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Consultation Paper 153
Central Bank of Ireland
North Wall Quay
Dublin 1
By email to IAFconsultation@centralbank.ie

13 June 2023

Re: Consultation Paper on the Individual Accountability Framework

Dear Sir/Madam

Thank you for the opportunity to engage with you in relation to the Central Bank's proposals for an Individual Accountability Regime, pursuant to the primary legislation published earlier this year. I would also like to acknowledge the Central Bank's wider industry engagement on this topic over the past number of years.

FSI is the Ibec trade association representing the full financial services industry in Ireland. Our 160 members are engaged in domestic and international banking, (re)insurance, funds and asset management, payments, fintech, aircraft leasing, and others. Our objective is to continuously improve Ireland's position as a top global financial centre.

FSI welcomes the Individual Accountability Framework (IAF). We want to ensure that this powerful framework enhances Ireland's global reputation, instils pride in the financial services sector, and appeals to talent of all disciplines. Our members are focused on the continuous improvement in trust and accountability for the good of customers, investors, and the industry itself.

I set out hereunder our responses to the individual questions posed by the CBI in CP153. I also extract/summarise below our key asks in relation to the implementation of the regime:

1. Timelines. The currently proposed 6 months is not adequate for full and proper implementation of the regime, as the industry does not yet have final Regulations or Guidance, with the final public consultation still to commence. In some cases, thousands of staff are impacted by the new regime and adequate time is needed to carry out necessary training. For these reasons, we request at least a 12-month implementation period (01 July 2024) for conduct standards and enhanced Fitness & Probity, and at least 18 months (31 December 2024) for SEAR and additional conduct standards.
2. Companies Acts. The IAF must respect the principle of collective responsibility of the board under the Companies Acts and corporate governance requirements in its practical application. For the purposes of accountability, we consider the process under which decisions are taken to be key, rather than their outcome (i.e. process-based accountability). Clarification on elements such as this will help to ensure the regime is adopted correctly, and applicable in a practical sense.

3. Proportionality.
    a. FSI requests further guidance on proportionality as it relates to different business structures under IAF (i.e. not just size/risk) and in relation to different cohorts of personnel impacted e.g. Board Directors, PCFs, CF1, CF2-11, in particular in relation to reasonable steps.
    b. Use of the word "exceptional" in relation to temporary PCF appointments could have unintended and negative consequences from a Diversity & Inclusion perspective, e.g. maternity/paternity leave. It would be good to have some flexibility and guidance around temporary cover for family-related leave.
4. Prescribed Responsibilities. Due to the wording of some responsibilities, it is challenging to allocate them to one role holder. And while we agree with the intention and principle of the proposals, we request that in specific circumstances where a clear rationale and evidence can be provided, PRs can be assigned to more than one individual (i.e. not just job sharing).
5. Management Responsibility Maps. FSI requests guidance on what constitutes non-complex firms and what approach should be taken by firms to maintaining the MRMs.
6. Draft Regulation 9. We request clarity from the CBI on what constitutes "disciplinary action taken", where this provision requires such action to be notified to the Central Bank, potentially during a disciplinary procedure. We believe notification should only occur after due process has concluded, including any appeals timelines.
7. Extraterritoriality. FSI has concerns about the application of SEAR to employees based outside the State, particularly in cases where it is unclear if the employment contract is pursuant to Irish law.

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

Practical implications for employers in preparing for SEAR/IAF

We request that the CBI accounts for the practical impact on firms in preparing for SEAR, which has informed our request (above) for an extension to the current timeline.

As part of our engagement with members on the new regime, FSI is conducting a workshop series for HR managers of the in-scope firms, which has included presentations from compliance personnel. The significant volume of work that will be needed to review contracts under the regime has been a key consideration, particularly when taken against a backdrop of other employment legislation implemented or due for implementation including:

- Predictable and Transparent Working Conditions Regulations, SI No 686/2022
- The Sick Leave Act 2022
- The Protected Disclosures (Amendment) Act 2022
- Employment Permits Bill 2022
- Work Life Balance & Miscellaneous Provisions Act 2023
- Auto enrolment retirement savings system 2024
- Pay Transparency Directive 2026

The IAF will impact all employment policies and procedures for each stage of the employment life cycle from recruitment, onboarding, learning & development, career development to separation.

While it may not be necessary for all employers to amend contracts of employments in order to ensure compliance with the Regulations, employers will be required to review all such relevant contracts to assess what if any, amendments are required. This task cannot be underestimated. Where contractual amendments, new contracts or side letters are required, this will require detailed consideration and consultation with employees to ensure compliance with employment laws and a full understanding for all parties of any changes made. It is noted that following the introduction of the EU (Transparent and Predictable Working Conditions) Regulations 2022, changes to contracts of employment must be notified to employees at the latest by the date of change. This means that any required consultation will need to take place in advance of the change taking effect.

