reprimanded-and-fined-100-520-000-by-the-central-bank-of-ireland-for-regulatory-breaches-affecting-tracker-mortgage-customers-29-september-2022

1.14. The FSBA has some concerns in relation to the draft guidance. Some of the draft guidance takes the form of subjective aspirational statements which fall short of illustrating the standard which is under discussion. For example, the section on honesty and integrity addresses the concept of integrity with reference to observations which would do little to assist an individual in understanding whether particular conduct would or might infringe that standard. The FSBA does not consider that the elucidation of the integrity standard as "*doing the right thing … even when no one is watching*" is helpful when it comes to ordering one's conduct or undertaking analysis as to whether a standard has or has not been complied with. Expressing the content of the duty in this way is overly subjective. The incorporation of beliefs into an integrity standard is, with respect, inapt when one is referring to a standard of law which can expose an individual to a fine of €1 million. The FSBA submits that a more specific and concrete discussion of the integrity standard would be helpful. Other examples are discussed in this submission.

1.15. The FSBA notes with particular concern the content on *Cooperating in Good Faith and Without Delay*, which is discussed below in the response to Question 12. The discussion appears principally to relate to responding to requests and requirements of the CBI or other regulators under financial services legislation such as, perhaps, Part 3 of the 2013 Act. The CBI's references to loopholes and technicalities are undeveloped and (with respect) disconcerting. As already noted, an infringement of section 53E(1) of the 2010 Act as amended by the 2023 Act exposes an individual to a fine of €1 million. The question as to whether there has or has not been such an infringement will in many cases be a question of law, or a mixed question of fact and law. It is concerning that the CBI indicates that it proposes to take an adverse view of persons who justify and/or defend their actions with reference to law. Firms, their directors and employees are entitled to defend their position in accordance with the law. An apparent intention to apply primary and secondary legislation with this gloss (i.e. by applying the law with perceived 'loopholes' and 'technicalities' excised) is not consistent with the rule of law, including the principle of legal certainty.

Draft SEAR Regulations

1.16. Subject to the foregoing observations, broadly, the FSBA considers that the draft regulations represent a reasonable approach to specifying responsibilities for the purposes of Part 3A of the 2010 Act.

1.17. The core concepts which are contained in Part 3A of the 2010 Act are those of inherent

responsibilities and allocated responsibilities. Section 53B(1)(a)(ii) envisages that aspects of the affairs of firms will be ***specified*** by regulations made under section 48(2)(ba) of the Central Bank (Supervision and Enforcement) Act 2013 in relation to ***inherent responsibilities***.

1.18. Section 53B(1)(b)(ii) envisages that responsibility for aspects of the affairs of firms will be ***allocated*** in accordance with regulations made under section 48(2) (bc) of the Central Bank (Supervision and Enforcement) Act 2013 in relation to ***allocated responsibilities***.

1.19. The draft regulations make use of these terms and also introduce two further concepts i.e. ***prescribed responsibility*** and ***other responsibility.***

1.20. Quite often, matters required to be identified in secondary legislation are described as to be ***prescribed***. In this case, the language of ***specified*** is used for that purpose and ***prescribed*** is used in the draft regulations to denote a subset of the responsibilities which are ***specified*** which are to be treated in a particular way i.e. which are identified by CBI as required to be allocated to a PCF holder.

1.21. While the intended purpose of identifying ***other responsibilities*** is understandable, it may be that some other term might be preferable given that the phrase “an other” is conventionally elided to “another” which obscures the defined term.

1.22. The terminology and structure of the draft regulations are somewhat technical and could perhaps be more straightforward.

Guidance

1.23. The draft guidance is very long. In some cases, rather extended aspirational statements and “management consultancy” style language could usefully be replaced with more concrete examples.

1.24. The definition of ***allocated responsibilities*** in the Glossary is rather more involved than the definition in the draft regulations. In particular, the words “*in addition to that PCF role holder’s inherent and prescribed responsibilities*” tend to confuse rather than clarify the preceding text which already contains a reference to prescribed responsibilities (“*responsibilities prescribed*…”).

1.25. The term "*area of the business for which the individual was/is responsible*" is somewhat

unwieldy and long. While it may be slightly more accessible than the text which appears in the 2010 Act (Section 53D) draft regulations ("*functions of the person in relation to the regulated financial service provider*"), it might be preferable to adopt a version of the terminology which appears in Section 53D rather than conceiving a new phrase.