On top of contract reviews, it will be necessary for employers to review existing policies to ensure that the requirements of the Regulations are embedded into a company's policies and procedures. Where policies and procedures are changed, a programme of employee training will likely be necessitated.

A particular difficulty arises for companies who are impacted by the Regulations but are not based in Ireland and whose employment contracts are subject to laws other than Irish law. It will be incumbent on such employers to ensure that they do not only comply with the Regulations but that in incorporating changes into contracts, policies and procedures, they are doing so in compliance with local employment and labour laws.

This will, in many instances, require them to obtain local labour law advice and may, depending on the jurisdiction, require additional consultation with employees, employee representatives and/or works councils. Indeed, certain local laws prescribe the duration of relevant consultation which may significantly delay the incorporation of required policies.

Proportionality – business types, roles and experience

Regarding the draft SEAR Regulations and related guidance, we have some concerns about the lack of clarity on the application of proportionality within the regime; there is nothing within the guidance in relation to how this proportionality may apply and seems to be focused on the low impact PRISM investment firms, rather than to all firms and personnel levels, their time in roles, etc. that come under the IAF. It is important to provide clear guidance on how proportionality should be applied to different business structures, nature of operations, and the size of business units within organisations. A one-size-fits-all approach may not be suitable for entities with diverse structures and business lines.

SEAR vs the Companies Acts and Collective Responsibility

It would be beneficial to receive further guidance or clarification on the relationship between Directors Duties under the Companies Act 2014 and the Individual Accountability Framework (IAF). Providing clear guidance on how these frameworks interact and any precedence given to one over the other would assist firms in understanding their obligations and ensuring compliance. As briefly mentioned above, based on academic input we have received, we believe that accountability in

this context should be informed by the process that leads to a decision, rather than the outcome (which would be in the realm of collective responsibility of the Board).

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

We generally agree with the direction taken and find it reasonable and aligned with existing responsibilities. However, we recommend that the Central Bank:

a. considers the allocation of responsibilities within the context of different organisational structures to ensure that they are appropriately assigned to the relevant individuals.

b. considers whether certain exemptions that we have observed across different financial services sub-sectors can be extended consistently across the industry. It would also be useful to understand the reasoning behind the differentiation to explore whether it can be applied more consistently. Ensuring consistency and fairness across different sectors is important, while still maintaining appropriate safeguards.

c. Consider the following amendment to S. 13 Schedule I of the draft Regulations in order to address an inconsistency we observe in the drafting of the Inherent Responsibilities, particularly in relation to the Chief Risk Officer (CRO) and other Key Functions:

> *"Overall responsibility for managing the firm's risk function including risk controls, setting and managing risk exposures and reporting directly to the Board on risk management matters."*

to

> *"Overall responsibility for managing the firm's risk function and reporting directly to the Board on risk matters."*

This clarification would provide greater clarity and consistency across the Inherent Responsibilities.

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

We request the Central Bank to consider the allocation of responsibilities within the context of different organisational structures to ensure that they are appropriately assigned to the relevant individuals. We also have observed that some of the Prescribed Responsibilities have the potential to blur the traditional three lines of defence model, particularly where the First line traditionally has primary responsibility for owning and managing operational activities, while the Second line provides compliance and oversight. It is challenging to envision how one PCF could be expected to fulfil both roles. Therefore, we kindly request clarification on whether Prescribed Responsibilities can be allocated to more than one PCF. This clarification is particularly relevant in light of the Central Bank Guidance on Climate Change, which suggests shared responsibility among several PCFs, including the Head of Asset Management and Chief Risk Officer.

We request clarity also in the following cases:

- where there is more than one PCF 18 in a firm, how it is intended that PR 24 would apply. For example, if you have a PCF 18 with responsibility for Personnel Lines and a PCF 18 with responsibility for Commercial Lines, whether PR 24 would apply to both. This would seem to be aligned with Insurance Distribution Directive responsibilities and Minimum Competency Code design requirements. If it were to apply to one PCF role holder only, then it may have to roll up to the CEO.
- For PR37, whether the intention is for one individual to have overall responsibility for managing operational committees charged with implementing regulatory change. There will always be new regulatory requirements to implement so we would ask for clarity on what instances the CBI thinks it would it be permissible this prescribed responsibility would not apply within a firm.