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

2.1. Yes. The FSBA considers that the approach to inherent responsibilities is broadly appropriate.

2.2. The FSBA considers that it is apparent that the matters listed in Column 2 of the table in Schedule 1 to the draft regulations "*are responsibilities that are concerned with aspects of a firm's affairs*" and that the quoted text is otiose.

2.3. As drafted, Regulation 4(1) is perhaps open to the reading that all inherent responsibilities listed in column 2 must be covered, even where the specific PCF role may not exist in the firm.

2.4. Draft Regulation 4(1) could be worded more simply:

> *A PCF holder shall have inherent responsibility pursuant to Section 53B(1)(a) of the 2010 Act for the matters specified in Column 2 of the table in Schedule 1 of these Regulations.*

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

3.1. Broadly, the FSBA considers that the draft regulations represent a reasonable approach to specifying responsibilities for the purposes of Section 53B(1)(b) of the 2010 Act.

3.2. The proposed approach appears reasonable and the inclusion of "Other Responsibilities" may futureproof the regulations by capturing developments in the complexity of business models, structure and technology.

3.3. While the intended purpose of identifying ***other responsibilities*** is understandable, the phrase "an other responsibility" is awkward as it is conventionally elided to "another" which obscures the defined term.

3.4. The designation of a firm under the CBI's Probability Risk Impact System is relevant to the allocation of prescribed responsibilities. It is also relevant to levies and other matters pursuant to regulations made under the CBAs. This designation is, therefore, of clear importance to the supervisory and regulatory system pursuant to the CBAs. However, the FSBA is not aware of an express statutory basis for designation in this way. An express statutory basis for PRISM designation might be desirable as a matter of transparency. This could open a regulatory debate as to whether PRISM designation should be an appealable decision.

3.5. The FSBA notes the draft Guidance includes some rather general statements such as: *"Further the individual themselves should promote the embedding of a culture of compliance by visibly leading by example and setting a tone that supports and encourages the compliance of those in the relevant area."*

3.6. The FSBA considers that the term "embedding" and any cognates are too vague and imprecise to form the basis for a prescribed responsibility, which in turn may lead to enforcement or disciplinary action. The term is not elucidated by the commentary in the draft Guidance which includes multiple layers of subjectivity e.g. leading by example, setting a tone, support and encourage.

3.7. The reference at PR6 in Schedule 2 Part 1 features a further subjective and aspirational term "*embedding positive culture*" into remuneration policies and practices. The FSBA considers that the term "*positive culture*" is too vague and aspirational to represent or form part of an enforceable standard in a legal instrument.

3.8. The references at PR3 and PR6 in Schedule 2 Part 1, at PR3 in Schedule 2 Part 1 and at PR3 in Schedule 2 Part 3 should be replaced with terminology which clearly states specific acts or articulates the desired regulatory standards with more precision.

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

4.1. Yes. We consider that the CBI position on sharing of roles and responsibilities is appropriate.

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

5.1. The FSBA notes the importance of the role of INEDs/NEDs in delivering corporate governance for financial services firms in Ireland.

5.2. It is vital that role is not hindered by an unrealistic conception of the respective roles of executive and non-executive directors or, indeed, an excessively exacting application of subjective standards of the type which are contained in the draft conduct standards or existing fitness and probity codes etc. This could deter talented INEDs/NEDs from the industry.

5.3. The FSBA considers that the risk adverted to by the CBI (i.e. that quality individuals may be dissuaded from undertaking non-executive roles) is very much present in the Irish market.

5.4. The statements at paragraphs 2.8.7 and 6.1.3 of the draft Guidance are welcome, but undeveloped.

> "*It is recognised that NEDs and INEDs individually do not manage a firm's business in the same way as executive directors. The responsibilities for which NEDs and INEDs are accountable are more limited, relating to their role in respect of governance, oversight and challenge, therefore they are not expected to assume executive responsibilities, and considerations in respect of reasonable steps will be limited to what should reasonably be expected of individuals in that context*."

5.5. The descriptions at items 2 and 3 of Schedule 1 could be more informative. While different activities may be indicated by the verbs directing / overseeing and monitoring, the descriptions tend to suggest that executive directors are responsible for directing the business in terms of commercial decision-making, and non-executive directors are responsible for everything else. In that context, a duty to take reasonable steps to ensure compliance with legislative and regulatory requirements is an onerous one. That is especially the case where the legal and regulatory framework is notably complex, largely unconsolidated and to date is the subject of little formal guidance from the CBI.

5.6. The FSBA considers that the CBI position on inclusion of INEDs/NEDs within scope of SEAR is appropriate if it will be supported by appropriate and comprehensive guidance on what the CBI considers are and are not the responsibilities of INEDs/NEDs. The FSBA does not consider the draft Guidance is sufficient in this regard. The FSBA considers that case studies or sample facts illustrating the general statements referenced above (paragraphs 2.8.7 and 6.1.3 of the draft Guidance) would be helpful.

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

6.1. Yes.

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

7.1. Yes.

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

8.1. Yes. The FSBA notes that the CBI does not propose to require initial or regular/periodic reporting in respect of Statements of Responsibilities and the Management Responsibilities Map but will require a Statement of Responsibilities to be submitted with new PCF applications. The FSBA considers that the proposed approach to submission of documents is appropriate.

8.2. On a related matter, the FSBA notes the provision at regulation 11 of the draft regulations in relation to record-keeping and retention which imposes a retention period of 10 years after a person has ceased to be a PCF holder or after the management responsibilities map or the statement of responsibilities has been superseded by a more up-to-date version. This retention period is notably long.

8.3. Insofar as this retention period reflects the period in which the CBI will consider enforcement action, the FSBA considers that period is excessively long having regard to the need for legal certainty and having regard to international comparators.

8.4. In this regard, the FSBA observes that there is a time limit on certain disciplinary powers of the Financial Conduct Authority and the Prudential Regulation Authority in the United Kingdom whereby those regulators may not take disciplinary action if proceedings are not commenced within six years of the date when the regulator first knew of the misconduct in question.[9]

[9] See Section 66(4) Financial Services and Markets Act 2000 as amended by *inter alia* the Financial Services (Banking Reform) Act 2013 (c. 33), ss. 28(6), 148(5); S.I. 2014/1819, art. 2(1)(c)).

8.5. The FSBA understands that the applicable statute of limitation in respect of Securities and Exchange Commission enforcement actions is generally 10 years from the date when the conduct giving rise to the claim occurred. The FSBA understands that the US Supreme Court determined in its 2013 decision in ***Gabelli v Securities and Exchange Commission*** that the statute of limitations applicable to civil monetary penalties (which approximate to administrative sanctions) is five years from the date of the underlying violation.

8.6. The FSBA considers that it is particularly important that enforcement or disciplinary action involving the application of subjective conduct standards should be undertaken and progressed expeditiously. If that is not the case, there is a clear risk of the CBI applying the standards with the benefit of hindsight (as standards develop over time), and the possibility of stale enforcement processes being commenced against individuals e.g long after they have moved on from a firm.

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

9.1. Yes.

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

10.1. Yes. The FSBA considers that the draft guidance on reasonable steps in respect of SEAR and the Conduct Standards is appropriate. However, there are certain areas in respect of which an individual may be required to take reasonable steps where the underlying legal and regulatory context and CBI guidance could be improved.

<u>Avoiding contravention and securing compliance with obligations under financial services legislation</u>

10.2. The FSBA notes the duty to take reasonable steps pursuant to Section 53B(2) of the 2010 Act to secure that, while a person has an inherent or allocated responsibility, the relevant aspect of the affairs of the regulated financial service provider is conducted so as to avoid contravention by it of its obligations under financial services legislation.

10.3. There is also the duty pursuant to Section 53C of the 2010 Act to take reasonable steps to

ensure that common conduct standards and additional conduct standards are met. The common conduct standards include having appropriate knowledge of the legal and regulatory framework, including any legal obligation or standard imposed on the firm, relevant to the controlled function. The additional conduct standards include a duty to take reasonable steps to ensure that the business of the firm is conducted in accordance with its obligations under financial services legislation.