In the context of insurance, we make two recommendations. First, we suggest clarifying that Prescribed Responsibility 22 and 23 do not apply to the General Insurance sector. Secondly, there is some concern about the use of the word “function” throughout the Guidance. The Solvency II Directive defines a number of functions such as the Risk Function or the Actuarial Function, which is taken to be teams with a leader. The guidance expands the use of the word ‘function’ to cover things like underwriting, where this might be part of a person. This use of the word ‘function’ is implying an organisational design expectation that would not align with reality. The very formal meaning of ‘function’ in Solvency II covers a number of areas such as the actuarial function (see below an extract from the Solvency II Directive). The part that worries me is the last point that says you can’t hold more than one function except for very small firms. This is reasonable in the context of the CRO or the Head of Actuarial Function but makes less sense for say the Head of Underwriting who could also be the COO

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

As above, while we agree with the intention and principle of the proposals, we request that in specific circumstances where a clear rationale and evidence can be provided, PRs can be assigned to more than one individual (i.e. not just job sharing). We have concerns about limiting the sharing of responsibilities to job sharing only. We recommend that the Central Bank allows for flexibility in allocating certain prescribed responsibilities to multiple individuals in specific cases. Our reasoning is based on different corporate structures of our members, and the practicality of centralised ownership for specific responsibilities.

We appreciate the acknowledgment of different jurisdictions and the need for flexibility. However, we seek clarification on certain aspects. The guidance states that "a person" should be responsible for preparing and maintaining Statements of Responsibilities and Management Responsibility Mapping. It would be beneficial to clarify if this responsibility falls under the PR1 role. If so, providing explicit guidance would assist firms in assigning the appropriate role and ensuring compliance.

In addition, when it comes to PCF17 (Head of Sales) and PCF16 (Branch Managers Outside of Ireland), where two individuals are appointed to the same PCF based on the territory they operate within, we presume it is possible for both individuals to hold the same Prescribed Responsibility. Clear guidance would nonetheless help ensure consistency across jurisdictions.

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

We have practical concerns about the inclusion of (I)NEDs in the regime, which would place us at odds with the approach (for the most part) in other jurisdictions. In the UK for example, the equivalent SMCR applies to NEDs who hold the position of Chair of particular Committees. We would reiterate our points made under Q1 re the relationship between individual accountability and collective decision-making. We also have concerns when NEDs operate in overseas branches of Irish regulated entities. These individuals are already subject to Fitness and Probity regulations. We recommend reconsidering the applicability of SEAR to INEDs/NEDs in overseas branches.

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

We note the guidance's emphasis on allocating Prescribed Responsibilities to the most senior individual responsible in that area, considering the firm's governance structures. However, we seek clarification on how this approach will operate when a PCF reports directly into another PCF. For example, if the Head of Compliance (PCF12) reports into the Chief Risk Officer (PCF14), we request further guidance on the appropriate allocation of Prescribed Responsibilities and the associated Statements of Responsibilities.

We also note that while Fitness and Probity certifications and the conduct standards are due to be implemented by year-end, SEAR, including the Statements of Responsibilities, is scheduled for implementation by 01/07/2024. Our members do not agree that it will be possible to fulfil the initial set of requirements in the absence of the Statements of Responsibility within the timeframe currently earmarked. To ensure a smooth transition, adequate preparation and full embedding of the regime, we are requesting the current phased timelines are pushed out by 6 months, respectively (01 July 2024 and 31 December 2024).

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

We agree with the requirement to keep the MRM up-to-date and conduct regular reviews. However, there are a number of areas that require further clarification.

The guidance mentions that for non-complex firms, the MRM may be short and simple. It would be beneficial to provide a clear definition of "non-complex" to help firms assess whether their organisational structure falls under this category and determine the level of detail required for their MRM.

Secondly, there is a conflict between S. 2.6 (i) and (ii) in relation to maintenance of the MRM – kept up to date and reviewed on a regular basis. We would request more pragmatic wording in this section to bring clarity to the CBI's expectations of formal reviews. We would request that this takes into account the materiality of any updates that need to be made to the MRM for different business reasons, e.g. temporary absences.

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

We have concerns regarding the exterritorial effect of the SEAR in this context. This situation may potentially lead to overlapping regulatory obligations and administrative burdens, especially for firms with substantial European operations. It is important to address these concerns and provide clearer guidelines to mitigate potential challenges and ensure consistency with local HR laws and regulations. It is a very practical problem for firms where it is unclear if the employment contract of an individual is pursuant to Irish law.

We recommend reassessing the requirements related to outsourcing and considering the specific implications of individuals operating outside the Irish regulated entity.

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?