10.4. The FSBA observes that the legal and regulatory framework for financial services is notably complex. There is a pressing need for consolidation. Furthermore, the ability to pinpoint what regulations provide at a precise point of time in the past can be challenging. Although the Law Reform Commission presents certain of the Central Bank Acts as revised Acts, these are not up to date. The framework is neither consolidated nor is it the subject of any comprehensive guidance. There is no single overview or roadmap of the legal and regulatory framework. The FSBA considers that maintaining and publishing an overview of that type is a responsibility which is inherent in the CBI's role as apex regulator. The FSBA notes the reference in the draft Guidance to "*the importance of* simplification *and streamlining of the regulatory framework and the conduct obligations imposed on firms…*" The FSBA comments that the task of simplification and streamlining of the regulatory framework may largely fall to the Oireachtas but that the CBI clearly has a role in terms of simplification and streamlining of secondary legislation and guidance.

10.5. The FSBA does not consider that it is possible, in many cases, for an individual who will be subject to a duty to take reasonable steps to identify "*the legal and regulatory framework*" or a firm's "*obligations under financial services legislation*" without expert professional advice. Rather, there is a large body of primary and secondary legislation and certain other secondary legislation in the form of regulations, codes etc issued by the CBI. There is uneven coverage in terms of guidance.

10.6. The information offered by the CBI in relation to retail intermediaries, generally considered among the smallest and least complex firms, is illustrative. If an individual who is involved with a retail intermediary seeks to ascertain the legal and regulatory framework from the CBI website, he or she will find a webpage which states:

> *"Legislation relevant to the regulation of retail intermediaries is listed below. Where the links provided are to www.irishstatutebook.ie users should note the disclaimer on the Irish Statute Book website. The following list is not exhaustive and is intended to*

serve as a general guide only."[10]

10.7. The webpage provides a list of 10 Acts, 6 statutory instruments and two EU directives. As noted, the list is stated to be non-exhaustive and intended to serve as a general guide only.

10.8. The CBI will be aware of the primary and secondary legislation pursuant to which it regulates and supervises this sector. It should therefore be possible for the CBI to provide a complete list or statement of this primary and secondary legislation. (This is not to suggest that the CBI should identify all generally applicable primary and secondary legislation which applies to all persons and which does not relate to its functions such as, for example, the Companies Act 2014).

10.9. The FSBA considers that the CBI should aspire to providing more than a very short and general guide to the legislation pursuant to which it exercises its statutory functions: it should seek to communicate and inform. Of the 10 Acts listed, the principal Act which sets the functions and powers of the CBI, and many core regulatory processes i.e. the Central Bank Act 1942 is not listed. The 2003 and 2004 Acts which merely amended the 1942 Act are listed. In each case, the primary legislation which is linked is unconsolidated. That includes cases where a consolidated version is made available by the Law Reform Commission.

10.10. There is then a separate page headed *Codes/Guidance on Regulatory Requirements*. This does not provide guidance on the fit and proper process or fitness and probity codes, for example. There is a brief statement relating to fitness and probity on the page which is headed *Changes or Amendments After Authorisation*. This relates to the online reporting system and the submission of an individual questionnaire (i.e. the mechanics of a submission) but does not provide any insight into the nature of the procedure generally or the standards applied. This material is accessible by selecting in turn the webpages headed *How We Regulate, Fitness & Probity, Requirements, PCF Assessment and Ongoing Compliance*, and by selecting a sector. Having done so, there is a list of certain primary and secondary legislation. The Central Bank Reform Act 2010 which is linked to is an unconsolidated version of that Act as enacted which is at this point 10 years out of date. This is not the Law Reform Commission version. There is no indication that the version which is linked is not current.

10.11. The guidance provided is uneven in its coverage . The FSBA welcomes the guidance on the Consumer Protection Code but submits that a more extensive, comprehensive and organised set of guidance could be made available on generally applicable processes and

[10] https://www.centralbank.ie/regulation/industry-market-sectors/brokers-retail-intermediaries/legislation

concepts such as authorisation, conditions of authorisation, ongoing supervision, information gathering powers, fitness and probity as well as specific industry sectors. Rather than clicking through multiple links to identify relevant information hosted perhaps temporarily on a webpage, this should be presented centrally and with appropriate version control as a booklet of guidance applicable to a particular industry sector. The FSBA considers that this would largely involve a task of editing and presenting information which the CBI has already prepared: perhaps using a modern document management system. This is important not just for an individual's ongoing efforts to inform him or herself but so that the applicable legal and regulatory framework and guidance at any one time can be identified and collated. Given that the exposure to enforcement action under the ASP is open ended, it Is important that individuals and advisors are in a position conveniently to collate and record the legal and regulatory framework and guidance at a particular point in time.

10.12. As this illustration demonstrates, simply to identify and collate the legal and regulatory framework in relation to a particular regulated sector requires a good deal of searching and a certain amount of prior knowledge. The material which is offered is incomplete, inaccessible and potentially unreliable.

10.13. Many regulatory peers of the CBI present the legal and regulatory framework in an accessible format supported by uniform and consistent guidance.

- The Financial Conduct Authority Handbook in the United Kingdom makes available a comprehensive Handbook: https://www.handbook.fca.org.uk/handbook. This complements the consolidated legislation which is available at https://www.legislation.gov.uk

- The Central Bank of the Netherlands publishes a comprehensive road map to applicable law and regulation: https://www.dnb.nl/en/sector-information/open-book-supervision/laws-and-eu-regulations/

- The General Regulation of the Autorité des Marchés Financiers in France publishes its General Regulation: https://www.amf-france.org/fr/eli/fr/aai/amf/rg/20230508/notes and comprehensive guidance centrally organised: https://www.amf-france.org/fr/reglementation/doctrine/principes-de-doctrine

- The National Bank of Belgium publishes detailed and practical guidance including its *Manual on the assessment of suitability (fit & proper)*: https://www.nbb.be/en/financial-oversight/prudential-supervision/manual-assessment-suitability-fit-proper

- The Commission de Surveillance du Secteur Financier in Luxembourg makes the regulatory framework available through a single, comprehensive document management and search tool: https://www.cssf.lu/en/regulatory-framework/.

10.14. The FSBA submits that the legal and regulatory framework should be presented in an accessible and professional format and that it should be supported by uniform and consistent guidance. The FSBA considers that this exercise would draw upon the existing expert knowledge within the CBI as to the legal and regulatory framework and the work which has already been done in some areas in providing guidance. In many cases, the task should be one of collation, editing and organised presentation rather than of generating new material. Areas which do not appear to be the subject of any guidance would benefit from brief and clear guidance being prepared.

10.15. The FSBA recommends the following elements:

- fully consolidated primary legislation should be made available
- fully consolidated secondary legislation should be made available
- guidance of a uniform and consistent standard which is:
    - collated into a single publication or chapters of a publication rather than myriad individual documents of varying quality and depth
    - recorded permanently
    - appropriately archived
- the primary legislation, secondary legislation and guidance should be available through a single complete record similar to the Financial Conduct Authority Handbook in the United Kingdom which can be browsed by topic and using time travel (i.e. defining the date as of which the material is viewed)
- it should be possible to generate a complete printout/PDF of the primary and secondary legislation and guidance which is applicable to a particular firm and/or individual by selecting the firm's authorisation status.

10.16. In this regard, the FSBA considers that it is suboptimal that the current consultation exercise is having to be carried out without the benefit of consolidated primary legislation.

11. 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?

11.1. The FSBA considers that the draft Guidance is reasonably clear in relation to the duty of responsibility.

11.2. The FSBA notes and welcomes the statement at paragraph 2.8.7 whereby the CBI recognises that "*NEDs and INEDs individually do not manage a firm's business in the same way as* executive *directors.*"

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

12.1. The FSBA would offer the following comments on the style and depth of the draft guidance on the common conduct standards and additional conduct standards.

Acting with honesty and integrity

12.2. The FSBA notes that the CBI does not provide detailed guidance on this standard on the basis that both terms are well understood and commonly used. The FSBA observes that the terms may be well understood and commonly used in common parlance but have an applied or technical meaning in the context of fit and proper requirements, which has been discussed extensively in case law in the United Kingdom including ***Hoodless & Blackwell v FSA***[11] which described the test as follows: "*In our view "integrity" connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards.*"

12.3. The FSBA does not consider that the elucidation of the integrity standard with reference to "*doing the right thing … even when no one is watching*" is helpful. The purpose of guidance is to elucidate the applicable standards and to assist an individual in understanding his or her duties and his or her exposure to enforcement action. An individual considering the relevant conduct standards would not be assisted, in our view, by reflecting whether

[11] ***Geoffrey Alan Hoodless and Sean Michael Blackwell v Financial Services Authority.*** Upper Tribunal Tax and Chancery decision of Judge Bartlett QC and Member Chapman and Member Senior on 6 October 2003

particular action involves "*doing the right thing even when no one is watching*." That is especially so when "*the right thing*" is capable of being read as referring to a complex and subjective conduct of business framework as much as to what is intrinsically or inherently honest or dishonest according to objective standards.