Within SMCR in the UK, clarity was provided in respect of Legal Privilege in connection with the role of internal Legal Counsel. Our members are unsure how IAF will impact the exercise of legal professional privilege where internal Legal Counsel are deemed to hold CF1 roles. In the UK, Heads of Legal/General Counsels are certified under SMCR on the basis of exercising 'significant influence' over a firm/its affairs. This is similar to CF1, however a critical difference is that in the UK, individuals certified as holding 'significant influence' do not need to comply with the Senior Manager Conduct Rules. This outcome we understand, is the result of a number of years of testing and debate in the UK. Under IAF, CF1s are expected to comply with the Additional Conduct standards. Based on the foregoing, we recommend that this aspect be reassessed specifically in connection with internal Legal Counsel and the provision of an exemption for them in relation to the Additional Conduct Standards.

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

<u>Reasonable Steps and Proportionality</u>

The CBI's expectations in relation to what constitutes "reasonable steps" should be reflective of the cohort of staff to which it relates e.g.:

1.) high expectations for comprehensive, personalised, reasonable steps in place for CF1 & PCF role holders in relation to common, additional inherent and prescribed responsibilities;
2.) Simpler, standard, reasonable steps for CF2-11 in relation to common standards only; and
3.) INEDs - reasonable steps relative to common, additional, inherent and allocated responsibilities, but relative to existing requirements under Companies Act and corporate governance (i.e. in a non-executive capacity).

<u>Extraterritoriality/Outsourcing</u>

The draft guidance is clear that those functions or individuals that are currently exempt from the F&P standards are within scope of the Conduct Standards. This is a significant broadening of the in-scope population, particularly with reference to:

- Those operating in outsourced roles in other regulated entities. Across entities, firms may have many multiples of individuals performing outsourced roles such as Remote Booking, who will now be part of the IAF regime, and
- those individuals outside of the legal entity who may exert significant influence over a CF or PCF. This is likely to include line managers of PCFs and CFs who are outside of the Irish regulated entity. We believe it is disproportionate to scope these individuals in as part of the IAF regime.

It is unclear as to how these individuals may be held individually accountable as they are not operating within the Irish regulated entity. We consider that the existing exemptions that apply to F&P Standards should be continued to IAF standards as the controls that are in place for F&P have worked appropriately since F&P was introduced.

Regarding the guidance on the Common Conduct Standards we also have reservations regarding the potential expansion of annual certification (vs previous self-certification) of staff to encompass junior roles, particularly those that may follow a prescribed procedure. This may result in a significant increase in the number of staff falling within the scope of the Conduct Standards, while more senior staff not identified as CFs may be excluded.

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

We acknowledge the responsibility of regulated entities for the Fitness and Probity compliance of outsourced service providers (OSPs) under the existing regime. However, we do not believe a similar approach can be extended into the new certification requirements. We believe that the existing derogations under Fitness and Probity should be carried into the new enhanced regime, and those who are currently required to self-certify should continue to do so.

The guidance states that the regulated firm remains responsible for its obligations under Section 21 of the 2010 Act and Certification Regulations, even when a Controlled Function (CF) role is outsourced to an unregulated entity. While we recognise the importance of maintaining accountability, the certification process for outsourced CF roles presents significant practical challenges.

These challenges include extensive sharing of personal data (including sensitive/financial data) between the regulated firm and the OSP, onboarding and ongoing due diligence of OSP staff, annual Fitness and Probity certification, and the maintenance of accurate and up-to-date registers. It is essential to address these challenges and provide additional guidance to ensure effective implementation without imposing undue burden on regulated entities and OSPs.

Furthermore, we recommend providing additional guidance on the certification process itself, including clear criteria for determining the roles that require certification. This is particularly

important for firms with diverse business lines and complex organisational structures, where the identification of roles subject to certification may be more intricate.

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

We have concerns about the wording of Regulation 9, which does not clarify what constitutes "disciplinary action taken". It places firms in a very difficult and exposed situation where certain matters could potentially be in scope for reporting to the Central Bank before the completion of a disciplinary procedure. In our view, the proposal is not workable as it currently stands. This is based on a number of reasons:

1. We believe that a 5 working day timeline to report to the Central Bank is too short. The Financial Conduct Authority in the UK allow for 7 business days for SMF's (PCF equivalents) with verbal/email notification as soon as practicable. For SMCR Certified Persons (CF equivalents) there is only a requirement to report breaches annually unless material/serious misconduct.
2. Any breach should only be reportable once the disciplinary and appeal processes have both fully concluded. In the UK, as the vast majority of Conduct Rule breaches are reported annually, a similar issue is avoided.
3. There are data protection considerations if a breach was notified to the Central Bank, but then subsequently overturned.
4. The manner in which breaches are to be reported is not detailed in the guidance (apart from "in writing") and who is responsible in the business for making such reports.
5. The guidance lacks detail on how long records should be kept showing that individuals have been trained on the Common/Additional Conduct Standards, whereas the Central Bank can request this data at any point.

Please do not hesitate to contact us if you require further detail on any of the points raised above.

Yours faithfully,

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