12.4. We do not consider the distinction between positive values and personal gain advances the discussion in this area. The question is (or should be) whether conduct was acceptable or not according to an identifiable standard. The generally applicable understanding of integrity is that it connotes an ability to appreciate the distinction between honest and dishonest conduct by ordinary standards, and to choose appropriately. The FSBA submits that a more specific and concrete discussion of the integrity standard is appropriate.

12.5. The FSBA does not consider that the reference to behaving ethically by doing the right thing through one's beliefs (5.2.3) has any reasonable application in this context. A conduct standard should involve the application of an identifiable and predictable norm to external behaviours and acts: not to internal beliefs which do not find expression in words, actions or omissions.

Acting with due skill, care and diligence

12.6. The FSBA notes the wording in Section 53E(1) of the 2010 Act as amended by the 2023 Act: "*(b) that the person acts with due skill, care and diligence, including— (ii) having appropriate knowledge of the legal and regulatory framework, including any legal obligation or standard imposed on the regulated financial service provider, relevant to the controlled function.*"

12.7. The FSBA also notes the wording in section 53B of the 2010 Act as amended by the 2023 Act: "*to* avoid *contravention by it of its obligations under financial services legislation*."

12.8. As a general principle, where different language is used in legislation, this indicates that a different meaning is intended. Here, it is not quite clear what is the difference between "*obligations under financial services legislation*" or "*financial services legislation*" and "*the legal and regulatory framework.*" The FSBA does not necessarily agree with the CBI's statement that the list of behaviours are generally self-explanatory and should be readily understood by those to whom they apply. The legal and regulatory framework is a general phrase. As the FSBA comments above, the legal and regulatory framework is not readily apparent or clearly identified in any one place and the published information and guidance which is made available by the CBI is incomplete and difficult to navigate. The FSBA

considers it is unfortunate that the Oireachtas has enshrined the general phrase "*the legal and regulatory framework*" in the 2010 Act via amendment by the 2023 Act. We would suggest that there is significant work to be done in identifying clearly and communicating what is and what is not comprised in "*the legal and regulatory framework*."

12.9. The FSBA considers the guidance which is offered departs from the language of the legislation. The Act deals with "*appropriate knowledge of the legal and regulatory framework*." On one reading, the knowledge which is appropriate is that which is relevant to the controlled function. The guidance goes beyond requiring appropriate knowledge and substitutes a different standard which is that of "*a clear and comprehensive understanding of […] the related legal and regulatory framework*." That is <u>similar</u> to the standard which applies pursuant to the Central Bank of Ireland Fitness and Probity Standards issued as a Code under Section 50 of the Central Bank Reform Act 2010, but it is not identical. The wording in the Code makes it much clearer that the understanding which is required is that which is appropriate to the relevant function (paragraph 3.2(e)).

12.10. The FSBA notes the following statement:

> *"An individual should proactively keep themselves informed with regard to developments relevant to their role/function, including for example changes in respect of the legal and regulatory framework."*

12.11. On a separate point, the FSBA considers that the reference to "*act[ing] in the spirit as opposed to the letter of the law*" at paragraph 5.3.5 is uninformative as presented. Assessing compliance with regulatory obligations and standards should be an objective exercise determined by reference to what is expressly required by the relevant statute or regulation. Apart from certain rare instances (such as paragraph 2.12 General Principles of the Consumer Protection Code), compliance with law involves compliance with the law as stated and not with any assumed or imputed spirit which lays behind the law.

<u>Cooperating in Good Faith and Without Delay</u>

12.12. The FSBA considers that the guidance offered under this head is broadly appropriate. However, the observations in paragraph 5.4.3 are concerning:

> *"Where loopholes or technicalities are either sought to be relied on by an individual in order to justify taking a particular action or behaviour or to defend a particular action or behaviour then it should be considered that they are not being fully cooperative or*

acting in good faith."

12.13. This reference is not further elucidated. It is appropriate to recall the context. The CBI is here commenting on a conduct standard: a suspected breach of which may lead to disciplinary or enforcement action. Both types of action can have profound consequences for individuals.

12.14. The FSBA infers that "loopholes" is intended to refer to a person ordering their behaviour in accordance with primary or secondary legislation, which the CBI may consider in some respect to be imperfect. Firms and individuals are fully entitled to take action which is in accordance with law, and to justify and/or defend their actions with reference to law.

12.15. The reference to "technicalities" in context is not understood. Financial services is a specialised and technical industry, and is governed by a specialised and technical legal and regulatory framework. In many cases, a focus on technicality is the <u>duty</u> of an individual exercising a role of responsibility in financial services. Firms and individuals are fully entitled to make reference to and to rely upon the black letter of the legal and regulatory code: both procedural and substantive. The FSBA would not consider a firm or its individual directors or employees should be criticised for dealing with statutory information requests according to the black letter of the law.

12.16. The FSBA considers that this is an important point. The principle of legal certainty is a fundamental aspect of the rule of law. This requires, among other things, that the system of law and regulation which is applied either in the determination of civil rights and obligations or in the imposition of potentially heavy administrative penalties must be knowable. A reference to the "spirit" of a statute or regulation is not knowable in this sense because it is uncertain, and dependent on a value-judgment on the statutory body which is purporting to enforce or adjudicate upon compliance with the "spirit" of the law or regulation.

<u>Acting in the Best Interests of Customers and Treating Them Fairly and Professionally</u>

12.17. While the conventional or traditional view is that a "best interests" standard does not necessarily connote a fiduciary relationship (fiduciaries being obliged to act in the sole interests of the beneficiaries), this view does not always find expression in the case law. For example, Baker J summarised the test for a fiduciary relationship in ***Best v Ghose*** [2018] IEHC 376: "*the essential material characteristic of a fiduciary relationship arises where a person has both the power to act on behalf of another or to act in a way that impacts on the interests of another, and responsibility to do so in the interests of that other person*."

12.18. In ***Bristol and West Building Society v Mothew*** [1998] Ch 1, **Millett LJ** offered the classic statement:

> "*A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.*"

12.19. The FSBA observes that it remains unclear what a 'best interests' conduct standard actually means. The CBI could usefully discuss and reflect this with reference to practical decisions and actions and discuss the tension between the best interests of a customer and the interests of a firm and the balancing which is required.

12.20. Insofar as the draft Guidance uses the term "legitimate expectations" this could usefully be clarified. Legitimate expectations is an established legal concept in public law which relates to circumstances in which a public body may be compelled to follow a certain procedure, or more rarely, arrive at a substantive position because it has done so in the past or unambiguously and unequivocally represented that it would do so. (See e.g. ***Lett & Co v Wexford Borough Council*** [2012] 2 IR 198, 251 for the test as identified by the Supreme Court).

12.21. The concept appears inapplicable and inapt to identifying the respective rights and obligations of customers and firms. If a different meaning is intended here, (such as reasonable expectations) it may be preferable to avoid using the established term of art.

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

13.1. The FSBA comments that the content of paragraph 4.23 of the draft Guidance ("*[a] has a critical role to play in embedding the Conduct Standards in its culture in a meaningful way for all individuals…*") is aspirational and subjective rather than concrete and identifiable. Both

"*embedding*" and "*in a meaningful way*" are somewhat aspirational and subjective statements.

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

14.1. Yes.

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

15.1. The FSBA considers that the draft Certification Regulations and related guidance are broadly appropriate.

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

16.1. Yes.

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

17.1. Regulation 9 of the draft regulations provides:

> *Disciplinary Action*
>
> *9. A regulated financial service provider or holding company must report to the Central Bank disciplinary action taken against a person performing a controlled function ~~where that disciplinary action is relevant to compliance with the Fitness and Probity Standards, in particular, disciplinary action~~ relating to breach of a provision of the additional conduct standards, the common conduct standards, or any other provision of financial services legislation.*

17.2. The FSBA considers that the proposed approach to reporting of disciplinary action is broadly appropriate, but that the phrase "*where that disciplinary action is relevant to Compliance with*

the Fitness and Probity Standards" is overly broad given the subjective and general language of the conduct standards. If the matters introduced by the words "*in particular*" represent the scope of the reporting obligation, then we suggest that the text marked as struck through above should be removed.

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

18.1. Yes.